

Chapter 1¹

New and continuing matters

1.1 In this chapter the committee has examined the following bills and legislative instruments for compatibility with human rights:

- bills introduced into the Parliament between 8 and 17 February 2022;
- legislative instruments registered on the Federal Register of Legislation between 20 December 2021 and 15 March 2022.²

1.2 Bills and legislative instruments from this period that the committee has determined not to comment on are set out at the end of the chapter.

1.3 The committee comments on the following bills and legislative instruments, and in some instances, seeks a response or further information from the relevant minister.

Advice only comments

1.4 The following bills and legislative instruments raise human rights concerns that are substantively similar or related to measures the committee has previously reported on, and the committee reiterates the views as set out in those reports in relation to these bills and instruments:

Bills

- Crimes Legislation Amendment (Ransomware Action Plan) Bill 2022:
see the previous comments in [Report 10 of 2021](#),³

1 This section can be cited as Parliamentary Joint Committee on Human Rights, New and continuing matters, *Report 2 of 2022*; [2022] AUPJCHR 8.

2 The committee examines all legislative instruments registered in the relevant period, as listed on the Federal Register of Legislation. To identify all of the legislative instruments scrutinised by the committee during this period, select 'legislative instruments' as the relevant type of legislation, select the event as 'assent/making', and input the relevant registration date range in the Federal Register of Legislation's advanced search function, available at: <https://www.legislation.gov.au/AdvancedSearch>.

3 Parliamentary Joint Committee on Human Rights, *Report 10 of 2021* (25 August 2021) pp. 91–102.

- Education Legislation Amendment (2022 Measures No. 1) Bill 2022, Schedule 1, Part 1:
see the previous comments in [Report 10 of 2020](#);⁴ and
- Electoral Legislation Amendment (Voter Identification) Bill 2022:
see the previous comments in [Report 14 of 2021](#).⁵

Legislative instruments

- Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Regulations 2021 [[F2021L01855](#)]; Legislation (Deferral of Sunsetting Autonomous Sanctions Instruments) Certificate 2022 [[F2022L00101](#)];⁶ Autonomous Sanctions Amendment (Russia) Regulations 2022 [[F2022L00180](#)]; and Autonomous Sanctions Amendment (Myanmar) Regulations 2022 [[F2022L00246](#)]:
see the previous comments in [Report 15 of 2021](#);⁷
- Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Regulations 2021 [[F2021L01842](#)]:
see the previous comments in [Report 13 of 2020](#);⁸ and
- Crimes (Major Airports—Cairns Airport) Determination 2022 [[F2022L00196](#)]:
see the previous comments in [Report 4 of 2019](#);⁹

4 Parliamentary Joint Committee on Human Rights, *Report 10 of 2020* (26 August 2020) pp. 11–19.

5 Parliamentary Joint Committee on Human Rights, *Report 14 of 2021* (24 November 2021) pp. 19–33.

6 This legislative instrument extends the operation of another legislative instruments that raises human rights concerns (and as such, the instrument extending its operation raises similar human rights concerns).

7 Parliamentary Joint Committee on Human Rights, *Report 15 of 2021* (8 December 2021) pp. 2–11.

8 Parliamentary Joint Committee on Human Rights, *Report 13 of 2020* (13 November 2020) pp. 19–62.

9 Parliamentary Joint Committee on Human Rights, *Report 4 of 2019* (10 September 2019) pp. 18–20.

Bills

Appropriation Bills 2021-2022¹

Purpose	These bills propose appropriations from the Consolidated Revenue Fund for services ²
Portfolio	Finance
Introduced	House of Representatives, 9 February 2022
Rights	Multiple rights

Appropriation of money

1.5 These bills seek to appropriate money from the Consolidated Revenue Fund for a range of services. The portfolios, budget outcomes and entities for which these appropriations would be made are set out in the schedules to each bill.³

International human rights legal advice

Multiple rights

1.6 Proposed government expenditure to give effect to particular policies may engage and limit, or promote, a range of human rights, including civil and political rights and economic, social and cultural rights (such as the rights to housing, health, education and social security).⁴ The rights of people with disability, children and women may also be engaged where policies have a particular impact on vulnerable groups.⁵

1.7 Australia has obligations to respect, protect and fulfil human rights, including the specific obligations to progressively realise economic, social and cultural rights

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- 1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, *Appropriation Bills 2021-2022*, Report 2 of 2022; [2022] AUPJCHR 9.
 - 2 Appropriation (Coronavirus Response) Bill (No. 1) 2021-2022; Appropriation (Coronavirus Response) Bill (No. 2) 2021-2022; Appropriation Bill (No. 3) 2021-2022 and Appropriation Bill (No. 4) 2021-2022.
 - 3 Appropriation (Coronavirus Response) Bill (No. 1) 2021-2022, Schedule 1; Appropriation (Coronavirus Response) Bill (No. 2) 2021-2022, Schedule 1; Appropriation Bill (No. 3) 2021-2022, Schedule 1 and Appropriation Bill (No. 4) 2021-2022, Schedules 1 and 2.
 - 4 Under the International Covenant on Civil and Political Rights and the International covenant on Economic, Social and Cultural Rights.
 - 5 Under the Convention on the Rights of Persons with Disabilities; Convention on the Rights of the Child; and Convention on the Elimination of All Forms of Discrimination against Women.

using the maximum of resources available; and a corresponding duty to refrain from taking retrogressive measures (or backwards steps) in relation to the realisation of these rights.⁶ Economic, social and cultural rights may be particularly affected by appropriation bills, because any increase in funding would likely promote such rights, and any reduction in funding for measures which realise such rights, such as specific health and education services, may be considered to be retrogressive with respect to the attainment of such rights and, accordingly, must be justified for the purposes of international human rights law.

1.8 The statements of compatibility accompanying these bills do not identify that any rights are engaged by the bills, and state that the High Court has emphasised that because appropriation Acts do not ordinarily confer authority to engage in executive action, they do not ordinarily confer legal authority to spend, and as such, do not engage human rights.⁷ However, because appropriations are the means by which the appropriation of money from the Consolidated Revenue Fund is authorised, they are a significant step in the process of funding public services. The fact that the High Court has stated that appropriations Acts do not create rights or duties as a matter of Australian law, does not address the fact that appropriations may nevertheless engage human rights for the purposes of international law. As the committee has consistently stated since 2013,⁸ the appropriation of funds facilitates the taking of actions which may affect both the progressive realisation of, and failure to fulfil, Australia's obligations under international human rights law. Appropriations may, therefore, engage human rights for the purposes of international law, because reduced appropriations for particular areas may be regarded as retrogressive – a type of limitation on rights.

6 See, International Covenant on Economic, Social and Cultural Rights.

7 Statements of compatibility, p. 4.

8 Parliamentary Joint Committee on Human Rights, *Report 3 of 2013* (13 March 2013) pp. 65-67; *Report 7 of 2013* (5 June 2013) pp. 21-27; *Report 3/44* (4 March 2014) pp. 3-6; *Report 8/44* (24 June 2014) pp. 5-8; *Report 20/44* (18 March 2015) pp. 5-10; *Report 23/44* (18 June 2015) pp. 13-17; *Report 34/44* (23 February 2016) p. 2; *Report 9 of 2016* (22 November 2016) pp. 30-33; *Report 2 of 2017* (21 March 2017) pp. 44-46; *Report 5 of 2017* (14 June 2017) pp. 42-44; *Report 3 of 2018* (27 March 2018) pp. 97-100; *Report 5 of 2018* (19 June 2018) pp. 49-52; *Report 2 of 2019* (2 April 2019) pp. 106-111; *Report 4 of 2019* (10 September 2019) pp. 11-17; *Report 3 of 2020* (2 April 2020) pp. 15-18; *Report 12 of 2020* (15 October 2020) pp. 20-23; *Report 7 of 2021* (16 June 2021) pp. 11-15.

1.9 There is international guidance about reporting on the human rights compatibility of public budgeting measures.⁹ For example, the Committee on the Rights of the Child has advised that countries must show how the public budget-related measures they have chosen to take result in improvements in children's rights,¹⁰ and has provided detailed guidance as to implementation of the rights of the child, which 'requires close attention to all four stages of the public budget process: planning, enacting, executing and follow-up'.¹¹ It has also advised that countries should 'prepare their budget-related statements and proposals in such a way as to enable effective comparisons and monitoring of budgets relating to children'.¹²

1.10 Without an assessment of human rights compatibility of appropriations bills, it is difficult to assess whether Australia is promoting human rights and realising its human rights obligations. For example, a retrogressive measure in an individual bill may not, in fact, be retrogressive when understood within the budgetary context as a whole. Further, where appropriation measures may engage and limit human rights, an assessment of the human rights compatibility of the measure would provide an explanation as to whether that limitation would be permissible under international human rights law.

1.11 Considering that appropriations may engage human rights for the purposes of international law, in order to assess such bills for compatibility with human rights the statements of compatibility accompanying such bills should include an assessment of the budget measures contained in the bill, including an assessment of:

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- 9 See, for example, UN Office of the High Commissioner for Human Rights, *Realising Human Rights through Government Budgets* (2017); South African Human Rights Commission, *Budget Analysis for Advancing Socio-Economic Rights* (2016); Ann Blyberg and Helena Hofbauer, *Article 2 and Governments' Budgets* (2014); Diane Elson, *Budgeting for Women's Rights: Monitoring Government Budgets for Compliance with CEDAW*, (UNIFEM, 2006); and Rory O'Connell, Aoife Nolan, Colin Harvey, Mira Dutschke, Eoin Rooney, *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Routledge, 2014).
- 10 Committee on the Rights of the Child, *General Comment No. 19 on public budgeting for the realization of children's rights (art. 4)* (2016) [24].
- 11 Committee on the Rights of the Child, *General Comment No. 19 on public budgeting for the realization of children's rights (art. 4)* (2016) [26].
- 12 Committee on the Rights of the Child, *General Comment No. 19 on public budgeting for the realization of children's rights (art. 4)* (2016) [81].

- overall trends in the progressive realisation of economic, social and cultural rights (including any retrogressive trends or measures);¹³
- the impact of budget measures (such as spending or reduction in spending) on vulnerable groups (including women, First Nations Peoples, people with disability and children);¹⁴ and
- key individual measures which engage human rights, including a brief assessment of their human rights compatibility.

1.12 In relation to the impact of spending or reduction in spending on vulnerable groups, relevant considerations may include:

- whether there are any specific budget measures that may disproportionately impact on particular groups (either directly or indirectly); and
- whether there are any budget measures or trends in spending over time that seek to fulfil the right to equality and non-discrimination for particular groups.¹⁵

Committee view

1.13 The committee notes that these bills seek to appropriate money from the Consolidated Revenue Fund for services. The committee considers that proposed government expenditure to give effect to particular policies may engage and promote, or limit, a range of human rights.

1.14 The committee acknowledges that appropriations bills may present particular difficulties given their technical and high-level nature, and as they generally include appropriations for a wide range of programs and activities across many portfolios. As such, it may not be appropriate to assess human rights compatibility for each individual measure. However, the committee considers that

13 This could include an assessment of any trends indicating the progressive realisation of rights using the maximum of resources available; any increase in funding over time in real terms; any trends that increase expenditure in a way which would benefit vulnerable groups; and any trends that result in a reduction in the allocation of funding which may impact on the realisation of human rights and, if so, an analysis of whether this would be permissible under international human rights law.

14 Spending, or reduction of spending, may have disproportionate impacts on such groups and accordingly may engage the right to equality and non-discrimination.

15 There are a range of resources to assist in the preparation of human rights assessments of budgets. See, for example, UN Office of the High Commissioner for Human Rights, [Realising Human Rights through Government Budgets](#) (2017); South African [Human Rights Commission, Budget Analysis for Advancing Socio-Economic Rights](#) (2016); Ann Blyberg and Helena Hofbauer, [Article 2 and Governments' Budgets](#) (2014); Diane Elson, [Budgeting for Women's Rights: Monitoring Government Budgets for Compliance with CEDAW](#) (2006); Rory O'Connell, Aoife Nolan, Colin Harvey, Mira Dutschke, Eoin Rooney, [Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources](#) (Routledge, 2014).

the allocation of funds via appropriations bills is susceptible to a human rights assessment that is directed at broader questions of compatibility, namely, their impact on progressive realisation obligations and on vulnerable minorities or specific groups.

1.15 The committee considers that statements of compatibility for future appropriations bills should contain an assessment of human rights compatibility which meets the standards outlined in the committee's [Guidance Note 1](#) and addresses the matters set out at paragraphs [1.11] and [1.12].

1.16 The committee draws this matter to the attention of the minister and the Parliament.

Criminal Code Amendment (Firearms Trafficking) Bill 2022¹

Purpose	<p>This bill seeks to amend the <i>Criminal Code Act 1995</i> to:</p> <ul style="list-style-type: none"> • double the maximum penalty for existing firearms trafficking offences from 10 years imprisonment and/or a fine of 2,500 penalty units to 20 years imprisonment and/or a fine of 5,000 penalty units; • introduce new aggravated offences for trafficking 50 or more firearms or firearm parts (or a combination of firearms and firearm parts such that the sum total is 50) within a six month period, punishable by a maximum penalty of imprisonment for life and/or a fine of 7,500 penalty units; and • introduce mandatory minimum penalties of at least 5 years' imprisonment for these offences for adult offenders, while giving courts the discretion to reduce this minimum penalty if the offender pleads guilty to the offence and/or co-operates with law enforcement agencies
Portfolio	Home Affairs
Introduced	House of Representatives, 16 February 2022
Rights	Liberty; fair trial

Mandatory minimum jail sentences

1.17 The Criminal Code currently sets out a number of offences relating to the disposal and acquisition of firearms and international firearms trafficking.² This bill seeks to require that a court must impose a sentence of imprisonment of at least five years on a person aged over 18 years who is convicted of these offences.³ A court would only be able to reduce a sentence of imprisonment by a set amount to take into account a guilty plea or cooperation with police.⁴

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Criminal Code Amendment (Firearms Trafficking) Bill 2022, *Report 2 of 2022*; [2022] AUPJCHR 10.

2 *Criminal Code Act 1995*, Schedule 1, Divisions 360 and 361.

3 Schedule 1, item 8, proposed section 360.3A and item 10, proposed section 361.5.

4 Schedule 1, item 8, proposed subsection 360.3A(3) and item 10, proposed subsection 361.5(3).

1.18 Proposals to introduce mandatory minimum sentences for firearms offences have been proposed for a number of years, and previously commented on by this committee.⁵

International human rights legal advice

Rights to liberty and fair trial

1.19 Mandatory minimum sentences of imprisonment engage the right to be free from arbitrary detention. Article 9 of the International Covenant on Civil and Political Rights protects the right to liberty, including the right not to be arbitrarily detained. The United Nations (UN) Human Rights Committee has stated that 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability.⁶ In order for detention not to be considered arbitrary in international human rights law it must be reasonable, necessary and proportionate in the individual case. Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy). As mandatory sentencing removes judicial discretion to take into account all of the relevant circumstances of a particular case, it may lead to the imposition of disproportionate or unduly harsh sentences of imprisonment.

1.20 The proposed mandatory minimum sentencing provisions also engage and limit article 14(5) of the International Covenant on Civil and Political Rights, which protects the right to have a sentence reviewed by a higher tribunal (right to a fair trial). This is because mandatory sentencing prevents judicial review of the severity or correctness of a minimum sentence. A previous UN Special Rapporteur on the Independence of Judges and Lawyers has observed in relation to article 14(5) and mandatory minimum sentences:

5 Mandatory minimum sentences for firearms offences were originally introduced in the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014; see Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (26 August 2014) pp. 9-19, *Fifteenth Report of the 44th Parliament* (14 November 2014) pp. 24-34, and *Nineteenth Report of the 44th Parliament* (3 March 2015) pp. 101-107. The measures were then reintroduced in the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015; see *Twenty-second Report of the 44th Parliament* (13 May 2015) pp. 35-39; and *Twenty-fourth Report of the 44th Parliament* (24 June 2015) pp. 74-76. They were again reintroduced in the Criminal Code Amendment (Firearms Trafficking) Bill 2015; see *Thirty-third Report of the 44th Parliament* (2 February 2016) p. 3 and again in the Criminal Code Amendment (Firearms Trafficking) Bill 2016, see *Report 8 of 2016* (9 November 2016) pp. 29-32.

6 UN Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of person)* (2014) [12]. It is noted that the UN Human Rights Committee has held that mandatory minimum sentences will not *per se* be incompatible with the right to be free from arbitrary detention, see *Nasir v Australia*, UN Human Rights Committee Communication No 2229/2012 (2016) [7.7].

This right of appeal, which is again part of the requirement of a fair trial under international standards, is negated when the trial judge imposes the prescribed minimum sentence, since there is nothing in the sentencing process for an appellate court to review. Hence, legislation prescribing mandatory minimum sentences may be perceived as restricting the requirements of the fair trial principle and may not be supported under international standards.⁷

1.21 In general, the rights to liberty and a fair trial may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.22 The statement of compatibility states that the measure seeks to achieve the legitimate objective of 'ensuring the courts are able to hand down sentences to convicted firearms trafficking offenders that reflect the seriousness of their offending'.⁸ It goes on to note the harms of firearms trafficking and the impact on the community and argues that the introduction of a mandatory minimum penalty 'reflect[s] the gravity of supplying firearms and firearm parts to the illicit market'.⁹ In general terms, ensuring courts can hand down appropriate sentences reflecting the gravity of the offence is capable of constituting a legitimate objective for the purposes of international human rights law. However, in order to establish whether this is a legitimate objective in a particular case, it needs to be established that there is a pressing and substantial concern which gives rise to the need for the specific measure. The statement of compatibility does not address why setting the maximum sentence, but leaving the actual sentence imposed, based on individual circumstances, to the discretion of the court, would be insufficient to achieve the stated objective. Additionally, no evidence has been provided of any sentences that have been imposed for firearms offences that did not adequately reflect the seriousness of the offence. As such, it has not been established that introducing mandatory minimum sentences for firearms offences seeks to address a pressing and substantial concern such that it is necessary to warrant limiting the rights to liberty and a fair trial.

1.23 Further, a key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. In this respect, it is necessary to consider a number of factors, including whether a proposed limitation is accompanied by sufficient safeguards and whether any less rights restrictive alternatives could achieve the same stated objective. In this respect, the statement of compatibility states that the amendments do not apply to children, thereby preserving judicial discretion in cases involving minors. It also states that the measure does not impose a minimum non-parole period for offenders, and that the mandatory minimum

7 Dato' Param Cumaraswamy 'Mandatory Sentencing: the individual and Social Costs', [Australian Journal of Human Rights](#), vol. 7, no. 2, 2001, pp. 7–20.

8 Statement of compatibility, p. 4.

9 Statement of compatibility, p. 4.

sentence 'is not intended as a guide to the non-parole period, which in some cases may differ significantly from the head sentence'.¹⁰ It is also noted that a court may reduce the sentence of imprisonment by 25 per cent to take into account a guilty plea or cooperation with police.

1.24 The fact that there is no minimum non-parole period, and some discretion is retained by the court in relation to some aspects of sentencing, assists with the proportionality of the measure. However, it is noted that the court's discretion is significantly limited, and it would not appear that the court would be able to fully take into account the particular circumstances of the offence and the offender in determining an appropriate sentence. It is also noted that the non-parole period for a sentence of imprisonment is discretionary, and a prisoner will not automatically be entitled to be released from detention once the non-parole period has passed. Further, as noted above in relation to whether the measure addresses a pressing and substantial concern, it is not clear that judicial discretion in sentencing cannot achieve the objective of ensuring sentences reflect the gravity of the offence. As such, it also appears there may be a less rights restrictive way of achieving the stated objective – namely, increasing the applicable penalty for the offences (which this bill also seeks to do) and leaving it to the courts to impose a sentence that fits the circumstances of the relevant case.

1.25 The imposition of a mandatory minimum sentence risks not being reasonable, necessary and proportionate in the individual case. In particular, it has not been established that the imposition of mandatory minimum sentences for firearms offences meets a pressing and substantial need such that it is appropriate to limit the rights to liberty and fair trial. Accordingly, there is a risk that the measure may operate in individual cases in a manner which is incompatible with the right to be free from arbitrary detention and the right to have a sentence reviewed by a higher tribunal.

Committee view

1.26 The committee notes this bill seeks to require that courts must impose a mandatory minimum five-year sentence for adults convicted of firearms offences.

1.27 The committee has previously considered the compatibility of mandatory minimum sentences with the right not to be arbitrarily detained and the right to a fair trial.¹¹ In order for detention not to be considered arbitrary in international human rights law it must be reasonable, necessary and proportionate in the individual case. The right to a fair trial also protects the right to have a sentence reviewed by a higher tribunal. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

10 Statement of compatibility, p. 4.

11 See also Parliamentary Joint Committee on Human Rights, [Guidance Note 2: Offence provisions, civil penalties and human rights](#).

1.28 The committee considers that ensuring that courts can hand down appropriate sentences reflecting the gravity of firearms offences, in general terms, is a legitimate objective. However, the statement of compatibility does not set out any evidence of sentences for firearms offences that have not adequately reflected the gravity of the offence. The committee notes that this bill also seeks to double the applicable penalty for firearms trafficking offences and it is not clear why increasing the applicable penalty, and then allowing the court the discretion to impose an appropriate sentence in the individual circumstances of a case, would not be sufficient to achieve the stated objective. Further in relation to the proportionality of the measure, it is not clear that there are sufficient safeguards or no less rights restrictive ways to achieve the stated objective.

1.29 Accordingly, the committee considers there is a risk that these proposed mandatory minimum sentences may operate in individual cases in a manner which would be incompatible with the right to be free from arbitrary detention and the right to have a sentence reviewed by a higher tribunal.

1.30 The committee draws these human rights concerns to the attention of the minister and the Parliament.

Electoral Legislation Amendment (Foreign Influences and Offences) Bill 2022¹

Purpose	This bill, now Act, amends the <i>Commonwealth Electoral Act 1918</i> to extend the ban on foreign donations to also prohibit foreign persons and entities from fundraising or directly incurring electoral expenditure, and from authorising electoral material The bill, now Act, also increases the penalty for misleading voters in relation to the casting of their vote
Portfolio	Finance
Introduced	Senate, 9 February 2022 <i>Received Royal Assent 17 February 2022</i>
Rights	Privacy; freedom of expression; freedom of association; equality and non-discrimination

Prohibition on foreign campaigners engaging in certain electoral conduct

1.31 This bill, which is now an Act, extends the ban on foreign donations to also prohibit foreign campaigners from engaging in certain electoral conduct. A foreign campaigner means a person or entity who is not an elector, an Australian citizen, an Australian resident,² or a New Zealand citizen who holds a Subclass 444 (Special Category) visa.³

1.32 In particular, the bill prohibits foreign campaigners from authorising certain electoral matter, including paying for the production or distribution, and approving the content, of electoral advertisements; or approving the content of electoral materials such as how-to-vote cards, posters, flyers, notices and pamphlets.⁴ This prohibition, however, does not apply to certain electoral matters, including matters

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Electoral Legislation Amendment (Foreign Influences and Offences) Bill 2022, *Report 2 of 2022*; [2022] AUPJCHR 11.

2 Section 287 of the *Commonwealth Electoral Act 1918* defines an 'Australian resident' as a person who holds a permanent visa under the *Migration Act 1958*. Subsection 30(1) of the *Migration Act 1958* defines a 'permanent visa' as a visa to remain in Australia indefinitely.

3 Schedule 1, item 1; *Commonwealth Electoral Act 1918*, sections 287 and 287AA. 'Foreign campaigner' has the same meaning as 'foreign donor', as defined in section 287AA of the *Commonwealth Electoral Act 1918*.

4 Schedule 1, item 8, new subsection 321DA(1).

that form part of opinion polls or research relating to voting intentions at an election; personal or internal communications; and certain communications at meetings.⁵ Contravention of this prohibition attracts a civil penalty of 120 penalty units (\$26,640).⁶ The bill also extends the Electoral Commissioner's existing information-gathering powers to circumstances where they have reason to believe that a person has information or a document relevant to investigating a possible contravention of this prohibition.⁷

1.33 In addition, the bill prohibits foreign campaigners from either fundraising or directly incurring electoral expenditure in a financial year equal to, or more than, \$1,000.⁸ The prohibition extends to conduct that occurs in and outside Australia.⁹

International human rights legal advice

Rights to privacy, freedom of expression, freedom of association and equality and non-discrimination

1.34 Given this bill applies to foreign persons, it is important to note at the outset that Australia's human rights obligations apply to all people subject to its jurisdiction, regardless of whether they are Australian citizens. This means that Australia owes human rights obligations to everyone in Australia, including foreign persons who are not citizens or permanent residents.¹⁰ While many foreign campaigners would not fall within Australia's jurisdiction for the purposes of international human rights law, there are likely to be some foreign persons residing in Australia who are owed human rights obligations and whose rights may be impacted by this bill.

1.35 By prohibiting foreign persons authorising the production and distribution of electoral materials, and fundraising or directly incurring electoral expenditure, the measure interferes with these persons' right to freedom of expression, particularly

5 Schedule 1, item 8, new subsection 321DA(2).

6 Schedule 1, item 8, new subsection 321DA(1).

7 Schedule 1, item 15. The Commissioner's information-gathering powers are set out in section 321F of the *Commonwealth Electoral Act 1918*.

8 Schedule 1, item 21, new section 314AJ.

9 Schedule 1, item 21, new subsection 314AJ(2).

10 Australia's obligations under the International Covenant on Civil and Political Rights are applicable in respect of its acts undertaken in the exercise of its jurisdiction to anyone within its power or effective control (and even if the acts occur outside its own territory). See United Nations Human Rights Committee, *General Comment No.31: The nature of the general legal obligation imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13 (26 May 2004) [10]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Reports 136 [107]–[111].

their right to disseminate ideas and information.¹¹ This is acknowledged in the statement of compatibility.¹² The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or print, in the form of art, or through any other media of an individual's choice, including online platforms.¹³ It protects all forms of expression, including political discourse and commentary on public affairs, and the means of its dissemination, including spoken, written and sign language and non-verbal expression (such as images).¹⁴ International human rights law has placed particularly high value on uninhibited expression in the context of public debate in a democratic society concerning figures in the public and political domain.¹⁵

1.36 To the extent that the restriction on foreign persons fundraising or incurring electoral expenditure interferes with the ability of a political association to carry out its activities, it may also engage and limit the right to freedom of association. The right to freedom of association protects the right of all persons to group together voluntarily for a common goal and to form and join an association.¹⁶ This right prevents States parties from imposing unreasonable and disproportionate restrictions on the right to form associations, including imposing procedures that may effectively prevent or discourage people from forming an association. For instance, the European Court of Human Rights has found that legislation prohibiting a French political party receiving

11 The European Court of Human Rights has found that legislation restricting persons from incurring electoral expenditure in the weeks prior to an election amounted to a restriction on the right to freedom of expression. See *Bowman v The United Kingdom*, European Court of Human Rights (Grand Chamber), Application No. 141/1996/760/961 (1998), particularly [33]. Further, it is noted that the right to take part in public affairs and elections is not directly engaged by this measure as this right only applies to citizens. See International Covenant on Civil and Political Rights, article 25.

12 Statement of compatibility, p. 4.

13 International Covenant on Civil and Political Rights, article 19(2). See also UN Human Rights Council, *The promotion, protection and enjoyment of human rights on the Internet*, UNHRC Res. 20/8 (2012).

14 UN Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression* (2011) [11]–[12].

15 UN Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression* (2011) [34], [37] and [38]. The UN Committee has previously raised concerns about certain restrictions on political discourse, including 'the prohibition of door-to-door canvassing' and 'restrictions on the number and type of written materials that may be distributed during election campaigns'.

16 International Covenant on Civil and Political Rights, article 22.

funding or donations from foreign entities interfered with its right to freedom of association by impacting its financial capacity to carry on its political activities.¹⁷

1.37 In addition, by prohibiting individuals from engaging in certain conduct in the private sphere, such as incurring electoral expenditure, and expanding the Electoral Commissioner's information-gathering powers, the measure also engages and limits the right to privacy. The statement of compatibility acknowledges this, noting that information or documents gathered by the Electoral Commissioner may contain personal information.¹⁸ The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.¹⁹ It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. The right to privacy also includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information. It includes the right to control the dissemination of information about one's private life.

1.38 Further, noting the measure applies to foreign persons, treating such persons differently from others on the basis of their nationality, it engages and may limit the right to equality and non-discrimination.²⁰ This right provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.²¹ The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).²² While Australia maintains a discretion under international law with respect to its treatment of non-citizens in the context of the electoral process, Australia also has obligations under

17 *Parti Nationaliste Basque – Organisation Régionale D'Iparralde v France*, European Court of Human Rights, Application No. 71251/01 (2007) [43]–[44]. Ultimately the Court concluded at [51] that 'the impact of the measure in question on the applicant party's ability to conduct its political activities is not disproportionate. Although the prohibition on receiving contributions from the Spanish Basque Nationalist Party has an effect on its finances, the situation in which it finds itself as a result is no different from that of any small political party faced with a shortage of funds'.

18 Statement of compatibility, p. 3.

19 International Covenant on Civil and Political Rights, article 17; UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [3]–[4].

20 International Covenant on Civil and Political Rights, articles 2 and 26.

21 International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights.

22 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

article 26 of the International Covenant on Civil and Political Rights not to discriminate on grounds of nationality or national origin.²³ Differential treatment will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria.²⁴

1.39 It is noted that the statement of compatibility only addresses potential limitations on the rights to privacy and freedom of expression and does not provide an assessment as to the compatibility of the measure with the rights to freedom of association or equality and non-discrimination.

1.40 The above rights may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.²⁵ In relation to the rights to freedom of expression and freedom of association, a legitimate objective is one that is necessary to protect specified interests, including the rights or reputations of others, national security, public order, or public health or morals.²⁶

1.41 The statement of compatibility states that the objective of the bill is to safeguard the integrity of the electoral system by ensuring that only those with a legitimate connection to Australia are able to influence Australian elections, and by reducing both the real and perceived threat of foreign influence in Australian democracy.²⁷ This objective is reflected in the bill itself.²⁸ Regarding the expanded information-gathering powers, the statement of compatibility states that this will facilitate the gathering of information to enable the Electoral Commissioner to regulate the potential influence of foreign campaigners over Australian elections.²⁹ The statement of compatibility notes the threat of foreign influence in democratic elections can risk undermining electoral integrity and has the potential to erode

23 UN Committee on the Elimination of Racial Discrimination, *General Recommendation 30: Discrimination against non-citizens* (2004).

24 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

25 Regarding limitations on the right to privacy see, UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin*, A/HRC/13/37 (2009) [15]–[18]. Regarding limitations on the right to freedom of expression see, UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [21]–[36].

26 International Covenant on Civil and Political Rights, article 19(3) and article 22(2). See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [32]–[35].

27 Statement of compatibility, pp. 3–4.

28 Schedule 1, item 21, new section 314A1.

29 Statement of compatibility, p. 3.

democracy by compromising trust in electoral results.³⁰ It states the prohibition of foreign campaigners engaging in certain conduct is a mechanism to counteract the effects of foreign influence, and maintain trust, in Australia's democracy.³¹

1.42 Seeking to protect the integrity of the electoral system has been recognised as a legitimate objective for the purposes of international human rights law.³² Indeed, the UN Human Rights Committee has accepted that legislation 'restricting the publication of opinion polls for a limited period in advance of an election' for the purposes of guaranteeing fair elections and protecting the rights of Presidential candidates addressed the legitimate objectives of protecting public order and respecting the rights of others.³³ The European Court of Human Rights has accepted that prohibiting foreign States and foreign legal entities from funding national political parties pursued the legitimate objective of protecting institutional order and prevention of disorder.³⁴ In light of this jurisprudence, the measure appears to pursue a legitimate objective. To the extent that prohibiting foreign campaigners from engaging in certain electoral conduct would reduce the threat of foreign influence on elections and maintain the public's confidence in the integrity of the electoral process, the measure would be rationally connected to the stated objective.

1.43 A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. In this respect, it is necessary to consider a number of factors, including whether a proposed limitation is sufficiently circumscribed; whether it is accompanied by sufficient safeguards; and whether any less rights restrictive alternatives could achieve the same stated objective.

1.44 The breadth of the measure is relevant in considering whether it is sufficiently circumscribed. The measure applies to foreign campaigners, which, as noted above, encompasses foreign persons who are not citizens or permanent residents but may still reside in Australia on another type of visa. This definition may capture a broad range of people, some of whom may have a legitimate connection with Australia and a genuine stake in the outcome of the Australian political process, noting that the

30 Statement of compatibility, p. 4.

31 Statement of compatibility, p. 4.

32 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [37].

33 *Kim Jong-Cheol v Republic of Korea*, UN Human Rights Committee Communication No. 968/2001 (2005) [8.3].

34 *Parti Nationaliste Basque – Organisation Régionale D'Iparralde v France*, European Court of Human Rights, Application No. 71251/01 (2007) [43]–[44]. See also *Bowman v The United Kingdom*, European Court of Human Rights (Grand Chamber), Application No. 141/1996/760/961 (1998), where the Court found that legislation restricting electoral expenditure prior to an election pursued the legitimate aim of protecting the rights of others, namely the candidates for election.

outcome of elections may impact certain areas of concern for such persons, such as employment opportunities; access to social welfare and support services; access to education and housing; and migration policies and laws. As to the type of expression captured, the measure prohibits the expression of electoral matters that are in electoral advertisements paid for and approved by a foreign campaigner; and electoral matters approved by a foreign campaigner that form part of a sticker, fridge magnet, leaflet, flyer, pamphlet, notice, poster or how to vote card. Electoral matter is defined as a 'matter communicated or intended to be communicated for the dominant purpose of influencing the way electors vote in an election', including communications that expressly promote or oppose a political entity or parliamentarian but not those that serve an educative purpose.³⁵ Noting this definition, the prohibition could potentially capture a wide range of materials and forms of expression. Considering the broad range of people to whom the measure may apply, and the types of expression prohibited, questions remain as to whether the measure is sufficiently circumscribed.³⁶

1.45 In addition, the UN Human Rights Committee has noted that restrictions on the right to freedom of expression must not be overly broad and, even where restrictions are based on legitimate grounds, States parties 'must demonstrate in [a] specific and individualized fashion the precise nature of the threat' and establish 'a direct and immediate connection between the expression [in question] and the threat'.³⁷ In the context of this bill, it does not allow for an individualised assessment of the threat posed by the foreign persons, or the forms of expression, captured by the measure. It is therefore not clear that all forms of expression prohibited by this bill would necessarily pose a threat to Australia's democracy and electoral system in practice. A measure that imposes a blanket prohibition without regard to the merits of an individual case is less likely to be proportionate than those which provide flexibility to treat different cases differently.

35 *Commonwealth Electoral Act 1918*, section 4AA. 'Electoral matter' does not include communications whose 'dominant purpose is to educate their audience on a public policy issue, or to raise awareness of, or encourage debate on, a public policy issue'.

36 The Parliamentary Joint Committee on Human Rights has previously raised concerns about the breadth of related measures that restrict foreign political donations and impose registration requirements on certain campaigners and entities, as well as persons undertaking activities on behalf of a foreign principal. See Parliamentary Joint Committee on Human Rights, *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017*, *Report 1 of 2018* (6 February 2018), pp.11–29; *Report 3 of 2018* (27 March 2018) pp. 154–180; *Foreign Influence Transparency Scheme Bill 2017 and Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017*, *Report 1 of 2018* (6 February 2018), pp.34–44; *Report 3 of 2018* (27 March 2018) pp. 189–206.

37 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [34]–[35].

1.46 Further, it is not clear from the information provided in the statement of compatibility that the measure is accompanied by sufficient safeguards to ensure any limitation on rights is proportionate. It is also not clear whether there are less rights restrictive ways of achieving the stated objective. Without this information, it is not possible to conclude that the measure is a proportionate limit on the rights to privacy, freedom of expression, freedom of association and equality and non-discrimination.

Committee view

1.47 The committee notes this bill prohibits foreign campaigners, including foreign persons who are neither citizens nor permanent residents, from engaging in certain electoral conduct, including authorising the production and distribution of certain electoral matters, and fundraising or directly incurring electoral expenditure. The bill also expands the Electoral Commissioner's existing information-gathering powers to allow for investigation of possible contraventions of these new prohibitions.

1.48 By prohibiting foreign persons in Australia from engaging in certain electoral conduct, and expanding the Electoral Commissioner's information-gathering powers, the measure engages and limits the rights to freedom of expression and privacy. To the extent that restricting foreign persons fundraising or incurring electoral expenditure interferes with the ability of a domestic political association to carry out its activities, it may also engage and limit the right to freedom of association. Further, noting the measure treats foreign persons differently from others on the basis of nationality, it engages and may limit the right to equality and non-discrimination. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.49 The committee considers the measure pursues the legitimate objective of protecting the integrity of Australia's electoral system and reducing the threat of foreign influence on Australia's elections. However, the committee notes that it is not clear that the measure is proportionate, noting that it applies to almost all non-nationals living in Australia who are not permanent residents, such that they would be prohibited from engaging in any form of campaigning in the political process (for example, prohibiting those on student visas from creating pamphlets opposing a political party).

1.50 The committee notes with concern that this bill passed four sitting days after introduction.³⁸ It notes that this short timeframe did not provide the committee with adequate time to scrutinise the legislation and seek further information in order to provide appropriate advice to the Parliament as to the human rights compatibility

38 This bill was introduced in the Senate on 9 February 2022; finally passed both Houses on 16 February 2022; and received Royal Assent on 17 February 2022.

of the bill. As the bill has now passed, the committee makes no further comment on this bill.

Social Media (Anti-Trolling) Bill 2022¹

Purpose	<p>This bill seeks to create a framework to regulate defamatory content posted on social media</p> <p>The bill would deem an Australian person who maintains or administers a social media page not to be the publisher for material posted on the page by another person. Instead, the social media service provider would be considered the publisher of material published on their service for the purposes of defamation law</p> <p>The bill would introduce a defence in defamation proceedings for social media service providers if certain conditions are satisfied, including the provision of, and compliance with, a complaints scheme</p> <p>The bill would introduce end-user information disclosure orders that would require a social media service provider to disclose the poster's relevant contact details and country location data to the potential complainant in defamation proceedings</p>
Portfolio	Attorney-General
Introduced	House of Representatives, 10 February 2022
Rights	Privacy; freedom of expression

Disclosure of poster's personal information

1.51 This bill seeks to provide a framework to regulate who is responsible for defamatory content posted on social media, and introduce powers for anonymous commenters to be identified, for the purpose of instituting defamation proceedings.

1.52 In particular, the bill seeks to introduce end-user information disclosure orders (disclosure orders) that would require a social media service provider (the provider)² to disclose the poster's relevant contact details and country location data to the potential complainant in defamation proceedings, irrespective of whether the poster consents to the disclosure. The relevant contact details would include the poster's name, email address, phone number and such other details (if any) as are specified in

¹ This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Media (Anti-Trolling) Bill 2022, *Report 2 of 2022*; [2022] AUPJCHR 12.

² This bill would apply to foreign social media service providers if they have at least 250,000 Australian account-holders or they are specified in legislative rules. See clauses 21 and 22.

the legislative rules.³ An Australian person⁴ (the prospective applicant) may apply to a court for a disclosure order if they reasonably believe they may have a right to obtain relief against the anonymous poster in a defamation proceeding relating to the defamatory material posted.⁵ The court may order the disclosure of the poster's contact details and/or country location data if satisfied of particular matters, including that there are reasonable grounds to believe that there may be a right for the prospective applicant to obtain relief against the poster in a defamation proceeding that relates to the material.⁶ However, the court may refuse to make a disclosure order if they are satisfied that the disclosure of the relevant contact details or country location data is likely to present a risk to the poster's safety.⁷ If a disclosure order is made, the provider must comply with that order in order to rely on the defence set out in clause 16 and avoid liability in any defamation proceedings.⁸

Preliminary international human rights legal advice

Rights to privacy and freedom of expression

1.53 The bill may promote the right to privacy to the extent that it facilitates the resolution of defamation complaints, assisting potential applicants to seek an effective remedy for reputational damage. The right to privacy protects against arbitrary and unlawful interferences with an individual's privacy and attacks on reputation.⁹ International human rights law recognises that all human rights, including the right to privacy, must be protected online.¹⁰

1.54 However, by requiring providers to collect and disclose personal information of their users, including, where ordered to do so by a court, disclosing the contact details of anonymous users without their consent, the measure would also limit the right to privacy. The measure may also limit the right to privacy if it were to incentivise providers to pre-emptively collect additional personal information of their users to

3 Clause 6.

4 An Australian person means an Australian citizen; an individual who holds a permanent visa; or a body corporate incorporated in Australia. See clause 6.

5 Subclause 19(1).

6 Subclause 19(2).

7 Subclause 19(3).

8 Subparagraph 16(2)(d)(ii).

9 International Covenant on Civil and Political Rights, article 17. There is international case law to indicate that this protection only extends to attacks on reputation that are unlawful. See *RLM v Trinidad and Tobago*, UN Human Rights Committee Communication No. 380/89 (1993); and *IP v Finland*, UN Human Rights Committee Communication No. 450/91 (1993).

10 UN General Assembly, *The right to privacy in the digital age*, UNGA Res. 68/167 (2014); UN Human Rights Council, *The promotion, protection and enjoyment of human rights on the Internet*, UNHRC Res. 20/8 (2012).

ensure that they can access the defence contained in the bill and thereby avoid liability for defamatory material posted on their platforms.¹¹ The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.¹² It also includes the right to control the dissemination of information about one's private life. The right to privacy has been recognised as a 'a gateway to the enjoyment of other rights, particularly the [right to] freedom of opinion and expression'.¹³

1.55 The measure also engages and limits the right to freedom of expression insofar as it interferes with a person's ability to express themselves via posts on social media.¹⁴ To the extent that it may deter people from expressing themselves for fear of defamation proceedings being instituted against them, the bill may have a chilling effect on free speech. The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or print, in the form of art, or through any other media of an individual's choice, including online platforms.¹⁵ The right to freedom of expression encompasses expression that may be favourably received as well as expression that may be regarded as deeply

11 Statement of compatibility, pp. 6–7.

12 International Covenant on Civil and Political Rights, article 17. Every person should be able to ascertain which public authorities or private individuals or bodies control or may control their files and, if such files contain incorrect personal data or have been processed contrary to legal provisions, every person should be able to request rectification or elimination. See UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [10]. See also, UN Human Rights Committee, *General comment No. 34: Article 19: Freedoms of opinion and expression* (2011) [18].

13 UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, A/HRC/29/32* (2015) [17].

14 To the extent that the measure applies to children, the rights of the child may also be engaged, including their rights to privacy and freedom of expression. See Convention on the Rights of the Child, articles 13 and 16.

15 International Covenant on Civil and Political Rights, article 19(2). See also UN Human Rights Council, *The promotion, protection and enjoyment of human rights on the Internet*, UNHRC Res. 20/8 (2012).

offensive and insulting, although such expression may be restricted in certain contexts, such as hate speech.¹⁶

1.56 Relevantly in relation to this measure, international human rights law has recognised the importance of anonymous expression, particularly in the context of public debate concerning political and public institutions.¹⁷ The United Nations (UN) Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has, in a number of reports, highlighted the value of anonymous expression in protecting the rights to freedom of expression and privacy.¹⁸ In a 2015 report, the Special Rapporteur stated:

Anonymity has been recognized for the important role it plays in safeguarding and advancing privacy, free expression, political accountability, public participation and debate...Encryption and anonymity, and the security concepts behind them, provide the privacy and security necessary for the exercise of the right to freedom of opinion and expression in the digital age. Such security may be essential for the exercise of other rights, including economic rights, privacy, due process, freedom of peaceful assembly and association, and the right to life and bodily integrity.¹⁹

1.57 Noting the significant ways anonymity facilitates opinion and expression online, the Special Rapporteur has stated that 'States should protect it and generally not restrict the technologies that provide it' and any 'restrictions on encryption and anonymity must be strictly limited according to principles of legality, necessity,

16 Article 20 of the International Covenant on Civil and Political Rights places limits on freedom of expression by prohibiting propaganda for war and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. See UN Human Rights Committee, *General comment No. 34: Article 19: Freedoms of opinion and expression* (2011) [11] and [38]. See also UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/HRC/17/27* (2011) at [37], where the Special Rapporteur noted that 'the right to freedom of expression includes expression of views and opinions that offend, shock or disturb'. The European Court of Human Rights has made similar statements, see, eg, *Standard Verlagsgesellschaft MBH v Austria (No. 3)*, European Court of Human Rights, Application No. 39378/15 (2021) [83].

17 See, eg, UN Human Rights Committee, *General comment No. 34: Article 19: Freedoms of opinion and expression* [38]; *Standard Verlagsgesellschaft MBH v Austria (No. 3)*, European Court of Human Rights, Application No. 39378/15 (2021); *Delfi AS v Estonia*, European Court of Human Rights (Grand Chamber), Application No. 64569/09 (2015).

18 See, eg, UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, A/HRC/29/32* (2015) [12]–[17], [47]–[60]; *A/HRC/32/38* (2016) [62], [85]; *A/HRC/35/22* (2017) [21], [78]; UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/HRC/23/40* (2013) [47]–[49].

19 UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, A/HRC/29/32* (2015) [47], [56].

proportionality and legitimacy in objective'.²⁰ In another report, the Special Rapporteur noted that:

restrictions on anonymity have a chilling effect, dissuading the free expression of information and ideas. They can also result in individuals' de facto exclusion from vital social spheres, undermining their rights to expression and information, and exacerbating social inequalities. Furthermore, restrictions on anonymity allow for the collection and compilation of large amounts of data by the private sector, placing a significant burden and responsibility on corporate actors to protect the privacy and security of such data.²¹

1.58 The Special Rapporteur has observed that intermediary liability, whereby States impose liability on internet service providers or media platforms for anonymous defamatory statements posted on their sites, and broad mandatory data retention policies, limit an individual's ability to remain anonymous and consequently interfere with their rights to freedom of expression and privacy.²² The Special Rapporteur observed that:

intermediary liability is likely to result either in real-name registration policies, thereby undermining anonymity, or the elimination of posting altogether by those websites that cannot afford to implement screening procedures, thus harming smaller, independent media.²³

1.59 These comments are noteworthy given the bill seeks to introduce a form of intermediary liability, whereby liability would be imposed on social media service providers for defamatory third-party material unless certain conditions are met.

1.60 The European Court of Human Rights has also recognised the importance of anonymity for internet users to enhance their free expression of opinion, ideas and information online, and has observed the chilling effect on free speech of measures that require the disclosure of anonymous internet users' identity. In a recent case concerning an Austrian daily newspaper (the applicant) that had been ordered to disclose the identities of persons who anonymously posted defamatory comments on its website, the Court was of the view that 'an obligation to disclose the data of authors of online comments could deter them from contributing to debate and therefore lead

20 UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye*, A/HRC/29/32 (2015) [47].

21 UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*, A/HRC/23/40 (2013) [49].

22 UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye*, A/HRC/29/32 (2015) [54]–[55].

23 UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye*, A/HRC/29/32 (2015) [54].

to a chilling effect among users posting in forums in general'.²⁴ The Court found that 'the interference [with the right to freedom of expression] lies in the lifting of anonymity and the effects thereof, irrespective of the outcome of any subsequent [defamation] proceedings'.²⁵ In this way, the lawfulness, or otherwise, of the comments for the purposes of defamation law did not change the Court's evaluation. While the Court acknowledged that there is not an 'absolute right to anonymity on the Internet', it recognised the 'interest of Internet users in not disclosing their identity', noting that '[a]nonymity has long been a means of avoiding reprisals or unwanted attention' and as such, 'is capable of promoting the free flow of opinions, ideas and information in an important manner, including, notably, on the Internet'.²⁶ In light of this international human rights law jurisprudence, it is evident that the measure would limit the rights to privacy and freedom of expression by seeking to establish a framework that would lift the anonymity of persons who post online material considered to be defamatory.

Limitation criteria

1.61 The rights to privacy and freedom of expression may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.²⁷ In relation to the right to freedom of expression, a legitimate objective is one that is necessary to protect specified interests, including the rights or reputations of others.²⁸ The UN Special Rapporteur has emphasised that in the context of measures that restrict online anonymity, any limitation on these rights must be strictly interpreted.²⁹

1.62 As restrictions on freedom of expression on the ground of protecting the reputation or rights of others invariably involve a clash of rights, competing rights and

24 *Standard Verlagsgesellschaft MBH v Austria (No. 3)*, European Court of Human Rights, Application No. 39378/15 (2021) [74].

25 *Standard Verlagsgesellschaft MBH v Austria (No. 3)*, European Court of Human Rights, Application No. 39378/15 (2021) [79].

26 *Standard Verlagsgesellschaft MBH v Austria (No. 3)*, European Court of Human Rights, Application No. 39378/15 (2021) [76].

27 See UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, Martin Scheinin, A/HRC/13/37 (2009) [15]–[18]; UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [21]–[36].

28 International Covenant on Civil and Political Rights, article 19(3). See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [32]–[35].

29 See UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, David Kaye, A/HRC/29/32 (2015) [29] and [56]. See generally UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [21]–[22].

interests must be balanced. In undertaking this balancing exercise, the European Court of Human Rights has considered whether 'domestic authorities have struck a fair balance when protecting' the rights to privacy and freedom of expression, noting that as a matter of principle, both rights 'deserve equal respect'.³⁰ In balancing these conflicting rights, the Court has considered several factors about the relevant online comment, including:

whether a contribution is made to a debate of public interest; the subject of the report in question; the prior conduct of the person concerned and how well he or she is known; the content, form and consequences of the publication in question; and the gravity of the penalty imposed on the journalists or publishers.³¹

Legitimate objective and rational connection

1.63 The statement of compatibility states that the purpose of the bill is to address the harm of defamation on social media and create a framework to regulate defamatory content posted on social media.³² It notes that defamatory material published on social media can be relatively more harmful than the equivalent material published through traditional media outlets, given the speed at which the material can spread on social media. It further notes that potential complainants may not be able to vindicate their reputation when harmful material is posted anonymously. The statement of compatibility states that by requiring the disclosure of the poster's personal information, the potential complainant can commence defamation proceedings against the poster and pursue a remedy.³³ In this way, the measure promotes the right of individuals to be free from attacks to their honour and reputation.³⁴ As to the necessity of the measure, the statement of compatibility states that the disclosure of the poster's contact details is necessary for the mechanisms in the bill to be effective, and providers having access to that personal information is necessary to enable effective disclosure.³⁵

1.64 Legislation relating to defamation claims has been found to pursue the legitimate objective of protecting the rights or reputations of others, particularly

30 *Delfi AS v Estonia*, European Court of Human Rights (Grand Chamber), Application No. 64569/09 (2015) [138]–[139]. See also *Standard Verlagsgesellschaft MBH v Austria (No. 3)*, European Court of Human Rights, Application No. 39378/15 (2021) [84].

31 *Standard Verlagsgesellschaft MBH v Austria (No. 3)*, European Court of Human Rights, Application No. 39378/15 (2021) [85].

32 Statement of compatibility, pp. 4 and 9.

33 Statement of compatibility, p. 6.

34 Statement of compatibility, pp. 6 and 8.

35 Statement of compatibility, p. 8.

against arbitrary or unlawful interference with privacy and attacks on reputation.³⁶ Therefore, in general terms, seeking to regulate defamatory content on social media and facilitate the resolution of defamation complaints is capable of being a legitimate objective for the purposes of international human rights law.

1.65 However, in order to establish whether these indeed are legitimate objectives, further information is required as to whether there is a pressing and substantial concern which gives rise to the need for the specific measure. The UN Special Rapporteur has observed that 'the State must show that any restriction on encryption or anonymity is "necessary" to achieve the legitimate objective', meaning that the 'restriction must be something more than "useful", "reasonable" or "desirable"'.³⁷ While it is clear that there is a need to obtain the relevant contact details of the poster in order to institute defamation proceedings, there is already an existing preliminary discovery process that enables potential applicants to apply to the court to ascertain the identity or whereabouts of prospective defendants where the applicant is unable to obtain that information themselves.³⁸ In the context of defamation claims, discovery orders may be granted to enable potential complainants to identify an

36 The UN Human Rights Committee has observed that '[d]efamation laws must be crafted with care to ensure that they comply with [the right to freedom of expression], and that they do not serve, in practice, to stifle freedom of expression': *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [47]. For jurisprudence of the European Court of Human Rights, see, eg, *Lukpan Akhmedyarov v Kazakhstan*, UN Human Rights Committee Communication No. 2535/2015 (2020), particularly [9.7]–[9.10]; *Aquilina and Others v. Malta*, European Court of Human Rights, Application No. 28040/08 (2011); *Palomo Sánchez and Others v. Spain*, European Court of Human Rights (Grand Chamber), Application Nos. 28955/06, 28957/06, 28959/06, and 28964/06 (2011).

37 UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, A/HRC/29/32* (2015) [34]. At [35], the Special Rapporteur noted that the concept of necessity also implies an assessment of proportionality. See also UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [33].

38 The Judicial Commission of NSW summarises the preliminary discovery process as follows: 'If an applicant satisfies the court that, having made reasonable enquiries, he or she is unable to ascertain sufficiently the identity or whereabouts of a proposed defendant (or cross-defendants as the case may be), and that someone may have information, or may have or have had possession of a document or thing that tends to assist in ascertaining such identity or whereabouts, the court may order that such person attend the court for examination or give discovery of such documents'. See Judicial Commission of NSW, 'Preliminary discovery to ascertain identity or whereabouts of prospective defendants', *Civil Trials Bench Book* (2021) [2-2290] <https://www.judcom.nsw.gov.au/publications/benchbks/civil/discovery.html#p2-2280>.

anonymous poster of online material for the purposes of commencing defamation proceedings against that poster.³⁹

1.66 Noting that the preliminary discovery process offers potential complainants a mechanism to ascertain the identity or whereabouts of prospective defendants, including anonymous online users, it is not clear why there is a pressing and substantial need to introduce disclosure orders. The bill provides that the power conferred on the court to make disclosure orders is in addition to, and not instead of, any other powers of the court.⁴⁰ The explanatory memorandum states that the disclosure order is intended to provide an additional mechanism to prospective applicants to obtain the relevant contact details of the poster. It states that the prospective applicant will be able to choose between a disclosure order and existing mechanisms to obtain personal information, such as an order for preliminary discovery. It notes that both mechanisms may be utilised, subject to the criteria of each mechanism and any relevant laws or rules of court.⁴¹ It is unclear, in practice, how both mechanisms would operate concurrently, and how disclosure orders would differ from orders for preliminary discovery.⁴² Questions therefore remain as to whether there is a pressing and substantial concern which gives rise to the need for these orders.

1.67 To the extent that disclosing the poster's personal information would assist the complainant to institute defamation proceedings against the person who made the defamatory expression and seek a remedy for any reputational damage, the measure appears to be rationally connected to the stated objective.

Proportionality

1.68 A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. In assessing proportionality, it is necessary to consider a number of factors, including whether it is accompanied by sufficient safeguards and sufficiently flexible to treat different cases differently; and

39 See *Kabbabe v Google LLC* [2020] FCA 126. In this case the applicant sought to commence defamation proceedings against an anonymous poster of a Google review. As Google, the internet intermediary, was considered 'likely' to have information about the poster's identity, an order was granted requiring Google to provide preliminary discovery of all documents or things in its possession or control relating to the description of the unknown person who posed an allegedly defamatory review on Google, see [18].

40 Subclause 19(5).

41 Explanatory memorandum, p. 22.

42 A number of submitters raised similar queries in their submissions to the Senate Standing Committee on Legal and Constitutional Affairs' [inquiry](#) into this bill, particularly querying the necessity of the new powers and their effectiveness given the existing court powers. See, e.g. Law Council of Australia, *Submission 1*, p. 18; Professor David Rolph, *Submission 14*, p. 11.

whether any less rights restrictive alternatives could achieve the same stated objective.⁴³

1.69 The statement of compatibility identifies a number of safeguards that accompany the measure, including:

- that disclosure mechanisms are only enlivened when a potentially defamatory comment has been posted on a social media service;
- the definition of 'relevant contact details' is narrowly drafted to only include the minimum amount of information necessary to institute defamation proceedings, including by way of substituted service;
- the definition of 'country location data' is narrowly drafted so as to only encompass whether the poster was located in or outside of Australia when they posted the material in question;
- the poster's contact details may only be disclosed with their consent or pursuant to a court order;
- social media service providers will continue to be subject to the same privacy obligations regarding collection of personal information;
- the availability of independent judicial oversight by way of disclosure orders; and
- the court's discretion to refuse to make a disclosure order if it is not satisfied of the specified matters or if disclosure may present a risk to the poster's safety.⁴⁴

1.70 These safeguards are likely to assist with the proportionality of the measure. The availability of external and independent judicial oversight and access to review is a particularly important safeguard, especially in the context of restrictions on anonymity.⁴⁵ The UN Special Rapporteur has stated that:

Strong procedural and judicial safeguards should also be applied to guarantee the due process rights of any individual whose use of encryption or anonymity is subject to restriction. In particular, a court, tribunal or other independent adjudicatory body must supervise the application of the restriction.⁴⁶

43 UN Human Rights Committee, *General comment No. 34: Article 19: Freedoms of opinion and expression* (2011) [34]–[35].

44 Statement of compatibility, pp. 7–9.

45 See UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, A/HRC/35/22 (2017) [78].

46 UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, David Kaye, A/HRC/29/32 (2015) [32]. See also [34].

1.71 The requirement that disclosure orders are court-ordered would ensure that restrictions on anonymity and consequent interferences with privacy occur on a case-by-case basis, subject to judicial supervision.⁴⁷ In this way, the measure contains flexibility to enable different cases to be treated differently.

1.72 Further, noting that the misuse of a poster's personal information by a complainant may lead to a greater interference with their right to privacy, the court's discretion to refuse to make a disclosure order where doing so may present a risk to the poster's safety may also operate as an important safeguard. On this issue the eSafety Commissioner has stated that withholding a poster's personal information from the complainant is an 'important protection against the risk of retaliation', noting that basic subscriber information from social media services 'can be used for harmful purposes, including doxing'.⁴⁸ Doxing refers to the 'intentional online exposure of an individual's identity, private information or personal details without their consent', which may undermine their privacy, security, safety and/or reputation.⁴⁹ For example, as noted by the eSafety Commissioner, 'a person could post an email address or phone number online and invite others to dole out punishment'.⁵⁰

1.73 Regarding the operation of this safeguard, the explanatory memorandum states that it does not limit the court's general power to refuse to make an order (for example, where the potential defamation claim is trivial or *prima facie* untenable). It states that while there is no positive obligation on the court to undertake investigations to ascertain the impact of a disclosure order on a poster's safety, if there is information before the court to suggest that the poster's safety might be at risk, the court may refuse to grant the order.⁵¹ The strength of this safeguard therefore depends on what, if any, information is before the court regarding the poster's safety. Noting that the poster would not be a party to disclosure order proceedings and the

47 The UN Special Rapporteur has observed that blanket prohibitions on anonymity are not necessary and proportionate, and that court-ordered decryption 'may only be permissible when it results from transparent and publicly accessible laws applied solely on a targeted, case-by-case basis to individuals (i.e., not to a mass of people) and subject to judicial warrant and the protection of due process rights of individuals': UN Human Rights Council, [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, A/HRC/29/32](#) (2015) [60], see also [57]. See also *NK v Netherlands*, UN Human Rights Committee Communication No.2326/2013 (2018) [9.5]; UN Human Rights Committee, *General Comment No. 16: Article 17 (Right to privacy)* (1988) [8].

48 eSafety Commissioner, *Submission 5*, p.14 to the Senate Standing Commission on Legal and Constitutional Affairs, *Inquiry into the Social Media (Anti-Trolling) Bill 2022*.

49 eSafety Commission, *Doxing trends and challenges – position statement*, 23 May 2020, p. 1 <https://www.esafety.gov.au/industry/tech-trends-and-challenges/doxing> (accessed 10 March 2022).

50 eSafety Commissioner, *Submission 5*, p.14 to the Senate Standing Commission on Legal and Constitutional Affairs, *Inquiry into the Social Media (Anti-Trolling) Bill 2022*.

51 Explanatory memorandum, p. 9.

provider does not appear to have an obligation to seek the poster's views on disclosure, including whether disclosure poses any safety risks, there may be a risk that, in practice, the court may not be provided with the necessary information to properly assess the risk of disclosure.⁵²

1.74 Additionally, to protect against the risk of misuse of the poster's personal information as well as the consequent risk of greater interference with their right to privacy, it is important that there are adequate safeguards to ensure the poster's personal information is only used for the purpose of instituting defamation proceedings. It is not clear that the above safeguards would be adequate to mitigate this risk, noting that the bill does not prohibit the use or onwards disclosure of the poster's personal information for unauthorised purposes.

1.75 Further, noting that the measure involves competing rights and interests, it is important that the court considers these other matters when making a disclosure order. The bill provides that the court may make a disclosure order where a prospective applicant satisfies the court that a poster has posted material on social media; there are reasonable grounds to believe the applicant might have a right to obtain relief in a defamation proceeding; an Australian court would have jurisdiction to hear the matter; and the applicant cannot ascertain the poster's contact details, or whether they are in Australia, or they reasonably believe the material was posted in Australia.⁵³ However, the bill does not require the court to consider other relevant matters, such as the poster's rights to privacy and expression, including whether any limit on the poster's privacy is only as extensive as is strictly necessary, and the type of expression and the context in which it was made. While the court may consider these other matters using its general power to make orders as it considers appropriate in the interests of justice, it would not be specifically required to do so.⁵⁴

1.76 The UN Human Rights committee has observed that the form of expression and the means of its dissemination are relevant considerations in assessing the proportionality of restrictions on the right to freedom of expression.⁵⁵ In particular, it

52 The eSafety Commissioner similarly queried 'how a court is to obtain the factual information it would need to make this assessment – particularly if the commenter [or poster] has not been involved in the proceedings': eSafety Commissioner, *Submission 5*, p.14 to the Senate Standing Commission on Legal and Constitutional Affairs, *Inquiry into the Social Media (Anti-Trolling) Bill 2022*.

53 Subclause 19(2).

54 Section 23 of the *Federal Court Act 1986* provides that the 'Court has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kinds, as the Court thinks appropriate'. Rule 1.32 of the *Federal Court Rules 2011* provides that the 'Court may make any order that the Court considers appropriate in the interests of justice'.

55 UN Human Rights Committee, *General comment No. 34: Article 19: Freedoms of opinion and expression* (2011) [34].

has noted that 'the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain'.⁵⁶ In relation to defamation complaints instituted by public figures, the UN Human Rights Committee has observed that a fair balance must be struck between protection of the complainant's rights and reputation, and the author's right to freedom of expression, including the right to express information of public interest and the public's right to receive such information.⁵⁷ The European Court of Human Rights has also emphasised the importance of balancing competing rights and interests in the context of defamation claims and restrictions on anonymity, particularly where political speech and debates of public interest are concerned.⁵⁸ In deciding whether to disclose an anonymous author's identity, the Court has observed that it must first examine the alleged defamation claim and then weigh the conflicting interests at stake.⁵⁹ In cases where these competing rights and interests were not balanced, and weight was not given to the value of anonymity in promoting the free flow of opinions, ideas and information, the Court has found a violation of the right to freedom of expression.⁶⁰

1.77 Given the importance of this balancing exercise, it is not clear why the bill does not require the court to consider the competing rights and interests at stake as well as the form of expression in deciding whether to make a disclosure order. Such a

56 UN Human Rights Committee, *General comment No. 34: Article 19: Freedoms of opinion and expression* (2011) [34]. The Committee further stated at [38] that: 'the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties, albeit public figures may also benefit from the provisions of the Covenant. Moreover, all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition'. See also *Lukpan Akhmedyarov v Kazakhstan*, UN Human Rights Committee Communication No. 2535/2015 (2020) [9.7].

57 *Lukpan Akhmedyarov v Kazakhstan*, UN Human Rights Committee Communication No. 2535/2015 (2020) [9.9]–[9.10]. In this case, which involved a defamation lawsuit by a public official against a journalist, the committee considered that the national courts in Kazakhstan did not make 'an appropriate attempt to strike a fair balance between protection of the claimant's rights and reputation, on one hand, and the author's right to impart information of public interest and the public's right to receive it, on the other hand'. On this basis, the Committee considered that the state party failed to justify that the restriction on the author's freedom of expression was proportionate and thus found a violation of the author's rights.

58 *Standard Verlagsgesellschaft MBH v Austria (No. 3)*, European Court of Human Rights, Application No. 39378/15 (2021) [91]–[92].

59 *Standard Verlagsgesellschaft MBH v Austria (No. 3)*, European Court of Human Rights, Application No. 39378/15 (2021) [92].

60 *Standard Verlagsgesellschaft MBH v Austria (No. 3)*, European Court of Human Rights, Application No. 39378/15 (2021) [95]–[97].

requirement may also ensure the least rights restrictive approach is applied in each case.

1.78 Finally, it is noted that the above safeguards primarily apply to the right to privacy and may offer little protection in relation to the right to freedom of expression. While court-ordered disclosure may only occur when the complainant may have a right to obtain relief against the poster in defamation proceedings, this may offer little safeguard value where the scope of permitted speech under defamation law is narrower than under international human rights law.

1.79 To assess the compatibility of this measure with the rights to privacy and freedom of expression, further information is required as to:

- (a) why the existing preliminary discovery process in defamation proceedings is insufficient so as to justify the need to introduce end-user information disclosure orders;
- (b) why does the bill not require the court to balance competing rights and interests (particularly the rights to privacy and freedom of expression) as well as consider other relevant matters, such as the form of expression and the context in which it is made;
- (c) how would the court's power to refuse to make a disclosure order, where to do so would pose a safety risk to the poster, be effective in practice, noting it is not clear how the court would obtain the necessary information to make this assessment;
- (d) what safeguards are there, if any, to ensure that the poster's personal information is only used by the applicant for the purposes of instituting defamation proceedings; and
- (e) why does the bill not prohibit the unauthorised use and disclosure of the poster's personal information once it is disclosed.

Committee view

1.80 This bill seeks to provide a framework to regulate who is responsible for defamatory content posted on social media, and introduce powers for anonymous commenters to be identified, for the purpose of instituting defamation proceedings. In particular, it seeks to introduce end-user information disclosure orders (disclosure orders) that would require a social media service provider to disclose the poster's relevant contact details and country location data to the applicant, irrespective of whether the poster consents to the disclosure. The court may make a disclosure order if satisfied of particular matters, including that there are reasonable grounds to believe that there may be a right for the prospective applicant to obtain relief against the poster in defamation proceedings.

1.81 The committee notes that the bill may promote the right to privacy to the extent that it assists potential applicants to institute defamation proceedings and seek an effective remedy for any reputational damage. The committee notes that

defamatory material published on social media can be particularly harmful because of the speed at which it is disseminated. It further notes that where harmful material is posted anonymously, potential complainants may be unable to vindicate their reputation. By providing a framework to regulate defamatory content on social media and assist complainants to institute defamation proceedings directly against the author of the defamatory content, the committee considers that the measure promotes the right of individuals to be free from attacks to their honour and reputation.

1.82 However, the committee notes that the measure also limits the right to privacy by permitting the collection and disclosure of the poster's personal information without their consent. The measure also engages and limits the right to freedom of expression insofar as establishing a framework to lift the anonymity of social media users may have a chilling effect on free speech if it inhibits a person from expressing themselves on social media.

1.83 The committee notes that these rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate. The committee notes that while the measure pursues the legitimate objective of protecting the rights or reputations of others, particularly against unlawful attacks on reputation, there are some questions as to whether the measure addresses a pressing and substantial concern for the purposes of international human rights law. Further, the committee notes that there are a number of important safeguards that assist with proportionality, including judicial oversight of disclosure orders. However, there are some questions as to whether these safeguards are sufficient, noting the absence of any requirement for the courts to specifically consider the rights to privacy and freedom of expression of the poster of the content, and the lack of prohibition against the unauthorised use and disclosure of the poster's personal information.

1.84 The committee has not yet formed a concluded view in relation to this matter. It considers further information is required to assess the human rights implications of this bill, and as such seeks the Attorney-General's advice as to the matters set out at paragraph [1.79].

Telecommunications (Interception and Access) Amendment (Corrective Services Authorities) Bill 2022

Telecommunications (Interception and Access) (Enforcement Agency—NSW Department of Communities and Justice) Declaration 2022 [F2022L00154]¹

Purpose	<p>The Telecommunications (Interception and Access) Amendment (Corrective Services Authorities) Bill 2022 seeks to amend the <i>Telecommunications (Interception and Access) Act 1979</i> to provide State and Territory corrective services authorities with the ability to access telecommunications data</p> <p>The Telecommunications (Interception and Access) (Enforcement Agency—NSW Department of Communities and Justice) Declaration 2022 [F2022L00154] declares the NSW Department of Communities and Justice to be an enforcement agency, and each staff member of Corrective Services NSW, to be an officer, for the purpose of accessing telecommunications data</p>
Portfolio	Home Affairs
Bill introduced	House of Representatives, 17 February 2022
Last day to disallow instrument	15 sitting days after tabling
Authorising legislation	<i>Telecommunications (Interception and Access) Act 1979</i>
Rights	Privacy

Access to telecommunications data by corrective services authorities

1.85 The *Telecommunications (Interception and Access) Act 1979* (TIA Act) provides a legal framework for certain agencies to access telecommunications data for law enforcement and national security purposes. Telecommunications data is information about a communication – such as the phone number and length of call or email address from which a message was sent and the time it was sent – but does not include

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Telecommunications (Interception and Access) Amendment (Corrective Services Authorities) Bill 2022; Telecommunications (Interception and Access) (Enforcement Agency—NSW Department of Communities and Justice) Declaration 2022 [F2022L00154], *Report 2 of 2022*; [2022] AUPJCHR 13.

the content of the communication.² The TIA Act provides that an authorised officer in an enforcement agency can authorise the disclosure of such data if it is for the purposes of enforcing the criminal law or a law imposing a pecuniary penalty, or for the protection of public revenue.³ An enforcement agency is defined as a criminal law enforcement agency⁴ or an authority or body the minister declares, by legislative instrument, to be an enforcement body.⁵ A corrective services authority can be declared to be an enforcement body under this power.⁶ Such a declaration ceases to be in force 40 sitting days after it is made.⁷

1.86 This bill seeks to amend the TIA Act to amend this declaration power in relation to corrective services authorities. It provides that the minister may declare, by legislative instrument, that a state or territory corrective services authority is an enforcement agency if the relevant state or territory minister has requested this. In considering whether to make such a declaration, the Commonwealth minister may consult such persons or bodies as the minister thinks fit, such as the Privacy Commissioner or Ombudsman (but this is not required). The minister may also make the declaration subject to conditions. The declaration would not be time-limited and could be revoked by the minister if satisfied the authority's compliance with the TIA Act is unsatisfactory and must be revoked if the relevant state or territory minister requests it be revoked.⁸

1.87 The Telecommunications (Interception and Access) (Enforcement Agency—NSW Department of Communities and Justice) Declaration 2022 (NSW Declaration), is made under the TIA Act as it currently stands, and it declares the New South Department of Communities and Justice (being that part known as Corrective Services NSW) to be an enforcement agency under the TIA Act. It also declares that each staff member of Corrective Services NSW is an officer for the purposes of the TIA Act – such that they can authorise the disclosure of telecommunications data.⁹ The NSW

2 *Telecommunications (Interception and Access) Act 1979*, section 172.

3 *Telecommunications (Interception and Access) Act 1979*, Part 4.1, Division 4.

4 *Telecommunications (Interception and Access) Act 1979*, section 110A, which includes all state and territory police agencies, the Department of Home Affairs (for limited purposes), the Australian Competition and Consumer Commission, the Australian Securities and Investments Commission, the Australian Criminal Intelligence Commission, and various integrity and corruptions Commissions.

5 *Telecommunications (Interception and Access) Act 1979*, subsection 176A(1).

6 See, e.g., Telecommunications (Interception and Access) (Enforcement Agency—NSW Department of Communities and Justice) Declaration 2022 [F2022L00154]

7 *Telecommunications (Interception and Access) Act 1979*, paragraph 176A(10)(b).

8 Schedule 1, item 4, proposed section 176B.

9 Telecommunications (Interception and Access) (Enforcement Agency—NSW Department of Communities and Justice) Declaration 2022, section 3.

Declaration is subject to the condition that officers cannot apply for a journalist information warrant.¹⁰

International human rights legal advice

Right to privacy

1.88 The power to declare a corrective services authority as an enforcement body, which means it may access telecommunications data, engages and limits the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.¹¹ It also includes the right to control the dissemination of information about one's private life. Communications data can reveal quite personal information about an individual, even without the content of the data being made available, by revealing who a person is in contact with, how often and where.¹² It is noted that in accessing telecommunications data under the bill a corrective services authority would be able to access information not only in relation to prisoners, but also anyone in contact with them. The right to privacy may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.89 The bill's statement of compatibility acknowledges that the measure limits the right to privacy, but states that the measure seeks to achieve the legitimate objective of protecting national security, public order and the rights and freedoms of others.¹³ In particular, it states that there is a threat posed by illicit mobile phones in correctional facilities, 'including their use to facilitate serious offences such as escape attempts, threatening the safety of victim and witnesses and the trafficking of contraband'. It states that telecommunications data is vital in establishing the ownership or location of mobile phones used to commit offences within correctional facilities.¹⁴ It is also noted that the *Comprehensive Review of the Legal Framework of the National Intelligence Community* recommended that corrective services authorities should be granted the power to access telecommunications data, if the

10 Telecommunications (Interception and Access) (Enforcement Agency—NSW Department of Communities and Justice) Declaration 2022, section 4.

11 International Covenant on Civil and Political Rights, article 17.

12 See [Digital Rights Ireland Ltd \(C-293/12\) and Kärntner Landesregierung ors \(C-594/12\), v Minister for Communications, Marine and Natural Resources and ors](#), Court of Justice of the European Union (Grand Chamber), Case Nos. C-293/12 and C-594/12 (2014) [27]

13 Statement of compatibility, p. 5.

14 Statement of compatibility, p. 5.

relevant state or territory government considers it to be necessary.¹⁵ However, this review also stated that several police authorities questioned the need to enable corrective services authorities to access telecommunications data in their own right, as such data can already be sought from police authorities. The review stated that 'evidence from several states indicates that well-managed, cooperative and joint investigative arrangements between police forces, integrity bodies and corrections agencies can work well to investigate criminal activity in prisons'.¹⁶

1.90 The objective of addressing the threat posed by illicit mobile phones in prison is, in general, likely to constitute a legitimate objective. However, under international human rights law a legitimate objective must be one that is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right. It is not sufficient, therefore, that a measure simply seeks an outcome regarded as desirable or convenient. The bill's statement of compatibility does not fully address why current laws are insufficient to achieve the stated objective. Given that corrections agencies can currently work with the police to access telecommunications data to investigate alleged offences within correctional facilities (or alternatively a time limited declaration can already be made under the TIA Act), this raises questions as to whether the measure in the bill addresses a pressing and substantial concern.

1.91 Further, a key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. In this respect, it is necessary to consider a number of factors, including whether a proposed limitation is sufficiently circumscribed; whether it is accompanied by sufficient safeguards; and whether any less rights restrictive alternatives could achieve the same stated objective.

1.92 The statement of compatibility states that the bill includes multiple safeguards to ensure appropriate oversight, namely:

- before issuing a declaration the minister 'will consider whether the agency has demonstrated its readiness to access telecommunications data (for example, having regard to the authority's privacy arrangements, ensuring appropriate policies and procedures to govern access to, and use, of data are in place and having engaged with the Commonwealth Ombudsman regarding oversight)';
- the declaration may be subject to conditions. The statement of compatibility gives, as an example, that 'a declaration could provide that a corrective

15 Comprehensive Review of the Legal Framework of the National Intelligence Community by Mr Dennis Richardson AC, [Volume 2: Authorisations, Immunities and Electronic Surveillance](#), December 2019, recommendation 78.

16 Comprehensive Review of the Legal Framework of the National Intelligence Community by Mr Dennis Richardson AC, [Volume 2: Authorisations, Immunities and Electronic Surveillance](#), December 2019, p. 278.

services authority is not able to apply for journalist information warrants, as these type of warrants are not relevant to the functions of the authority or the purposes for which they seek access to telecommunications data¹⁷;

- the declaration can only be made if requested by the relevant state or territory minister, so as to ensure only those states and territories that require access to telecommunications data will be able to access it;
- the declaration must be revoked if this is requested by the relevant state or territory minister, and the Commonwealth minister may revoke a declaration if satisfied that an authority's compliance with the TIA Act has been unsatisfactory.¹⁷

1.93 The bill's statement of compatibility also notes that existing safeguards in the TIA Act would continue to apply, including independent oversight by the Commonwealth Ombudsman and the Minister for Home Affairs' annual report to Parliament on the operation of the data retention scheme.¹⁸

1.94 It is noted that some of these safeguards may operate, in practice, to help protect against arbitrary interference with the right to privacy. However, in relation to those measures that may operate to safeguard the right to privacy, these would be discretionary only and not required as a matter of law. The minister would not be required before making a declaration to consider whether the authority has demonstrated its readiness to access telecommunications data. This is in contrast to the current requirements in the TIA Act which, among other things, require the minister to have regard to whether:

- the authority is required to comply with the Australian Privacy Principles, or with a binding scheme that provides sufficient protection of personal information, or has agreed in writing to comply with such a scheme;
- the authority proposes to adopt processes and practices that would ensure its compliance with the obligations under the TIA Act; and
- the declaration would be in the public interest.¹⁹

1.95 Further, while a declaration may be subject to conditions, there is no legislative requirement that conditions must be attached. Noting that the statement of compatibility states that journalist information warrants are not relevant to the functions of a corrective services authority or the purposes for which they seek access to telecommunications data, it is not clear why the bill does not specifically state that a declaration could not include access to journalist information warrants (noting

17 See statement of compatibility, p. 5–6.

18 Statement of compatibility, p 6.

19 *Telecommunications (Interception and Access) Act 1979*, subsection 176A(4).

access to such warrants would also have implications for the right to freedom of expression).

1.96 It is also noted that the bill provides the minister with the discretion to consult with whomever the minister thinks fit, including the Commonwealth Ombudsman or Information Commissioner. Yet, it is not clear why there is no specific requirement to consult with relevant persons, particularly the Information Commissioner.

1.97 Where a measure limits a human right, discretionary or administrative safeguards alone may not be sufficient for the purpose of a permissible limitation under international human rights law.²⁰ This is because administrative and discretionary safeguards are less stringent than the protection of statutory processes and can be amended or removed at any time. As there are very few legislative safeguards that would apply before the minister could make a declaration that a corrective services authority be granted the ability to access telecommunications data, and it has not been fully established that such authorities need this power (noting they can access the data via the police), the measure risks arbitrarily interfering with the right to privacy.

1.98 In relation to the NSW Declaration, the inclusion of the condition that journalist access warrants cannot be accessed by Corrective Services NSW officers operates as a safeguard that assists with the proportionality of the measure. However, it is noted that every officer of Corrective Services NSW has been designated as an authorised officer under the NSW Declaration. This would appear to apply to thousands of employees of Corrective Services NSW.²¹ It is not clear why all such officers need to be authorised to access telecommunications data, rather than restricting it to those persons performing particular roles who require it to perform their functions. As such, this does not appear to be the least rights restrictive way of achieving the stated objective, and there is a risk that this measure arbitrarily interferes with the right to privacy.

Committee view

1.99 The committee notes this bill seeks to amend the *Telecommunications (Interception and Access) Act 1979* to change the basis on which the minister may declare, by legislative instrument, that a state or territory corrective services authority is an enforcement agency for the purposes of accessing telecommunications data. Such a declaration gives corrective services authorities, such as prisons, the right to access telecommunications data to investigate illicit mobile phone usage. The committee notes the NSW Declaration, made under the

20 See, e.g., UN Human Rights Committee, *General Comment 27, Freedom of movement (Art.12)* (1999).

21 See Media Release, [Corrective Services NSW salutes its staff](#), 19 January 2019 which stated that there were 9,000 prison, parole and other corrective services staff.

existing law, enables Corrective Services NSW, and all of its officers, to access telecommunications data.

1.100 The committee notes that enabling a corrective services authority to access telecommunications data engages and limits the right to privacy. Communications data can reveal quite personal information about an individual, even though it does not include the content of the data, it reveals who a person is in contact with, how often and where. The committee notes that in accessing telecommunications data a corrective services authority would be able to access information not only in relation to prisoners, but also anyone in contact with them. The right to privacy may be subject to permissible limitations if it is shown to be reasonable, necessary and proportionate

1.101 The committee considers that seeking to address the threat posed by illicit mobile phones in correctional facilities is, in general terms, a legitimate objective. However, the committee considers that some questions remain as to the necessity of this power given that corrective services authorities can already access such data via the police or via a more time-limited declaration. The committee is also concerned that there are few legislative safeguards in the bill to guide the making of such a declaration, and that safeguards that currently apply would no longer apply to the making of this new declaration. Further, the committee notes that the NSW Declaration enables thousands of employees of Corrective Services Australia to access telecommunications data, rather than restricting this to only those with a specific need to access such data. As such, the committee considers that the bill and NSW Declaration, as currently drafted, risk arbitrarily interfering with the right to privacy.

Suggested action

1.102 The committee considers that the compatibility of the measure in the bill with the right to privacy may be assisted were the bill amended to provide that:

- (a)** in requesting a declaration, the state or territory minister for a corrective services authority must explain why it is not sufficient for the authority to seek access to the data via police authorities, and before making a declaration the Commonwealth minister must consider, and be satisfied with, this explanation;
- (b)** a corrective services authority is not able to apply for journalist information warrants; and
- (c)** in considering whether to make a declaration the minister must:
 - (i)** consider the authority's privacy arrangements and ensure the authority has appropriate policies and procedures to govern access to and use of data;
 - (ii)** consider that the declaration would be in the public interest;

(iii) consult with the Commonwealth Ombudsman and the Information Commissioner.

1.103 Further, the committee considers the compatibility of the measure in the NSW Declaration may be assisted were the Declaration amended to declare only those staff members who require access to telecommunications data to perform their functions to be officers for the purposes of the TIA Act (rather than all staff members of Corrective Services NSW).

1.104 The committee draws these human rights concerns to the attention of the minister and the Parliament.

Legislative Instruments

Biosecurity (Remote Communities) Determinations¹

Purpose	These seven legislative instruments ² determine remote communities' requirements to prevent a person from entering or exiting a designated area unless they meet certain criteria, to prevent or control the spread of COVID-19 in designated areas
Portfolio	Health
Authorising legislation	<i>Biosecurity Act 2015</i>
Last day to disallow	These instruments are exempt from disallowance (see subsections 477(5) and 477(6) of the <i>Biosecurity Act 2015</i>)
Rights	Health; life; free movement; private life; equality and non-discrimination

Controlling entry and exit to certain remote Northern Territory communities

1.105 These Biosecurity determinations designated (or amended the designations) of a number of geographical areas in the Northern Territory for the purposes of the *Biosecurity Act 2015* (Biosecurity Act). They established that persons could not enter or leave these areas except in specified circumstances during specified periods of time. These time periods differed depending on the determination and area. The first period began on 20 December 2021³ and the last period ended on 17 February 2022.⁴ The length of time an area was subject to entry and exit requirements differed according

- 1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Biosecurity (Remote Communities) Determinations, *Report 2 of 2022*; [2022] AUPJCHR 14.
- 2 Biosecurity (Emergency Requirements—Remote Communities) Determination (No. 2) 2021 [F2021L01863]; Biosecurity (Emergency Requirements—Remote Communities) Determination (No. 3) 2021 [F2021L01885]; Biosecurity (Emergency Requirements—Remote Communities) Determination (No. 1) 2022 [F2022L00029]; Biosecurity (Emergency Requirements—Remote Communities) Amendment Determination (No. 1) 2022 [F2022L00041]; Biosecurity (Emergency Requirements—Remote Communities) Determination (No. 2) 2022 [F2022L00073]; Biosecurity (Emergency Requirements—Remote Communities) Determination (No. 3) 2022 [F2022L00104]; and Biosecurity (Emergency Requirements—Remote Communities) Amendment (No. 2) Determination 2022 [F2022L00149].
- 3 Biosecurity (Emergency Requirements—Remote Communities) Determination (No. 2) 2021 [F2021L01863].
- 4 Biosecurity (Emergency Requirements—Remote Communities) Determination (No. 3) 2022 [F2022L00104].

to the area, with some areas (such as Amoonguna, Yuelamu and Yuendumu) subject to three extensions, totalling 15 days.⁵

1.106 These instruments were made under section 477(1) of the Biosecurity Act, which provides that during a human biosecurity emergency period, the Minister for Health may determine emergency requirements, or give directions, that they are satisfied are necessary to prevent or control the entry, emergence, establishment or spread of the disease in Australian territory. Failure to comply with such a direction is a criminal offence punishable by five years' imprisonment, or a penalty of up to \$63,000.

International human rights legal advice

Rights to life, health, freedom of movement, private life and equality and non-discrimination

1.107 The explanatory statements accompanying these determinations note that the purpose of designating these geographical areas is to prevent or control the entry or spread of COVID-19 in these areas.⁶ As the measures are intended to prevent the spread of COVID-19, which has the ability to cause high levels of morbidity and mortality, it would appear to promote the rights to life and health.⁷ The right to life requires the State to take positive measures to protect life.⁸ The United Nations Human Rights Committee has stated that the duty to protect life implies that State parties should take appropriate measures to address the conditions in society that may give rise to direct threats to life, including life threatening diseases.⁹ The right to health is the right to enjoy the highest attainable standard of physical and mental health, which includes taking steps to prevent, treat and control epidemic diseases.¹⁰

1.108 However, by restricting entry and exit to these locations, these measures also limit a number of other human rights, including the right to freedom of movement, a private life and equality and non-discrimination. The right to freedom of movement includes the right to move freely within a country for those who are lawfully within the country. It is linked to the right to liberty—a person's movement across borders

5 See Biosecurity (Emergency Requirements—Remote Communities) Determination (No. 1) 2022 [F2022L00029]; Biosecurity (Emergency Requirements—Remote Communities) Amendment Determination (No. 1) 2022 [F2022L00041]; Biosecurity (Emergency Requirements—Remote Communities) Determination (No. 2) 2022 [F2022L00073].

6 Explanatory statement, p. 1.

7 Right to life: International Covenant on Civil and Political Rights, article 6. Right to health: International Covenant on Economic, Social and Cultural Rights, article 12.

8 International Covenant on Civil and Political Rights, article 6.

9 See United Nations Human Rights Committee, *General Comment No. 36, Article 6 (Right to Life)* (2019), [26].

10 International Covenant on Economic, Social and Cultural Rights, article 12.

should not be unreasonably limited by the state.¹¹ It also encompasses freedom from procedural impediments, such as unreasonable restrictions on accessing public places.

1.109 The requirement to specify reasons for entering or leaving a designated area also engages the right to a private life. The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.¹² A private life is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others.

1.110 Further, as these remote geographical areas likely have a high proportion of Indigenous persons living there, the restrictions likely had a disproportionate impact on Indigenous persons. Consequently, the measures may also engage the right to equality and non-discrimination,¹³ which provides that everyone is entitled to enjoy their rights without distinction based on a personal attribute (for example, race).¹⁴ The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights). Indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate', exclusively or disproportionately affects people with a particular protected attribute.

1.111 These rights may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective. As there are no statements of compatibility accompanying the explanatory statements to these determinations,¹⁵ no assessment of the compatibility of these measures with any human rights has been provided.

11 UN Human Rights Committee, *General Comment 27: Freedom of movement* (1999) [8]. The freedom to leave the territory of a State may not be made dependent on any specific purpose or on the period of time the individual chooses to stay outside the country. The right of the individual to determine the State of destination is part of the legal guarantee.

12 UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [3]-[4].

13 International Covenant on Civil and Political Rights, articles 2 and 26. See also International Convention on the Elimination of All Forms of Racial Discrimination.

14 The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'.

15 Noting that section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* only requires rule-makers to prepare a statement of compatibility in relation to a legislative instrument that is subject to disallowance under section 42 of the *Legislation Act 2003*.

1.112 While the measures seek to achieve the legitimate objective of protecting public health, questions remain as to whether the measures are proportionate. The length of time these restrictions were in place is an important consideration and it is noted that each determination generally lasted less than one week. However, it is noted that there is no set limit on the amount of extensions that may be applied. There is also insufficient information in the explanatory statements as to:

- whether these measures constitute a proportionate limit on the rights to freedom of movement and a private life, having particular regard to the existence of any safeguards and oversight mechanisms;
- whether these measures have a disproportionate impact on Indigenous Australians;
- why it was necessary to impose these restrictions on the designated remote communities over and above the COVID-19 restrictions imposed by the Northern Territory government; and
- whether affected community members in these remote communities were consulted prior to the imposition of these measures, and/or were consulted about the measures while they were in place (noting that information in the explanatory statements suggested consultation was focused on governments, land councils and health organisations).

1.113 Without further information, it is not possible to conclude as to whether these determinations permissibly limited the rights to freedom of movement, private life and equality and non-discrimination.

Committee view

1.114 The committee notes that these legislative instruments determined requirements for entry to, or exit from, designated remote communities in the Northern Territory for a range of different short time periods.

1.115 The committee considers that the measures, which were designed to prevent the spread of COVID-19, promoted and protected the rights to life and health, noting that the right to life requires that Australia takes positive measures to protect life, and the right to health requires Australia takes steps to prevent, treat and control epidemic diseases. The committee further notes that the measures limited the rights to freedom of movement, a private life and to equality and non-discrimination. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.116 The committee considers that the measures sought to achieve the clearly legitimate objective of seeking to prevent the spread of COVID-19 to vulnerable remote communities. The committee also notes the particular importance of seeking to protect the life and health of those who reside in remote communities, who may be particularly vulnerable to COVID-19. The committee also considers that the

limited time period for each of these designations greatly assisted with the proportionality of the measure.

1.117 However, the committee notes that as there are no statements of compatibility accompanying these determinations, some questions remain as to whether the measures were accompanied by sufficient safeguards to ensure any limitation on the rights to freedom of movement, private life and equality and non-discrimination was proportionate.

1.118 The committee notes that there is no legislative requirement that these determinations, which are exempt from the disallowance process, be accompanied by a statement of compatibility.¹⁶ However, the committee notes its role is to scrutinise all legislative instruments for compatibility with human rights, including exempt legislative instruments.¹⁷

Suggested action

1.119 As the committee has consistently said since the start of the legislative response to the COVID-19 pandemic,¹⁸ given the human rights implications of legislative instruments dealing with the COVID-19 pandemic, it would be appropriate for all such legislative instruments to be accompanied by a detailed statement of compatibility (regardless of whether this is required as a matter of law).

1.120 The committee draws this matter to the attention of the minister and the Parliament.

16 The *Human Rights (Parliamentary Scrutiny) Act 2011*, section 9, provides that only legislative instruments subject to disallowance under the *Legislation Act 2003* require a statement of compatibility.

17 The *Human Rights (Parliamentary Scrutiny) Act 2011*, section 7, provides that the function of the committee is to examine all legislative instruments that come before either House of the Parliament for compatibility with human rights.

18 The committee first stated this in Parliamentary Joint Committee on Human Rights, *Report 5 of 2020: Human rights scrutiny of COVID-19 legislation*, 29 April 2020. The committee also wrote to all ministers advising them of the importance of having a detailed statement of compatibility with human rights for all COVID-19 related legislation in April 2020 (see media statement of 15 April 2020, available on the committee's website).

Online Safety (Restricted Access Systems) Declaration 2022 [F2022L00032]

Online Safety (Basic Online Safety Expectations) Determination 2022 [F2022L00062]¹

Purpose	<p>The Online Safety (Restricted Access Systems) Declaration 2022 [F2022L00032] specifies an access-control system as a restricted access system for 'relevant class 2 material' being the material covered by certain provisions of the <i>Online Safety Act 2021</i></p> <p>The Online Safety (Basic Online Safety Expectations) Determination 2022 [F2022L00062] sets out basic online safety expectations for social media services, relevant electronic services and designated internet services</p>
Portfolio	Infrastructure, Transport, Regional Development and Communications
Authorising legislation	<i>Online Safety Act 2021</i>
Last day to disallow	15 sitting days after tabling (both tabled in the Senate and the House of Representatives on 8 February 2022)
Rights	Child; privacy; freedom of expression

Restricting access to online content

1.121 Part 9 of the *Online Safety Act 2021* enables the eSafety Commissioner (Commissioner) to require that a social media service, electronic service, designated internet service, or a hosting service provider remove, or otherwise deny access to, certain classes of material on their services. Relevantly, the Commissioner may investigate whether end-users in Australia can access relevant class 2 material, and if so, whether this access is subject to a restricted access system. This can be done either on the Commissioner's own initiative, or after a complaint.² In certain circumstances, the Commissioner may give an Australian provider or host of a service allowing access to relevant class 2 material a remedial notice requiring the provider to ensure that

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Online Safety (Restricted Access Systems) Declaration 2022 [F2022L00032] and Online Safety (Basic Online Safety Expectations) Determination 2022 [F2022L00062], *Report 2 of 2022*; [2022] AUPJCHR 15.

2 *Online Safety Act 2021*, section 42.

material is removed from the service or access to the material is subject to a restricted access system.³ If the Commissioner is satisfied that relevant class 2 material is not, or was not, subject to a restricted access system (among other things) on two or more occasions in the previous 12 months, the Commissioner may prepare and publish a statement to that effect.⁴ Relevant class 2 material includes films or computer games classified (or likely to be classified) as R 18+, or publications classified (or likely to be classified) as Category 1 restricted, or any other kind of material which would likely be similarly classified were it classified.⁵ This includes content that depicts realistically simulated sexual activity between adults; or high impact nudity, violence, drug use or language.⁶

1.122 The Online Safety (Restricted Access Systems) Declaration 2022 (Declaration) specifies an access-control system as a restricted access system for relevant class 2 material.⁷ The purpose of this Declaration is to seek to ensure that access to relevant class 2 material is limited to persons aged 18 years and over and the methods used for limiting this access meet a minimum standard.⁸ The Declaration does not specify or prescribe technologies or processes to be used by service providers to determine age and restrict access to content. Rather, it requires that an access control system must:

- require an application for access to the material, and a declaration from the applicant that they are at least 18 years of age;
- provide warnings as to the nature of the material;
- provide safety information for parents and guardians on how to control access to the material;
- incorporate reasonable steps to confirm that an applicant is at least 18 years of age; and
- limit access to the content unless certain steps are complied with, including that age has been verified, which may include the use of a PIN.⁹

3 *Online Safety Act 2021*, sections 119 and 120.

4 *Online Safety Act 2021*, section 123A.

5 Online Safety (Restricted Access Systems) Declaration 2022, explanatory statement, p. 1.

6 Online Safety (Restricted Access Systems) Declaration 2022, explanatory statement, p. 3.

7 Being material covered by the *Online Safety Act 2021*, paragraphs 107(1)(f), (g), (h), (i), (j), (k) and (l).

8 Online Safety (Restricted Access Systems) Declaration 2022, explanatory statement, p. 2.

9 Online Safety (Restricted Access Systems) Declaration 2022, sections 5–9.

1.123 The Online Safety (Basic Online Safety Expectations) Determination 2022 (Determination) also provides, as an expectation of service providers,¹⁰ that they will take reasonable steps to ensure that technological or other measures are in effect to prevent access by children to class 2 material provided on the service, including implementing age assurance mechanisms.¹¹

International human rights legal advice

Rights of the child and rights to privacy and freedom of expression

1.124 Restricting children's access to material on the internet that may be harmful to them is likely to promote the rights of the child. The United Nations (UN) Human Rights Council has stated that the human rights which people have offline must also be protected online.¹² Children have special rights under human rights law taking into account their particular vulnerabilities,¹³ including the right to protection from all forms of violence, maltreatment or sexual exploitation.¹⁴ The international community has recognised the importance of creating a safer online environment for children,¹⁵ and noted the need to establish regulation frameworks which enable users to report concerns about content.¹⁶ However, it is also noted that age alone has been seen as

10 Service providers that do not comply with an expectation of them are not subject to any formal penalty. Rather, the *Online Safety Act 2021* gives the Commissioner the power to require reports to be provided on the extent to which the provider complied with provisions in the Determination (see sections 49, 52, 56 and 59).

11 Online Safety (Basic Online Safety Expectations) Determination 2022, section 12. This determination also includes an expectation that the provider will take reasonable steps to minimise the extent to which other material is provided on the service (not just restricted to those over 18), and this includes access to class 1 material (see section 11). In relation to section 11 of the determination and the regulation of class 1 material, the committee reiterates its comments in relation to the regulation of online content by the Online Safety Bill 2021, see Parliamentary Joint Committee on Human Rights, [Report 5 of 2021](#) (29 April 2021) pp. 63–69.

12 See, UN Human Rights Council, *Resolution 32/13 on the promotion, protection and enjoyment of human rights on the internet*, A/HRC/RES/32/13 (2016).

13 Convention on the Rights of the Child. See also, UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [1].

14 See, Convention on the Rights of the Child, articles 19, 34, and 36.

15 UNICEF and International Telecommunications Union, *Guidelines for industry on child protection* (2015) p. 8.

16 See, for example, International Telecommunications Union, *Guidelines for policy-makers on Child Protection Online* (2020).

an imperfect metric to assess the capabilities of children,¹⁷ and access to certain class 2 material may not always be inappropriate for some children in some circumstances.

1.125 Implementing access control measures, which include a requirement to verify the age of the person accessing content on the internet is also likely to limit a number of rights, particularly the rights to privacy and freedom of expression.

1.126 International human rights law recognises that the right to privacy must be protected online. The right to privacy is multi-faceted. It protects against arbitrary and unlawful interferences with an individual's privacy and attacks on reputation.¹⁸ It can also be considered as the presumption that individuals should have an area of autonomous development, interaction and liberty, a 'private sphere' with or without interaction with others, free from excessive unsolicited intervention by other uninvited individuals.¹⁹ The Declaration does not set out how an access control system should verify that a person is aged 18 years or older, only that it must verify this before access to relevant class 2 material is provided.²⁰ The explanatory statement to the Declaration states that service providers must continue to comply with their obligations under applicable privacy laws, and that 'age confirmation methods should be privacy preserving to the extent possible'. It states that the only attribute being tested is the age of the applicant, and 'age confirmation does not involve identity verification'. It also states that practical steps to protect privacy include 'collecting the minimum amount of personal information necessary to take reasonable steps to confirm age, implementing security measures for any information collected and not using information collected for age confirmation for other purposes'.²¹ However, it does not explain how a person's age may be verified without the person being identified.

1.127 The measure may also limit the right to freedom of expression if the requirement to provide proof of age to access class 2 material is likely to deter individuals from accessing such material. The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds, either

17 Report of the Special Rapporteur on the right to privacy, Joseph A. Cannataci, [Artificial intelligence and privacy, and children's privacy](#), 25 January 2021, paragraph [113].

18 There is international case law to indicate that this protection only extends to attacks which are unlawful. See *RLM v Trinidad and Tobago*, UN Human Rights Committee Communication No. 380/89 (1993); and *IP v Finland*, UN Human Rights Committee Communication No. 450/91 (1993).

19 UN Human Rights Council, *Report of the High Commissioner for Human Rights: the right to privacy in the digital age*, A/HRC/39/29 (2018) [5]; *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin*, A/HRC/13/37 (2009) [11].

20 Online Safety (Restricted Access Systems) Declaration 2022, sections 8 and 9.

21 Online Safety (Restricted Access Systems) Declaration 2022, explanatory statement, p. 7.

orally, in writing or print, in the form of art, or through any other media of an individual's choice.²² As a UN Special Rapporteur on the right to freedom of expression has said, restrictions on anonymity online 'have a chilling effect, dissuading the free expression of information and ideas' and 'allow for the collection and compilation of large amounts of data by the private sector, placing a significant burden and responsibility on corporate actors to protect the privacy and security of such data'.²³

1.128 The rights to privacy and freedom of expression may be permissibly limited where the measure seeks to achieve a legitimate objective, is rationally connected to (that is, effective to achieve) that objective, and is a proportionate means by which to achieve it.

1.129 The statement of compatibility states that the Declaration seeks to achieve the legitimate objective of protecting children from exposure to content that is unsuitable for children. Protecting children in this way is a legitimate objective for the purposes of international human rights law and requiring service providers to verify a user's age may be rationally connected to (that is, effective to achieve) this objective.

1.130 A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. In this respect, it is necessary to consider a number of factors, including whether a proposed limitation is sufficiently circumscribed, accompanied by sufficient safeguards and the least rights-restrictive way to achieve the stated objective. In this respect the statement of compatibility states:

As the explanatory statement makes clear, age confirmation methods should be privacy preserving to the extent possible, and a data minimisation approach should be taken to ensure that the only attribute being tested is the age of the applicant. Age confirmation does not involve identity verification.²⁴

1.131 However, as noted above, it remains unclear how age confirmation is possible without identity verification, unless it is through the use of a third-party entity that verifies this information. There is nothing in the Declaration itself that specifies that age confirmation methods should be privacy preserving and that a data minimisation approach should be taken. Instead, it leaves it to private companies to determine how much, or how little, data to collect on users – while requiring that the company comply with this legislative requirement to verify age. While service providers would still be required to comply with their obligations under applicable privacy laws, it is not clear what privacy protections would apply. For example, the Australian Privacy Principles

22 International Covenant on Civil and Political Rights, article 19(2).

23 [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression](#), 2013, paragraph [49].

24 Online Safety (Restricted Access Systems) Declaration 2022, statement of compatibility p. 7.

state that if an entity no longer needs personal information about a person they must take reasonable steps to destroy or deidentify the information.²⁵ However, if the provider is required to be able to prove that they have verified the age of a user, it may be that the retention of such information will be considered to be still necessary. Further, the *Privacy Act 1988* only applies, in general, to businesses with an annual turnover of over \$3 million,²⁶ and it is therefore unclear what privacy legislation would apply to Australian based service providers who do not meet this criterion. If such data is to be collected and retained by service providers it would appear this may make such data more at risk of hacking, identity theft and leaks.

1.132 Mr David Kaye, a previous UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, expressed concern with respect to a proposed age verification scheme to access online pornographic content in the United Kingdom, which similarly provided no guidelines, technical requirements or conditions for the design of the age-verification mechanisms it imposed. Mr Kaye expressed concern:

at the bill's lack of privacy obligations, yet it effectively makes it compulsory to use technologies that limit the right to privacy through the age-verification requirement. I am concerned at the imposition of the age-verification mechanism which has implications for the right to privacy without imposing conditions for the storage of such data. The mechanism does not provide sufficient guarantees against abuse and the bill lacks clear provisions to protect information gathered through the age-verification mechanism, including the length of the storage of such data and their collection by government and private companies. States are required by article 17(2) of the ICCPR [right to privacy] to regulate, through clearly articulated laws, the recording, processing, deletion of, use and conveyance of automated personal data and to protect those affected against misuse by State organs as well as by private parties.²⁷

1.133 The lack of detail in the Declaration (or Determination) as to the operation of a restricted access system raises significant concerns that the measure is not sufficiently circumscribed and does not include sufficient safeguards to adequately protect the rights to privacy and freedom of expression. It is noted that there appears

25 See *Privacy Act 1988*, Australian Privacy Principle 11 – security of personal information.

26 Under the *Privacy Act 1988*, privacy obligations apply to an 'APP entity', which is defined in section 6 to mean an agency (government body) or organisation. Section 6C defines an organisation as anyone other than a small business operator. A small business operator is defined in section 6D to have a turnover of \$3 million or less (subject to some exceptions).

27 See, [correspondence](#) from Mr David Kaye, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, to Mr Julian Braithwaite, Ambassador, Permanent Mission of the United Kingdom to the United Nations (9 January 2017), p. 5.

to have been significant discussion in recent years around what standards should be included in any age-verification system, and the safeguards that could apply. For example, the House of Representatives Standing Committee on Social Policy and Legal Affairs, in its report into age verification for online wagering and online pornography, recommended the Digital Transformation Agency develop standards for online age verification which should specify minimum requirements for privacy, safety, security, data handling, usability, accessibility, and auditing of age-verification providers.²⁸ Submitters to that inquiry raised numerous options that could help to protect the rights to privacy and freedom of expression, including:

- requiring that the service provider of the class 2 content is not able to know who a user is, only that the user has been verified as 18 years or older;
- requiring that the entity verifying the age should not know what site the person wishes to view, only that age verification has been requested;
- requiring that age-verification data is not retained once confirmation of age is made; and
- restricting the amount of data that can be requested.²⁹

1.134 The possibility of including all, or some, of these proposed safeguards, suggests there may be a less rights restrictive way to achieve the stated objective.

1.135 In the absence of explicit privacy protections and requirements for data minimisation in these legislative instruments, there is a significant risk that an internet user's privacy may be arbitrarily interfered with by service providers who are required, as a matter of law, to establish an age-verification service, and that users may be dissuaded from accessing class 2 material, which would impermissibly limit the right to freedom of expression.

Committee view

1.136 The committee notes that the Online Safety (Restricted Access Systems) Declaration 2022 (Declaration) is designed to ensure that children are not able to access relevant class 2 material (including content that depicts realistically simulated sexual activity between adults; or high impact nudity, violence, drug use or language). The Declaration does not specify or prescribe technologies or processes to be used by service providers to determine age and restrict access to content, rather it requires users to declare they are 18 years or older; are provided with

28 House of Representatives Standing Committee on Social Policy and Legal Affairs, [Protecting the age of innocence: Report of the inquiry into age verification for online wagering and online pornography](#), February 2020, recommendation 1.

29 House of Representatives Standing Committee on Social Policy and Legal Affairs, [Protecting the age of innocence: Report of the inquiry into age verification for online wagering and online pornography](#), February 2020, pp. 6–31.

warnings and safety information about the material; reasonable steps are taken to confirm the user's age; and access is limited unless certain steps are complied with, including that age has been verified.

1.137 The committee notes the Online Safety (Basic Online Safety Expectations) Determination 2022 also provides, as an expectation of service providers, that they will take reasonable steps to ensure that technological or other measures are in effect to prevent access by children to class 2 material provided on the service, including implementing age assurance mechanisms.

1.138 The committee considers that restricting children's access to material on the internet that may be harmful to them is likely to promote the rights of the child. Children have special rights under human rights law taking into account their particular vulnerabilities, including the right to protection from all forms of violence, maltreatment or sexual exploitation. The committee recognises the importance of creating a safer online environment for children.

1.139 However, the committee notes that requiring age verification is likely to limit the right to privacy and, if it could deter individuals from accessing relevant material, limit the right to freedom of expression (including the right to seek information and ideas of all kinds). These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.140 The committee considers that protecting children from exposure to content that is unsuitable for them online is clearly a legitimate objective for the purposes of international human rights law and requiring service providers to verify a user's age is likely to be effective to achieve this objective. However, concerns arise as to whether the measure is proportionate to the objective being sought. The committee notes that there is nothing in the legislative instruments specifying that age confirmation methods should be privacy preserving and that a data minimisation approach should be taken. Instead, it leaves it to private companies to determine how much, or how little, data to collect on users – while requiring that the company comply with this legislative requirement to verify age. It is not clear what privacy protections would apply. The lack of detail as to the operation of a restricted access system raises significant concerns that the measure is not sufficiently circumscribed and does not include sufficient safeguards to adequately protect the rights to privacy and freedom of expression. The committee considers the inclusion of such detail and safeguards would be a less rights restrictive way to achieve the stated objective.

1.141 The committee considers that in the absence of explicit privacy protections and requirements for data minimisation in these legislative instruments, there is a significant risk that an internet users privacy may be arbitrarily interfered with by service providers who are required, as a matter of law, to establish an age-verification service, and that user's may be dissuaded from accessing class 2 material, thereby impermissibly limiting the right to freedom of expression.

Suggested action

1.142 The committee considers that the proportionality of the measure may be assisted were the Declaration amended to specify minimum privacy and data minimisation requirements that an access control system must comply with, including clear advice to users as to the use of any data provided for the purposes of age verification.

1.143 The committee draws these human rights concerns to the attention of the minister and the Parliament.

Telecommunications (Interception and Access) Amendment (International Production Orders) Regulations 2022 [F2022L00111]¹

Purpose	This legislative instrument amends the <i>Telecommunications (Interception and Access) Regulations 2017</i> to give effect in domestic law to the agreement between Australia and the United States of America on access to electronic data for the purpose of countering serious crime
Portfolio	Home Affairs
Authorising legislation	<i>Telecommunications (Interception and Access) Act 1979</i>
Last day to disallow	15 sitting days after tabling (tabled in the Senate and the House of Representatives on 8 February 2022)
Rights	Privacy; life

Designation of agreement with the United States to access electronic data

1.144 The *Telecommunications (Interception and Access) Act 1979* (the TIA Act) regulates access to telecommunications content and data. It creates a legal framework by which law enforcement and intelligence agencies can access information held by communications providers (such as social media and other internet providers) within Australia. Schedule 1 to the TIA Act establishes an International Production Order (IPO) framework to enable Australian law enforcement and national security agencies to obtain an IPO to allow them to seek content or data from a foreign communications service provider. This is subject to Australia having a designated international agreement with the foreign country.

1.145 These regulations seek to designate such an agreement between Australia and the United States (US) (the AUS-US CLOUD Act Agreement). The effect of designating this agreement is to allow Australian law enforcement and national security agencies to ask communications service providers in the US to provide content or data to investigate or prosecute serious offences in Australia, and to allow US law enforcement and security agencies to similarly request access to content or data held by Australian-based communication service providers to investigate or prosecute crimes in the US. The agreement provides that each party cannot target each other's

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Telecommunications (Interception and Access) Amendment (International Production Orders) Regulations 2022 [F2022L00111], *Report 2 of 2022*; [2022] AUPJCHR 16.

citizens or permanent residents, so that the US will be prevented from targeting Australian citizens and residents, and vice versa.²

International human rights legal advice

Right to privacy

1.146 Designating the agreement with the US will mean that Australian communications providers are not prohibited by law from granting the US government access to private communications data (as long as an appropriate order, made by the US, is in place). It also means that Australian law enforcement and national security agencies will be able to seek an IPO to gain access to private communications data held by US based communications providers. This necessarily engages and limits the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.³ It also includes the right to control the dissemination of information about one's private life. The right to privacy may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.147 The committee has previously raised a number of concerns regarding the compatibility of the IPO framework with the right to privacy, when this framework was introduced in 2020.⁴ Designating this agreement raises similar privacy concerns: namely, that while the IPO framework seeks to address the legitimate objective of protecting national security and public safety and addressing crime and terrorism, the framework is not sufficiently circumscribed and does not contain sufficient safeguards to ensure it would not arbitrarily limit the right to privacy.⁵

1.148 In terms of the safeguards that would apply to data collected by the US, there are a number of safeguards in the agreement and elsewhere that would likely help protect the right to privacy, including that:

2 Agreement between the Government of Australia and the Government of the United States of America on Access to Electronic Data for the Purpose of Countering Serious Crime (AUS-US CLOUD Act Agreement), Article 4.

3 International Covenant on Civil and Political Rights, article 17. Every person should be able to ascertain which public authorities or private individuals or bodies control or may control their files and, if such files contain incorrect personal data or have been processed contrary to legal provisions, every person should be able to request rectification or elimination. UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [10]. See also, *General Comment No. 34 (Freedom of opinion and expression)* (2011) [18].

4 See Parliamentary Joint Committee on Human Rights, *Report 7 of 2020* (17 June 2020) pp. 87–129.

5 Parliamentary Joint Committee on Human Rights, *Report 7 of 2020* (17 June 2020) p. 114.

- the Attorney-General has issued a statutory requirements certificate confirming the US has demonstrated respect for the rule of law and respect for human rights relevant to cross-border access to data;⁶
- personal data received by the US must be protected, subject to reasonable restrictions, including by limiting the use and disclosure of the data and limiting retention for only so long as is necessary and appropriate;⁷
- US orders must not intentionally target Australian citizens or permanent residents;⁸
- US orders must be subject to independent review or oversight;⁹
- US orders for interception must be for a fixed, limited duration and not last longer than reasonably necessary.¹⁰

1.149 This may operate to ensure that US orders do not arbitrarily interfere with the right to privacy in relation to personal data held by communications providers in Australia. However, much of this depends on the exact laws that apply in the US to this data. Without knowing the content of these laws and the safeguards applicable (for example, whether judicial authorisation is required for the issuance of such orders), it is not possible to conclude that designating this agreement is compatible with the right to privacy.

Right to life

1.150 The TIA Act provides that an agreement with a foreign government cannot be specified as a designated agreement unless the minister has received a written assurance from the foreign government relating to the use or non-use of Australian-sourced information in connection with any proceeding by way of a prosecution for a death-penalty offence.¹¹ The AUS-US CLOUD Act Agreement provides that where data has been received from a communications service provider and Australia has declared that its essential interests may be implicated by the introduction of such data 'as evidence' in the prosecution's case in the US for an offence for which the death penalty applies, then prior to using that data, the US must obtain Australia's permission. The explanatory statement explains:

The text of the Agreement and the side letters of understanding in relation to the death penalty will require the US to obtain Australia's permission to

6 Explanatory statement, p. 6.

7 AUS-US CLOUD Act Agreement, Article 3(4).

8 AUS-US CLOUD Act Agreement, Article 4.

9 AUS-US CLOUD Act Agreement, Article 5(2).

10 AUS-US CLOUD Act Agreement, Article 5(3).

11 *Telecommunications (Interception and Access) Act 1979*, Schedule 1, section 3.

use Australian sourced data obtained under the AUS-US CLOUD Act Agreement as evidence in the prosecution's case for an offence in which the death penalty is sought. Australia will retain the discretion to refuse permission, or to grant permission subject to such conditions as Australia considers necessary. This reflects Australia's policy position on the death penalty and domestic legal requirements.¹²

1.151 By providing that communications data can be shared with the US to investigate or prosecute an offence against the laws of that country that is punishable by the death penalty, the measure engages and may limit the right to life.¹³ The right to life imposes an obligation on Australia to protect people from being killed by others or from identified risks. While the International Covenant on Civil and Political Rights does not completely prohibit the imposition of the death penalty, international law prohibits States which have abolished the death penalty (such as Australia) from exposing a person to the death penalty in another state.¹⁴ The provision of information to other countries that may be used to investigate and convict someone of an offence to which the death penalty applies is also prohibited.¹⁵ In 2009, the UN Human Rights Committee stated its concern that Australia lacks 'a comprehensive prohibition on the providing of international police assistance for the investigation of crimes that may lead to the imposition of the death penalty in another state', and concluded that Australia should take steps to ensure it 'does not provide assistance in the investigation of crimes that may result in the imposition of the death penalty in another State'.¹⁶

1.152 The agreement with the US would mean the US government would be able to obtain private telecommunications data held by Australian-based communications service providers, which could be used to *investigate* a person for an offence which could be punishable by the death penalty. It would appear that the use of such data to investigate a death penalty offence would not require the Australian government's permission. Permission would only be required if the data is to be used as evidence in the prosecution's case. At that point Australia could permit the data to be used, or may not grant approval. Whether Australia permits this would be a matter for the discretion of the Australian government at the time of the request. As such, the agreement would not prevent such data being used in death penalty cases.

12 Explanatory statement, p. 2.

13 International Covenant on Civil and Political Rights, article 6.

14 Second Optional Protocol to the International Covenant on Civil and Political Rights.

15 UN Human Rights Committee, *Concluding observations on the fifth periodic report of Australia*, CCPR/C/AUS/CO/5 (2009), [20].

16 UN Human Rights Committee, *Concluding observations on the fifth periodic report of Australia*, CCPR/C/AUS/CO/5 (2009), [20].

1.153 There are therefore two concerns with the approach taken under this agreement in relation to the right to life. The first is that there is no basis on which Australia could object to personal data being used by the US to discover leads in an investigation that could ultimately lead to the death penalty being applied. Indeed, Australia would not necessarily even know if such data were used for such an investigation. On this basis, there appears to be a significant risk that under this agreement Australia would breach its obligations to protect the right to life.

1.154 The second concern is that the agreement would allow such data to be used as evidence in a death penalty case should Australia give permission to do so. The explanatory statement states that this gives the government the discretion to refuse permission or 'to grant permission subject to such conditions as Australia considers necessary'. It is unclear what such conditions could be. This permission therefore would rely on the discretion of the government at the time to adequately uphold the right to life. Where a measure limits a human right, discretionary or administrative safeguards alone may not be sufficient for the purpose of a permissible limitation under international human rights law. This is because administrative and discretionary safeguards are less stringent than the protection of statutory processes. As such, there would appear to be a risk that Australia could grant permission to use data obtained under this agreement as evidence in a death penalty trial, which would be incompatible with Australia's right to life obligations.

Committee view

1.155 The committee notes in 2020 the International Production Order (IPO) framework was established to enable Australian law enforcement and national security agencies to seek telecommunications data (including the content of personal communications) from a foreign communications service provider, and to allow foreign governments to access Australian-based data. This is subject to Australia having a designated international agreement with the foreign country.

1.156 These regulations seek to designate an agreement between Australia and the United States for this purpose. This would allow Australian law enforcement and national security agencies to ask communications service providers in the US to provide data to investigate or prosecute serious offences in Australia, and allow US law enforcement and security agencies to similarly request access to data held by Australian-based communication service providers to investigate or prosecute crimes in the US.

1.157 Enabling access to private telecommunications data engages and limits the right to privacy. The right to privacy may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate. The committee considers that designating this agreement seeks to achieve the legitimate objective of protecting national security and public safety and addressing crime and terrorism. However, it reiterates its previous comments in relation to IPOs that the framework may not be sufficiently circumscribed or contain sufficient safeguards to ensure the

orders would not arbitrarily limit the right to privacy. The committee further considers that while the agreement with the US contains some important safeguards, without knowing the process by which orders to allow access to data held within Australia are issued in the US, for example, whether judicial authorisation is required, it is not possible to conclude that designating this agreement is compatible with the right to privacy.

1.158 Further, the committee raises particular concerns that designating this agreement would allow data held within Australia to be shared with the US government to investigate, and potentially prosecute, a person for an offence to which the death penalty may apply. The committee considers this engages the right to life, and notes that international law prohibits States which have abolished the death penalty from exposing a person to the death penalty in another state or providing information that may be used to investigate someone for a death penalty offence.

1.159 The committee notes that under the agreement the US would only be required to obtain Australia's permission to use telecommunications data if it intended to use it as evidence in a death penalty trial. As such, under the agreement the US could use personal telecommunications data to discover leads in an investigation which could ultimately lead to the death penalty being applied, without notifying Australia. It is only if the US wished to admit the data as evidence in a death penalty trial that they would need to get the permission of Australia to do so. The committee considers there is a significant risk that designating this agreement is incompatible with the right to life as the agreement could result in the provision of assistance to the US in the investigation of crimes that may result in the imposition of the death penalty.

1.160 The committee also notes that as the agreement would allow data to be used as evidence in a death penalty case should Australia give permission to do so, this would rely on the discretion of the government at the time of the request to adequately uphold the right to life. As such, the committee considers there would appear to be a risk that under the agreement Australia could grant permission to use data obtained under this agreement as evidence in a death penalty trial, which would be incompatible with Australia's right to life obligations.

1.161 The committee draws these human rights concerns to the attention of the minister and the Parliament.

Bills and instruments with no committee comment¹

1.162 The committee has no comment in relation to the following bills which were introduced into the Parliament between 8 and 17 February 2022. This is on the basis that the bills do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights:²

- Agriculture Biodiversity Stewardship Market Bill 2022;
- Anti-Money Laundering and Counter-Terrorism Financing Amendment (Increased Financial Transparency) Bill 2022;
- Australian Radioactive Waste Agency Bill 2022;
- Brisbane Airport Curfew and Demand Management Bill 2022;
- Electoral Legislation Amendment (Authorisations) Bill 2022;
- Electoral Legislation Amendment (COVID Enfranchisement) Bill 2022;
- Fair Work Amendment (Equal Pay for Equal Work) Bill 2022;
- Health Insurance Amendment (Administrative Actions) Bill 2022;
- Higher Education Support Amendment (Australia's Economic Accelerator) Bill 2022;
- Income Tax Amendment (Labour Mobility Program) Bill 2022;
- Moratorium on New Coal, Gas and Oil Bill 2022;
- Parliamentary Workplace Reform (Set the Standard Measures No. 1) Bill 2022;
- Public Sector Superannuation Legislation Amendment Bill 2022;
- Regulator Performance Omnibus Bill 2022;
- Renewable Energy (Electricity) Amendment (Cheaper Home Batteries) Bill 2022;
- Security Legislation Amendment (Critical Infrastructure Protection) Bill 2022;
- Social Security Amendment (Improved Child to Adult Transfer for Carer Payment and Carer Allowance) Bill 2022;
- Social Services Legislation Amendment (Workforce Incentive) Bill 2022;

1 This section can be cited as Parliamentary Joint Committee on Human Rights, Bills and instruments with no committee comment, *Report 2 of 2022*; [2022] AUPJCHR 17.

2 Inclusion in the list is based on an assessment of the bill and relevant information provided in the statement of compatibility accompanying the bill. The committee may have determined not to comment on a bill notwithstanding that the statement of compatibility accompanying the bill may be inadequate.

- Transport Security Amendment (Critical Infrastructure) Bill 2022;
- Telecommunications Legislation Amendment (Faster Internet for Regional Australia) Bill 2022;
- Treasury Laws Amendment (Cyclone and Flood Damage Reinsurance Pool) Bill 2022;
- Treasury Laws Amendment (Enhancing Tax Integrity and Supporting Business Investment) Bill 2022;
- Treasury Laws Amendment (Modernising Business Communications) Bill 2022;
- Treasury Laws Amendment (Streamlining and Improving Economic Outcomes for Australians) Bill 2022;
- Treasury Laws Amendment (Tax Concession for Australian Medical Innovations) Bill 2022; and
- Veterans' Affairs Legislation Amendment (Enhanced Family Support) Bill 2022.

Private Members' and Senators' bills that may limit human rights

1.163 The committee notes that the following private members' and senators' bills appear to engage and may limit human rights. Should these bills proceed to further stages of debate, the committee may request further information from the legislation proponent as to the human rights compatibility of the bill:

- Commonwealth Electoral Amendment (Cleaning up Political Donations) Bill 2022;
- Sex Discrimination and Other Legislation Amendment (Save Women's Sport) Bill 2022; and
- Social Media (Protecting Australians from Censorship) Bill 2022.

Legislative instruments

1.164 The committee has examined the legislative instruments registered on the Federal Register of Legislation between 20 December 2021 and 15 March 2022.³ The committee has reported on 17 legislative instruments from this period earlier in this

3 The committee examines all legislative instruments registered in the relevant period, as listed on the Federal Register of Legislation. To identify all of the legislative instruments scrutinised by the committee during this period, select 'legislative instruments' as the relevant type of legislation, select the event as 'assent/making', and input the relevant registration date range in the Federal Register of Legislation's advanced search function, available at: <https://www.legislation.gov.au/AdvancedSearch>.

chapter. This period includes a number of autonomous sanctions instruments.⁴ The committee has considered the human rights compatibility of similar instruments on a number of occasions.⁵ As these legislative instruments do not appear to designate or declare any individuals who are currently within Australia's jurisdiction, the committee makes no comment in relation to these instruments at this time. The committee has determined not to comment on the remaining instruments from this period on the basis that the instruments do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights.

4 See Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Ukraine) Amendment (No. 1) Instrument 2022 [F2022L00181]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) Amendment (No. 3) Instrument 2022 [F2022L00186]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) Amendment (No. 2) Instrument 2022 [F2022L00187]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Ukraine) Amendment (No. 4) Instrument 2022 [F2022L00192]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Russia and Ukraine) Amendment (No. 1) Instrument 2022 [F2022L00193]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Russia and Ukraine) Amendment (No. 2) Instrument 2022 [F2022L00194]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Russia and Ukraine) Amendment (No. 4) Instrument 2022 [F2022L00281]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Russia and Ukraine) Amendment (No. 5) Instrument 2022 [F2022L00283]; and Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Russia and Ukraine) Amendment (No. 6) Instrument 2022 [F2022L00313].

5 See, most recently, Parliamentary Joint Committee on Human Rights, Parliamentary Joint Committee on Human Rights, *Report 15 of 2021* (8 December 2021), pp. 2-11.

