
# Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Report 9 of 2024

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PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3823

Email: human.rights@aph.gov.au
Website: http://www.aph.gov.au/joint_humanrights/

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|---|---|
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Charlotte Fletcher, Committee Secretary

Rebecca Preston, Principal Research Officer

Stephanie Lum, Principal Research Officer

Rashmi Chary, Legislative Research Officer

**Committee legal adviser**

Associate Professor Jacqueline Mowbray

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# Committee information

Under the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act), the committee's functions are to examine bills, Acts and legislative instruments for compatibility with human rights, and report to both Houses of the Parliament. The committee may also inquire into and report on any human rights matters referred to it by the Attorney-General.

The committee assesses legislation for compatibility with the human rights set out in seven international treaties to which Australia is a party.[1] The committee's *Guide to Human Rights* provides a short and accessible overview of the key rights contained in these treaties which the committee commonly applies when assessing legislation.[2]

The establishment of the committee builds on Parliament's tradition of legislative scrutiny. The committee's scrutiny of legislation seeks to enhance understanding of, and respect for, human rights in Australia and ensure attention is given to human rights issues in legislative and policy development.

Some human rights obligations are absolute under international law. However, most rights may be limited as long as it meets certain standards. Accordingly, a focus of the committee's reports is to determine whether any limitation on rights is permissible. In general, any measure that limits a human right must comply with the following limitation criteria: be prescribed by law; be in pursuit of a legitimate objective; be rationally connected to (that is, effective to achieve) its stated objective; and be a proportionate way of achieving that objective.

Chapter 1 of the reports include new and continuing matters. Where the committee considers it requires further information to complete its human rights assessment it will seek a response from the relevant minister, or otherwise draw any human rights concerns to the attention of the relevant minister and the Parliament. Chapter 2 of the committee's reports examine responses received in relation to the committee's requests for information, on the basis of which the committee has concluded its examination of the legislation.

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1 International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of Discrimination against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; and Convention on the Rights of Persons with Disabilities.

2 See the committee's *Guide to Human Rights*. See also the committee's guidance notes, in particular *Guidance Note 1 – Drafting Statements of Compatibility*.

# Report snapshot[1]

In this report the committee has examined the following bills and legislative instruments for compatibility with human rights. The committee's full consideration of legislation commented on in the report is set out in Chapters 1 and 2.

## Bills

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| **Chapter 1: New and continuing matters** | |
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### Aged Care Bill 2024

*Advice to Parliament*

**Commonwealth aged care system**

*Multiple rights*

This bill seeks to establish a legislative framework for the Commonwealth aged care system, including by providing legislative authority for the delivery of, and funding arrangements for, funded aged care services to individuals, which may include access to subsidised accommodation, food and other services to assist with daily living. The committee considers that several measures in the bill would promote human rights, including rights to an adequate

1 This section can be cited as Parliamentary Joint Committee on Human Rights, Report snapshot, *Report 9 of 2024*; [2024] AUPJCHR 64.

2 Fair Work (Registered Organisations) Amendment (Administration) Bill 2024, which was previously deferred in *Report 8 of 2024* (11 September 2024).

3 The committee makes no comment on the remaining bills on the basis that they do not engage, or only marginally engage, human rights; promote human rights; and/permissibly limit human rights. This 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.

standard of living and health, and the rights of people with disability. However, the committee notes that there are also measures in the bill that engage and limit human rights (as detailed in the entry). The committee notes that while ordinarily it would write to the minister seeking a response to any questions it has about the human rights compatibility of these measures, due to the tight timeframe available (noting that the bill has been referred for inquiry and report by 31 October 2024), it is not possible for the committee to seek a response from the minister in relation to these matters. The committee instead offers recommendations that may improve the human rights compatibility of specified measures, in order that these recommendations will be available to the minister and the Parliament for timely consideration.

**Statement of rights**

*Multiple rights*

The bill proposes to include a Statement of Rights, which would set out a number of rights to which individuals accessing, or seeking to access, funded aged care services would be entitled, including the rights to have personal privacy respected and personal information protected, and be free from all forms of violence, degrading or inhumane treatment, exploitation, neglect, coercion, abuse or sexual misconduct. Registered providers would be required to take all reasonable and proportionate steps to act compatibly with the rights specified in the Statement of Rights in delivering funded aged care services, taking into account that limits on rights may be necessary to balance competing or conflicting rights; the rights and freedoms of others; and compliance with other laws.

The committee considers that to the extent that registered providers deliver aged care services to individuals compatibly with the Statement of Rights, a number of human rights would be promoted. The committee notes that while a number of rights specified in the Statement of Rights are derived from international human rights law, there are number of key rights missing including the rights to life, liberty and security of person, freedom of movement, freedom of religion, freedom from restraint, the presumption of legal capacity and the prohibition against torture. It is not clear to the committee why these important human rights are not reflected in the Statement of Rights.

The committee further notes that the limitation clause that would apply to the Statement of Rights does not distinguish between rights that may be subject to permissible limitations and rights that may not (namely, absolute rights). The committee considers that without this distinction there may be a risk that registered providers may apply the limitation criteria to absolute rights and thus not act compatibly with international human rights law. The committee also notes that it is not clear whether there would be an effective remedy for any violation of the rights specified in the Statement of Rights.

The committee has made recommendations to strengthen the human rights compatibility of this measure, including that all key human rights be protected, that the limitation clause be amended to reflect international human rights law, and that there is an effective remedy for any violation of a right specified in the Statement of Rights.

**Restrictive practices**

*Rights of persons with disabilities; right to equality and non-discrimination, access to justice and effective remedy*

The bill would allow rules to be made regarding the use of restrictive practices. These rules must include certain requirements, such as that a restrictive practice only be used as a last resort to prevent harm; to the extent necessary and in proportion to the risk of harm; and with the informed consent of the individual or another person or body (a substitute decision-maker) if the individual lacks capacity to give that consent. If consent is given by a substitute decision-maker, the bill would grant the aged care provider and staff member who used the restrictive practice immunity from any civil or criminal liability in relation to the use of the restrictive practice.

The committee notes that the use of restrictive practices on persons in aged care raises significant human rights issues, as previously considered by the committee on numerous occasions. In particular, setting out requirements relating to when restrictive practices can be used by aged care providers engages multiple human rights. To the extent that the requirements would strengthen the responsibilities of providers by enhancing safeguards around the use of restrictive practices, the measure may assist to ensure that rights are not limited. However, the committee notes that as the restrictive practice requirements are to be set out in future rules, it is difficult to properly assess their safeguard value. The committee notes that allowing for the requirements to not apply in an emergency and authorising substitute decision-makers to consent to the restrictive practice on behalf of an individual who is considered to lack capacity, would likely weaken the safeguard value of the requirements and may in practice increase the risk of human rights violations.

The committee considers that allowing substitute decision-makers to consent to the use of restrictive practices and granting complete immunity to persons who use restrictive practices in reliance of the consent of substitute decision-makers risks being incompatible with a range of human rights, particularly the rights of persons with disability. Depending on which persons or bodies are prescribed in the rules to give consent, the committee considers there may be a risk that allowing a broad range of people who may not have the necessary expertise or qualifications with respect to restrictive practices could have the effect of facilitating the use of restrictive practices, which is inconsistent with Australia's obligation to minimise, and ultimately eliminate, the use of restrictive practices.

The committee has suggested some actions to assist with the human rights compatibility of the measure, including that the bill be amended to incorporate the additional safeguards with respect to restrictive practices recommended by the Royal Commission into Aged Care Quality and Safety.

**Supporters and guardians**

*Right of persons with disability to equal recognition before the law*

The bill establishes a supporter framework by which a person may be registered as a supporter of an individual and that supporter may be given decision-making authority to act and make decisions on behalf of the individual in exceptional circumstances.

The committee notes that while it is not clear on the face of the legislation the ground on which a person's capacity would be denied and a supporter would consequently be granted decision-making authority, there appears to be a risk that the measure would invariably apply to people with disability. Having regard to the clear position under international human rights law that a person's disability must never be grounds for denying legal capacity, the committee considers there to be a risk that this aspect of measure may be incompatible with the right to equal recognition before the law.

The committee further notes that Australia has an obligation to replace substitute decision-making with supported decision-making. The committee considers that the measure contains several key elements of supported decision-making and important safeguards to protect individuals against abuse. However, the committee considers that the effectiveness of the duties imposed on supporters and the other safeguards accompanying the measure will depend on how the measure operates in practice. The committee has made some recommendations to assist with the human rights compatibility of the measure.

**Publication of banning orders**

*Right to privacy*

The bill would empower the Commissioner to make banning orders prohibiting or restricting an entity (which includes an individual), or an individual worker, from engaging in the delivering funded aged care services generally or in a relation to a specified type of service. The Commissioner would be required to establish and maintain both a register of banning orders, and a provider register (which must include details about any associated banning orders).

The committee notes that insofar as publishing information about banning orders on a register may help to ensure that unsuitable people who may present a risk to aged care recipients are not engaged in the provision of their care, this measure appears to promote the right to health and the rights of people with disability. However, by providing that the register may be made public, the measure would limit the right to privacy. While the committee

considers that protecting the safety of vulnerable aged care recipients is a legitimate objective, it is not clear that the measure would be proportionate. The committee has made recommendations to assist with the proportionality of the measure, including amending the bill to require the Commissioner to ensure that the register contains correct and complete information, and does not include misleading information; and to empower the Commissioner to not include information on a register in certain circumstances; and identify whether a decision to include information on the register, or to not amend the register, would be reviewable.

**Information-sharing**

*Right to privacy*

The bill would provide for the use and disclosure of information including personal information, subject to an overarching prohibition against unauthorised disclosure. These provisions would engage and limit the right to privacy.

The committee considers that while the measures would pursue legitimate objectives, it is not clear that they would be sufficiently circumscribed, accompanied by sufficient safeguards, and subject to independent oversight and review. The committee considers that some of the safeguards in the bill could be strengthened in a manner that would assist their proportionality, and would not appear to frustrate their overall policy intention, and has made recommendations to that effect.

## Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024

*Advice to Parliament*

**Abrogation of privilege against self-incrimination**

*Right to a fair trial (and criminal process rights)*

The committee notes that two provisions in the bill would abrogate the privilege against self-incrimination, in whole and in part. The committee notes that the bill would expand the proceedings in relation to which a person would effectively be required to testify against themselves, and considers that there is a risk this would be incompatible with the right to a fair trial, which in the determination of a criminal charge includes a minimum guarantee of the right to not to incriminate oneself. The committee notes that section 172K, which would partially abrogate the privilege against self-incrimination, does not include a derivative use immunity, meaning that information derived from an answer could be admissible in relation to criminal proceedings, and that no explanation is provided in the explanatory materials as to why this immunity is not provided. The committee notes that it is not clear what (if any) consideration has been given in relation to the inclusion of a derivative use immunity, and there is no justification as to its absence. The committee considers that there is a risk this may be incompatible

with the right to a fair trial, and has recommended that consideration be given to the inclusion of a derivative use immunity.

**Significant civil penalties**

*Right to a fair trial (and criminal process rights)*

The committee notes that the bill would introduce several civil penalty provisions, subject to potentially significant penalties. The committee considers that, given the potential severity of civil penalties under the Anti-Money Laundering and Counter-Terrorism Financing Act 2006, where those penalties may be applied to people who are not a direct participant in the scheme, there may be a risk that those penalties would be regarded as criminal under international human rights law. The committee notes that if this were the case, they must be shown to be consistent with the criminal process guarantees, including the right to be presumed innocent until proven guilty according to law. The committee notes that as they are characterised as civil penalties under Australian law, those requirements would not be met.

**Sharing AUSTRAC information internationally**

*Right to life and prohibition against torture and other cruel, inhuman or degrading treatment or punishment*

The committee notes that the bill seeks to amend the Act in relation to the sharing of AUSTRAC information internationally. The committee considers that there may be a risk that the disclosure of certain information to foreign governments and entities, particularly information about alleged criminal activities, may in certain circumstances expose a person to a risk of the death penalty or to torture or other cruel treatment. Consequently, the committee considers that this measure may engage the right to life and freedom from torture and other cruel, inhuman or degrading treatment or punishment, which is not identified in the statement of compatibility. The committee considers that, in the event compatibility cannot be assured, amendments to the bill be considered to address this.

The committee draws its human rights concerns to the attention of the Attorney-General and the Parliament, and recommends that the statement of compatibility be updated.

## Better and Fairer Schools (Information Management) Bill 2024

*Advice to Parliament*

**Expanding the unique student identifier scheme**

*Rights of the child and rights to privacy and education*

This bill seeks to extend the Unique Student Identifier scheme to all Australian primary and secondary school students by enabling the assignment of a schools identifier to each student. A schools identifier would be a unique education number that may later be used as a 'student identifier' for the purposes of higher education. By authorising the verification, collection, use and disclosure of schools

identifiers and school identity management information (which would include personal information), the measures would engage and limit the right to privacy. As the measures would apply to primary and secondary school children, the rights of the child would also be engaged and limited, including the rights of children to have their best interests taken into account as a primary consideration in all actions concerning them and to freely express their views in all matters affecting them. If the measures had the effect of restricting access to primary or secondary education for students without a schools identifier, the right to education may also be engaged and limited. The committee considered that it is not clear whether the stated objectives of the measures would constitute legitimate objectives for the purposes of international human rights law or whether the proposed limitations on rights would be proportionate. As such, the committee considered further information is required to assess the compatibility of these measures with the right to privacy, the rights of the child and the right to education, and sought the minister's advice in *Report 7 of 2024*.

The committee notes the minister's advice that it is not intended that the measures would restrict access to primary or secondary education for students without a schools identifier. The committee considers that the bill may not, therefore, engage and limit the right to education. As to the right to privacy and the rights of the child, the committee notes that the bill seeks to improve the transfer of student information between entities and support the administration of education. The committee considers that these are important objectives, however the committee notes that under international human rights law, it must also be demonstrated that this objective seeks to address a matter of concern which is pressing and substantial enough to warrant limiting human rights. In this regard, the committee considers that the bill is largely directed towards administrative convenience, and it remains unclear that existing consent-based arrangements for sharing information when a child changes school are inadequate. As to proportionality, the committee considers that the bill seeks to establish a legislative scheme in which the majority of detail would be provided for by delegated legislation (and by associated non-legislative measures).

The committee considers that the bill itself does not sufficiently circumscribe potential limits on the right to privacy and rights of the child, nor does it contain sufficient safeguards to ensure that a resulting scheme would permissibly limit the right to privacy. As such, the committee considers that there is a risk that the bill constitutes an impermissible limit on the right to privacy and the rights of the child, and considers that the privacy implications (in particular) of a resulting scheme may only be apparent in practice. The committee has recommended some amendments to the bill, recommended that the statement of compatibility be updated to reflect the information provided by the minister, and draws its human rights concerns to the attention of the minister and the Parliament.

## Blayney Gold Mine Bill 2024

The committee notes that this non-government bill appears to engage and may limit human rights. Should this bill 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.

## Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024

*Advice to Parliament*

**Regulating digital content**

*Multiple rights*

The committee notes that this bill seeks to amend the *Broadcasting Services Act 1992* and related legislation to empower the Australian Communications and Media Authority (ACMA) to establish a regulatory framework requiring digital communications platform providers (providers) to manage the risk of certain content constituting misinformation and disinformation on their platforms.

The committee notes that seeking to regulate the dissemination of content on digital communications platforms, where that dissemination may cause or contribute to serious harm, may engage and promote numerous human rights. In this respect, the committee considers that the statement of compatibility is extensive and comprehensively outlines the expectations of United Nations bodies as to how States parties are to address the dissemination of certain types of misinformation and disinformation. The committee notes that the provision of a detailed statement of compatibility has, in relation to this bill, considerably assisted in the committee's consideration of the compatibility of the bill.

The committee also notes that, in seeking to regulate the dissemination of certain content, the bill also engages and limits the right to freedom of expression and the right to privacy. The committee considers that the bill is directed towards a legitimate objective which is broadly of pressing and substantial concern, and would likely be rationally connected to that objective. However, the committee considers that some questions remain as to whether the scheme would constitute a proportionate limit on the right to freedom of expression and the right to privacy in practice. The committee notes that the bill establishes several broad high-level safeguards which would assist with its proportionality, and provides for regular review of the operation of the scheme by ACMA. However, the committee notes that much of the detail of what the scheme would require providers to do in practice would be set out in delegated legislation. Further, the committee considers that there may be a risk that, in practice, providers may regulate content on their platforms in a manner which is beyond the scope of what would be required by this scheme in order to avoid the risk of a civil penalty for non-compliance. The committee considers that this may mean that the extent of the limitation on the right to freedom of expression

(and to privacy) may only be apparent as a matter of practice. The committee has made recommendations to amend the bill, and has proposed that the statement of compatibility be updated.

## Competition and Consumer Amendment (Make Price Gouging Illegal) Bill 2024

No comment

## Criminal Code Amendment (Hate Crimes) Bill 2024

*Advice to Parliament*

**Expansion of offences for urging or threatening violence, and the public display of prohibited symbols**

*Multiple rights*

The bill seeks to expand existing offences in the Criminal Code for intentionally urging another person or a group to use force or violence against a person or a group, including by reducing one relevant fault element to recklessness, expanding the list of protected attributes to include sex, sexual orientation, gender identity, intersex status and disability, and removing the existing defence of acting in good faith. The bill would make it an offence, punishable by up to five years imprisonment, to threaten to use such force or violence. It would also expand existing offences for publicly displaying prohibited symbols to include circumstances where the conduct is likely to offend, insult, humiliate or intimidate a reasonable person who is a member of a group of persons including persons distinguished by sexual orientation, gender identity, and intersex status.

The committee considers that the measure would likely promote numerous human rights, although criminalising certain forms of expression would also engage and limit the rights to freedom of expression, freedom of religion and equality and non-discrimination. The committee notes that it extensively considered the offences relating to public display of prohibited symbols in *Reports 8* and *9 of 2023*, at which time it raised several human rights concerns. The committee notes that it recommended 10 amendments to the bill to assist with its compatibility, and that it does not appear that those amendments were made. Consequently, the concerns the committee previously raised remain relevant to this measure. In relation to offences of urging violence, the committee considers that while protecting an expanded list of groups with protected attributes and lowering one fault element to recklessness will capture a broader range of conduct, which may help protect vulnerable groups from violence, there is a risk that in practice the offences could capture a greater range of conduct, including conduct that may be offensive and insulting, but the prohibition of which may constitute an impermissible limit on the rights to freedom of expression and religion. The committee considers that in the absence of any requirement to consider non-judicial alternatives to prosecution and detention of children or any other legislative safeguards to protect

the rights of the child with respect to any of these offences, there is a significant risk that the measures are not compatible with the rights of the child.

The committee has recommended that consideration be given to the amendments the committee previously proposed regarding the public display of prohibited symbols, and that the statement of compatibility be updated, and otherwise draws these concerns to the attention of the Attorney-General and the Parliament.

## Customs Tariff Amendment (Comprehensive and Progressive Agreement for Trans-Pacific Partnership Expansion) Bill 2024

No comment

## Fair Work (Registered Organisations) Amendment (Administration) Bill 2024 and related instrument[4]

*Advice to Parliament*

**Involuntary administration of part of the CFMEU**

*Rights to freedom of association and the right to form and join trade unions*

The committee notes that the Fair Work (Registered Organisations) Amendment (Administration) Bill 2024 (now Act) and the Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024 (the determination) provide for a scheme for the administration of the Construction and General Division of the Construction, Forestry and Maritime Employees Union (CFMEU) and its branches.

The committee considers that the background to these measures is a significant consideration. The committee notes that serious allegations have been raised about the conduct of some officials and associates of the CFMEU's Construction and General Division, including allegations of corruption, criminal conduct and other serious misconduct including bullying and harassment and general disregard for workplace laws. The committee considers that these are serious allegations, and notes that this measure seeks to respond to those specific matters, and does not apply to other trade unions. The committee notes that opportunity was given to the union to respond to these allegations in the Federal Court of Australia, and this opportunity was not taken. The committee notes that insufficient action was taken to respond to the serious allegations of criminal and corrupt behaviour.

The committee notes the international human rights legal advice that while the explanatory materials accompanying the amending Act refer to alleged conduct relating to the administration and operation of parts of the CFMEU, the committee notes that these are not

4 Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024.

allegations that have not been finally determined by a court. The committee notes that providing for the involuntary administration of a trade union engages and limits the right to freedom of association. The committee considers that, as allegations have not been final determined by a court, there may be questions as to whether it has been clearly established that the scheme for involuntary administration established by these measures is consistent with the guarantees of freedom of association and the right to collectively organise contained in International Labour Organization (ILO) Convention No. 87, and therefore whether the measure would constitute a permissible limit on the right to freedom of association.

**Suspension and termination of offices**

*Rights to work, just and favourable conditions of work, privacy and effective remedy*

The committee notes that the measures provide for the removal of office-holders in the CFMEU (and the termination of their employment); disqualify those persons from holding office in, or being employed by, a union; and prevent those persons from being a bargaining representative in another union without permission. The committee considers that these measures engage and limit the right to work, the right to just and favourable conditions of work, and the right to privacy and reputation. The committee notes that the statement of compatibility accompanying the amending Act only identified that these measures engage and limit the right to just and favourable conditions of work, meaning that no assessment of the amending Act's compatibility with these other rights is provided.

The committee considers that while protecting the integrity of union bargaining processes and addressing non-compliance with Australian laws are likely to address issues of public or social concern such as to amount to a legitimate objective, and the removal of individuals in offices may be effective to achieve that objective, it is unclear whether it is necessary to vacate 292 offices and all people employed under them, where it is not clear that it has been established that these individuals engaged in the alleged conduct that the measure seeks to address. The committee considers that questions remain as to whether the measures are a proportionate limit on rights. The committee further considers that it is not clear that the measures, to the extent they may result in an impermissible breach of the right to privacy and reputation, are compatible with the right to an effective remedy.

**Retrospective application of anti-avoidance provision**

*Prohibition against retrospective criminal laws*

The committee notes that the amending Act provides that a person who has engaged in (or been involved in) conduct or a course of conduct that results in another person or body being prevented from taking action under the scheme, or prevents the administrator from effectively administering the scheme, is liable to a civil penalty of 600

penalty units (currently $187,800). The committee notes that civil penalty provisions may be considered 'criminal' for the purposes of international human rights law, having regard to their potential severity and application. The committee considers that there may be a risk that this penalty may be regarded as criminal under international human rights law, and notes that if this were the case, it would not be consistent with criminal process guarantees contained in the International Covenant on Civil and Political Rights, and that the retrospective application of the penalty may, therefore, risk breaching the absolute prohibition against retrospective criminal laws.

The committee has recommended that, although the determination is exempt from disallowance, a statement of compatibility with human rights should be prepared noting that the legislative instrument engages and limits several human rights. However, as these measures are already in force, and the Act has passed, the committee makes no further comment.

## Family Law Amendment Bill 2024

*Advice to Parliament*

**Use and disclosure of safety-related information by Children's Contact Services**

*Right to privacy*

Schedule 2 of the bill seeks to amend Part II of the *Family Law Act 1975* to provide for the accreditation and regulation of existing services referred to as 'Children's Contact Services' (CCS), which facilitate contact between a child and a member of the child's family with whom the child is not living, and where members of the family may not be able to safely manage such contact. The bill would regulate the use and disclosure of certain 'safety-related information' by such services. This engages and limits the right to privacy. The committee sought further information from the Attorney-General in *Report 8 of 2024* in order to assess the compatibility of the measure with the right to privacy.

The committee considers that there may be circumstances where safety information may be used or disclosed in a manner which is accompanied by sufficient privacy and other safeguards. However, the committee notes that several key elements of the scheme relevant to an assessment of its proportionality would be set out in delegated legislation (in particular, any training requirements for entrusted persons, and additional privacy safeguards). Further, the committee notes that the bill would not appear to require routine oversight or review of CCS management of safety information, which raises the question of whether these information sharing powers would be appropriately monitored. The committee considers that given the breadth of safety information that could be shared by a range of persons to potentially any person, there may be a risk that information is disclosed in circumstances where the privacy and other safeguards outlined by the Attorney-General would not apply,

and it is not possible to assess the safeguard value of measures that may be included in future delegated legislation. Consequently, the committee considers that there may be a risk that personal information may be disclosed pursuant to this measure in a manner which would not constitute a proportionate limit on the right to privacy. The committee considers that much will depend on the content of the accreditation rules and how they are implemented in practice, and notes that it will assess the compatibility of any accreditation rules made pursuant to this legislation.

**Immunity from civil and criminal liability**

*Right to effective remedy*

Schedule 2 of the bill seeks to extend an existing power in the *Family Law Act 1975* to enable accreditation rules to be made in relation to Child Contact Services. It also seeks to insert an immunity to exclude the Commonwealth from all civil and criminal liability in relation to any act done, or omitted to be done, in good faith in the performance or exercise, or the purported performance or exercise, of a function, power or authority conferred by the accreditation rules. This engages the right to an effective remedy, which the statement of compatibility does not identify. The Attorney-General outlined a number of alternative mechanisms to which a person could have access despite this proposed immunity. The committee considers that the availability of these alternative mechanisms assists in an assessment of whether a person would still have access to an effective remedy where the performance of functions was done in good faith but resulted in a violation of their rights. The committee considers that whether these mechanisms would be sufficient for the purposes of the right to an effective remedy may depend on the circumstances in each case

The committee has recommended some amendments to the bill, and that the statement of compatibility be updated, and otherwise draws its human rights concerns to the attention of the Attorney-General and the Parliament.

## Future Made in Australia (Guarantee of Origin Charges) Bill 2024

No comment

## Future Made in Australia (Guarantee of Origin Consequential Amendments and Transitional Provisions) Bill 2024

No comment

## Future Made in Australia (Guarantee of Origin) Bill 2024

No comment

## Privacy and Other Legislation Amendment Bill 2024

The committee notes that this bill, in providing for a range of measures to protect the privacy of individuals' personal information, engages and promotes multiple rights, including the right to privacy. The bill also introduces a new civil penalty for interferences with privacy that are not serious. The statement of compatibility identifies that this measure may engage the right to a fair trial and criminal process rights, but it does not identify that the *Privacy Act 1998* generally only applies to individuals where acting as a sole trader (with a turnover of $3m or more) and generally does not apply to an individual acting in a personal capacity. This information is a key element in assessing whether a penalty could be regarded as 'criminal' under international human rights, and in this case suggests that it would not. The committee has authorised its secretariat to notify departments where statements of compatibility appear to be inadequate. As such, the committee's secretariat has written to the department in relation to this matter.

## Treasury Laws Amendment (2024 Tax and Other Measures No. 1) Bill 2024

No comment

## Universities Accord (National Student Ombudsman) Bill 2024

The committee notes that this bill, in proposing to limit liability for certain conduct under proposed section 21AZJ, engages the right to an effective remedy. This was not identified or explained in the statement of compatibility accompanying this bill. The committee has authorised its secretariat to notify departments where statements of compatibility appear to be inadequate. As such, the committee's secretariat has written to the department in relation to this matter.

## Wage Justice for Early Childhood Education and Care Workers (Special Account) Bill 2024

No comment

# Legislative instruments

## Chapter 1: New and continuing matters

| | |
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| Legislative instruments registered on the Federal Register of Legislation between 20 August to 6 September 2024[5] | 82 |
| Legislative instruments commented on in report[6] | 1 |

## Chapter 2: Concluded

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| Legislative instruments committee has concluded its examination of following receipt of ministerial response | 4 |

### Defence (Non-foreign work restricted individual) Amendment Determination 2024

This legislative instrument specifies classes of defence workers who are not subject to the prohibition in Part IXAA the *Defence Act 1903* on former defence workers performing certain work or training for a foreign country without a foreign work authorisation.

In *Report 11 of 2023*, the committee considered that the restrictions in the *Defence Act 1903* on foreign work engage and limit the rights to work and privacy. It raised concerns that it was not clear whether these restrictions would constitute a proportionate limit on these rights, and stated that much would depend on exemptions set out by delegated legislation. The committee notes that this legislative instrument amends the Defence (Non-foreign work restricted individual) Determination 2024 to amend the specific details of several exemptions from the scheme for various workers, albeit subject to a range of time periods which must have elapsed since the worker ceased working for Defence. However, as there would be workers who are still subject to the blanket ban (unless they have a ministerial authorisation to undertake foreign work), and noting that only four countries are exempted from the scheme, the committee draws attention to its broader concerns in its previous report regarding the proportionality of the measure.

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5 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, use the advanced search function on the Federal Register of Legislation, and select 'Collections' to be 'legislative instruments'; 'type' to be 'as made'; and date to be 'registered' and 'between' the date range listed above.

6 Unless otherwise indicated, the committee makes no comment on the remaining legislative instruments on the basis that they do not engage, or only marginally engage, human rights; promote human rights; and/permissibly limit human rights. This is based on an assessment of the instrument and relevant information provided in the statement of compatibility (where applicable). The committee may have determined not to comment on an instrument notwithstanding that the statement of compatibility accompanying the instrument may be inadequate.

## Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024

*Advice to Parliament*

See summary above regarding Fair Work (Registered Organisations) Amendment (Administration) Bill 2024

## Online Safety (Designated Internet Services—Class 1A and Class 1B Material) Industry Standard 2024 and Online Safety (Relevant Electronic Services—Class 1A and Class 1B Material) Industry Standard 2024

*Advice to Parliament*

**Regulation of certain online materials**

*Rights to freedom of expression and privacy*

These legislative instruments establish industry standards for 'relevant electronic services' and 'designated internet services', which include online chat services, SMS and MMS services, websites, apps and online storage services, with respect to class 1A materials (meaning child sexual exploitation material; pro-terror material; or 'extreme crime and violence material') and class 1B materials (meaning 'crime and violence material' or 'drug-related material'). The standards impose various obligations on service providers in relation to risk assessments and online compliance measures. Depending on the type of service, providers may be required, for example, to implement appropriate systems, processes and technologies to detect, identify and remove certain class 1A material; deter and disrupt end-users from using the service to create, offer, solicit, access, distribute, or otherwise make available or store certain class 1A material; and respond to classes 1A and 1B materials on the service, such as by removing the material and terminating the provision of the service to the end-user.

The committee notes that requiring service providers to implement measures to reduce the risk that their services will be used to solicit, generate, access, distribute and store harmful material, likely promotes numerous human rights, including the rights of women and children to be free from sexual exploitation; the rights to life and security of the person; and the prohibition against inciting national, racial or religious hatred. However, the committee also notes that the measures necessarily limit the rights to freedom of expression and privacy by regulating certain online material, including restricting access to, disrupting the dissemination of and removing the material. In relation to child sexual exploitation material, material depicting sexual violence and pro-terror material that reaches the threshold of incitement to national, racial or religious hatred, the committee considers that to the extent that regulating these types of material limits the rights to freedom of expression and privacy, such limitations are likely permissible under international human rights law. However, noting that the scope of materials captured by the measures is much broader, it is necessary to assess whether the regulation of these other types of material, such as crime and

violence or drug-related material that offends against the standards of morality, decency and propriety, is reasonable, necessary and proportionate. The committee sought further information from the minister in *Report 7 of 2024* as to whether the measures are rationally connected and proportionate to the stated objectives. A response was provided by the eSafety Commissioner.

The committee considers that, based on this response, it is not clear that regulating the full range of materials captured by the measures is rationally connected to the stated objectives, particularly that of preventing harm and improving online safety. The committee further considers that it has not been established that the measures are sufficiently circumscribed, noting the broad range of materials captured by the measures, the lack of guidance as to how key terms in the standards are to be interpreted and applied by providers, and the use of multiple definitions. The committee considers that there is also a risk that the measures may significantly interfere with rights, noting that while not required to do so, providers have the discretion to proactively scan private communications in order to comply with their obligations under the standards. The committee notes that the measures are accompanied by some safeguards and welcomes the Commissioner's advice that they will prepare regulatory guidance to industry that will include further information to support providers in complying with their obligations. However, noting that many of the safeguards accompanying the measures are discretionary, it is not clear these are sufficient. The committee therefore considers that there is a risk that the measures may not constitute a proportionate limitation on the rights to freedom of expression and privacy. Further, if an individual's rights to freedom of expression or privacy were violated, it is not clear that there would be an effective remedy available. The committee therefore considers that the measures do not appear to be compatible with the right to an effective remedy. The committee has recommended that the statement of compatibility be updated to reflect the additional information provided by the eSafety Commissioner, and draws its human rights concerns to the attention of the minister, the eSafety Commissioner, and the Parliament.

## Tax Agent Services Amendment (Register Information) Regulations 2024

*Advice to Parliament*

**Expansion of information on Tax Practitioner Board public register**

*Right to just and favourable conditions of work, work and privacy*

This legislative instrument expands the scope of information to be included on the register maintained by the Tax Practitioner Board. The register is a publicly available database that includes the details of all currently registered, and in some cases formerly registered, tax practitioners (including individuals). It enables the Board to publish more detailed reasons for tax practitioner sanctions, including terminations, on the register; publish a wider range of information, decisions and outcomes on the register; and removes time limits on

how long certain information appears on the register. This engages and limits the rights to work, just and favourable conditions of work, and privacy. The committee sought further information from the minister in order to assess the compatibility of this legislative instrument with these rights.

The committee considers that, on balance, based on the additional information provided by the minister, it appears that this measure may constitute a proportionate limit on these human rights. In particular, the committee notes that a decision to include information about a tax practitioner on the register is subject to external review. The committee considers that had this additional information been included in the statement of compatibility, it would not have sought further information in relation to it. The committee recommends that the statement of compatibility be updated and makes no further comment in relation to this legislative instrument.

## Work Health and Safety Amendment (Penalties and Engineered Stone and Crystalline Silica Substances) Regulations 2024

*Advice to Parliament*

**Disclosure of worker health monitoring reports**

*Rights to just and favourable conditions of work, health and privacy*

The regulations amend the Work Health and Safety Regulations 2011 to require an employer to provide health monitoring for all workers carrying out the processing of a crystalline silica substance that is high risk. A health monitoring report includes a range of personal information, including test results that indicate whether or not a worker has been exposed to a hazardous chemical or contracted a disease, injury or illness as a result of carrying out the work. Health monitoring reports must be shared with the regulator and relevant employers of the worker. While requiring health monitoring of workers (and providing for disclosure to the regulator and employers) would promote the rights to just and favourable conditions of work and the right to health, it also engages and limits the right to privacy. The committee considered this measure in *Report 7 of 2024* and sought further information from the minister.

The committee considers that, on balance, and having regard to the additional information the minister outlined, this measure likely constitutes a proportionate limit on the right to privacy. The committee notes that, had the statement of compatibility included the additional information outlined by the minister, the committee would not have sought further information in relation to this legislative instrument. the committee recommends that the statement of compatibility be updated and makes no further comment in relation to this legislative instrument.

# Chapter 1
## New and ongoing matters

1.1 The committee comments on the following bills and legislative instruments.

## Bills and legislative instrument

## Aged Care Bill 2024[9]

| | |
|---|---|
| **Purpose** | This bill would establish a legislative framework for the Commonwealth aged care system, including by:<br>• providing legislative authority for the delivery of funded aged care services to individuals;<br>• setting out the eligibility requirements for individuals seeking to access funded aged care services;<br>• setting out conditions of registration for providers and key obligations of registered providers and aged care workers;<br>• providing for funding arrangements for funded aged care services;<br>• establishing the governance and regulatory framework for the Commonwealth aged care system;<br>• authorising the use and disclosure of protected information in certain circumstances and providing for whistleblower protections; and<br>• providing pathways for review of decisions made under the bill. |
| **Portfolio** | Health and Aged Care |
| **Introduced** | House of Representatives, 12 September 2024 |
| **Rights** | Effective remedy; equality and non-discrimination; freedom of movement; health; liberty; privacy; rights of persons with disability; torture or cruel, inhuman or degrading treatment or punishment |

### Commonwealth aged care system

1.2 This bill seeks to establish a legislative framework for the Commonwealth aged care system (aged care system). The objects of the bill would be to:

[9] This entry can be cited as: Parliamentary Joint Committee on Human Rights, Aged Care Bill 2024, *Report 9 of 2024*; [2024] AUPJCHR 65.

- give effect to Australia's obligations under the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of Persons with Disabilities;
- provide a 'forward-looking aged care system' that is designed to do various things, including uphold the rights of individuals, assist individuals accessing funded age care services to live active, self-determined and meaningful lives, and facilitate access to integrated services in other sectors where required;
- enable individuals accessing funded aged care services to exercise choice and control in the planning and delivery of those services;
- ensure individuals accessing funded aged care services are free from mistreatment, neglect and harm from poor quality or unsafe care;
- provide a robust and risk-based regulatory framework for the delivery of funded aged care services;
- provide and support education and advocacy arrangements that can assist individuals access services, make decisions and provide feedback on services;
- provide for sustainable funding arrangements for the delivery of funded aged care services; and
- promote innovation in the aged care system.[10]

1.3 The bill seeks to achieve these objects in various ways, including by:

- providing legislative authority for the delivery of funded aged care services to individuals under the aged care system. Services would be delivered by registered providers and aged care workers in an approved residential care home or a home or community setting;[11]
- setting out a Statement of Rights and Statement of Principles that would underpin the aged care system;[12]
- setting out the eligibility requirements for individuals seeking to access funded aged care services and providing for an individual aged care needs assessment to identify which funded age care services are needed;[13]
- allowing supporters to be registered to assist individuals with navigating the aged care system;[14]

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10 Chapter 1, clause 5.

11 Chapter 1, clauses 8–11 and Chapter 2.

12 Chapter 1, clauses 23–26.

13 Chapter 2.

14 Chapter 1, Part 4.

- setting out conditions of registration for providers and key obligations of registered providers and aged care workers;[15]
- providing for funding arrangements for funded aged care services, either by way of a subsidy or grant payable to registered providers;[16]
- establishing the governance and regulatory framework for the Commonwealth aged care system, including conferring regulatory powers on the System Governor (the secretary of the department), Aged Care Quality and Safety Commissioner and Complaints Commissioner;[17]
- authorising the use and disclosure of protected information in certain circumstances and providing for whistleblower protections;[18] and
- providing pathways for review of decisions made under the bill.[19]

1.4 Much of the operational detail of the above measures is to be set out in future delegated legislation.

## International human rights legal advice

### *Multiple rights*

1.5 The various measures in the bill engage multiple human rights. In general, by providing for the delivery of funded aged care services to older persons, which may include access to subsidised accommodation, food and other services to assist with daily living, the bill would promote a number of human rights, including the rights to an adequate standard of living and health, and the rights of people with disability. The right to an adequate standard of living requires that the State party take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in its jurisdiction.[20] The Convention on the Rights of Persons with Disability elaborates on the content of this right for people with disability, providing that States parties should take appropriate steps to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs and, for those living in poverty, access to assistance from the State with disability-related expenses.[21] The right to health is the right to enjoy the highest attainable standard of physical and mental health.[22] It is a right to have access to adequate health care as well as to live in conditions that promote a healthy life (such as access to safe drinking

15 Chapter 3.

16 Chapter 4.

17 Chapters 5 and 6.

18 Chapter 7.

19 Chapter 8, Part 2.

20 International Covenant on Economic, Social and Cultural Rights, article 11.

21 Convention on the Rights of Persons with Disabilities, article 28.

22 International Covenant on Economic, Social and Cultural Rights, article 12(1).

water, housing, food, and a healthy environment).[23] With respect to people with disability, the Convention on the Rights of Persons with Disability reaffirms that this right is to be guaranteed without discrimination and obliges States parties to provide 'those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among…older persons'.[24]

1.6 Further, if aged care services are delivered in accordance with the Statement of Principles, which, among other things, would provide that the aged care system offers accessible, culturally safe, culturally appropriate, trauma-aware and healing-informed funded aged care services and supports a diverse, trained and appropriately skilled workforce who are valued and respected, other human rights may also be promoted, such as the rights to equality and non-discrimination, culture and work.[25]

1.7 However, other measures in the bill would engage and limit a number of human rights. The measures that would most directly limit human rights are set out in detail below – including the gaps and inconsistencies in the Statement of Rights; authorising the use of restrictive practices; providing supporters with decision-making authority; publishing banning orders; and authorising the use and disclosure of personal information. There are other measures in the bill that may also engage and limit human rights but as much of the operational detail is to be set out in future delegated legislation it is not possible to properly assess the potential compatibility of such measures with human rights.[26] For example, the bill would require the financial sustainability of the aged care system to be an overarching principle in decision-making and would require individuals to pay for some of the costs of the aged care services that they access based on an individual assessment of their means.[27] The individual contribution rate for an individual for each means testing category as well as an individual's total assessable income and the value of an individual's assets are to be determined by rules made by the System Governor.[28] Without knowing the content

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23 UN Economic, Social and Cultural Rights Committee, *General Comment No. 14: the right to the Highest Attainable Standard of Health* (2000) [4]. See also, *General Comment No. 12: the right to food* (article 11) (1999); *General Comment No. 15: the right to water* (articles 11 and 12) (2002); and *General Comment No. 22: the right to sexual and reproductive health* (2016).

24 Convention on the Rights of Persons with Disabilities, article 25.

25 International Covenant on Civil and Political Rights, articles 2, 26 and 27; International Covenant on Economic, Social and Cultural Rights, articles 2, 3, 6, 7 and 15.

26 Leaving significant matters to delegated legislation is an issue consistently raised by the Senate Standing Committee for the Scrutiny of Bills. See Senate Standing Committee for the Scrutiny of Bills, *Principle (iv): Inappropriate delegation of legislative powers*. This scrutiny issue as well as other measures that may unduly trespass on personal rights and liberties are likely to be raised by the Scrutiny of Bills committee in its consideration of this bill.

27 Chapter 1, clause 25 and Chapter 4, Part 5.

28 Chapter 4, clauses 314, 322 and 329.

of these rules, it is difficult to assess whether the practical effect of these measures would be to increase the cost of accessing aged care services for certain individuals. If this were the case, questions may arise as to whether the measures would be retrogressive with respect to the rights to an adequate standard of living and health.

1.8 Under international human rights law, Australia has obligations to progressively realise the rights to an adequate standard of living and health using the maximum of resources available. Australia has a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of these rights. If delegated legislation is made pursuant to this bill, the committee would scrutinise the human rights compatibility of such legislation as part of its usual scrutiny function, including whether the measures would be considered retrogressive and if so, whether they represent a permissible limitation on human rights.

## Committee view

1.9 The committee notes that the bill seeks to establish a legislative framework for the Commonwealth aged care system and respond to, and implement, recommendations of the Royal Commission into Aged Care Quality and Safety and the Final Report of the Aged Care Taskforce.

1.10 The committee considers that several measures in the bill would promote human rights. In general, providing for the delivery of funded aged care services to older persons, which may include access to subsidised accommodation, food and other services to assist with daily living, would promote the rights to an adequate standard of living and health, and the rights of people with disability. Further, if aged care services are delivered in accordance with the Statement of Principles, which, among other things, would provide that the aged care system offers accessible, culturally safe, culturally appropriate, trauma-aware and healing-informed funded aged care services and supports a diverse, trained and appropriately skilled workforce who are valued and respected, other human rights may also be promoted, such as the rights to equality and non-discrimination, culture and work. The committee considers this bill to be an important step toward realising a number of Australia's international human rights obligations, particularly with respect to older persons. Indeed, the committee notes that an object of the bill is to give effect to Australia's obligations under the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of Persons with Disabilities.

1.11 However, the committee notes that there are measures in the bill that engage and limit human rights. As set out in detail below, the committee has focused its consideration on those measures that would most directly limit human rights (including the gaps and inconsistencies in the Statement of Rights; authorising the use of restrictive practices; providing supporters with decision-making authority; publishing banning orders; and authorising the use and disclosure of personal information). Ordinarily the committee would write to proponents of legislation seeking a response to any questions it has about the compatibility of proposed

legislation with human rights. However, in this instance, the committee notes that the bill has been referred to the Senate Community Affairs Legislation Committee for inquiry and report by 31 October 2024, and that public hearings relating to this inquiry will be held from 3–24 October 2024. For this reason, it is not possible for the committee, in the timeframe available, to seek a response from the minister in relation to the matters it has raised below. The committee instead offers recommendations that may improve the human rights compatibility of specified measures, in order that these recommendations will be available to the minister and the Parliament for timely consideration. Absent this tight timeframe the committee would otherwise have written to the minister to seek further information.

1.12 The committee also notes that there are other measures in the bill that may engage and limit human rights, but as much of the operational detail is to be set out in future delegated legislation it is not possible to properly assess the potential compatibility of such measures with human rights.

## Statement of rights

1.13 The bill proposes to include a Statement of Rights, which would set out a number of rights to which individuals accessing, or seeking to access, funded aged care services would be entitled.[29] These include the rights to:

- exercise choice and make decisions;
- equitable access to palliative care and end-of-life care when required;
- have personal privacy respected and personal information protected;
- be free from all forms of violence, degrading or inhumane treatment, exploitation, neglect, coercion, abuse or sexual misconduct;
- be informed and express opinions about funded aged care services;
- communication in the individual's preferred language or method of communication; and
- opportunities, and assistance, to stay connected (if the individual so chooses) with cultural and spiritual activities, and for Aboriginal or Torres Strait Islander persons, community Country and Island Home.[30]

1.14 Registered providers would be required to take all reasonable and proportionate steps to act compatibly with the rights specified in the Statement of Rights in delivering funded aged care services, taking into account that limits on rights may be necessary to balance competing or conflicting rights; the rights and freedoms

29 Clauses 23 and 24.

30 Chapter 1, clause 23.

of others; and compliance with other laws.[31] However, clauses 23 and 24, which set out the Statement of Rights and the duty on registered providers to act compatibly with the Statement of Rights, would not create rights or duties that would be enforceable by proceedings in a court or tribunal.[32]

## International human rights legal advice

### *Multiple rights*

1.15 The rights specified in the Statement of Rights are derived from various international human rights law treaties, although are expressed in different terms.[33] Thus, to the extent that registered providers deliver aged care services compatibly with the Statement of Rights in practice, multiple human rights would be promoted, including the rights to privacy, health, an adequate standard of living, equality and non-discrimination, culture and freedom of expression; the right to be free from exploitation, violence and abuse; and the prohibition against cruel, inhuman or degrading treatment.[34] This is acknowledged in the statement of compatibility.[35]

1.16 However, the Statement of Rights does not include all human rights to which older persons accessing the aged care system are entitled – that is, all human rights protected under the international human rights law treaties to which Australia is party. The right to life (including the right not to be arbitrarily deprived of life), the right to liberty and security of person, the right to freedom of movement and choice of residence, the right to freedom of religion and the prohibition against torture are of particular relevance in the context of the aged care system and are not reflected in the Statement of Rights. The explanatory memorandum states that the Statement of Rights addresses Recommendation 2 of the Royal Commission into Aged Care Quality and Safety (Royal Commission) and draws on the recommended wording of the Royal Commission, which was derived from the International Covenant on Economic, Social and Cultural Rights.[36] It states that the rights specified in the Statement of Rights are relevant to the aged care system and not the rights of older people more generally.[37]

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31 Subclause 24(2).

32 Subclause 24(3).

33 Including the International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Convention on the Rights of Persons with Disabilities; and Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

34 International Covenant on Civil and Political Rights, articles 2, 7, 17, 19, 26 and 27; International Covenant on Economic, Social and Cultural Rights, articles 3, 11, 12 and 15; Convention on the Rights of Persons with Disabilities, articles 5, 15, 16, 19, 21, 25, 28 and 30; Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, article 16.

35 Statement of compatibility, pp. 6–37.

36 Explanatory memorandum, pp. 76–77.

37 Explanatory memorandum, p. 76.

However, several rights recommended for inclusion by the Royal Commission are not specified in the Statement of Rights, including the right to liberty, freedom of movement and freedom from restraint, and the right to the presumption of legal capacity.[38]

1.17 It is not clear why the Statement of Rights does not include all rights to which older persons accessing aged care services are entitled under international human rights law or, at a minimum, those rights recommended for inclusion by the Royal Commission, particularly given the purpose of the measure is to address Recommendation 2 of the Royal Commission and an overall object of the bill is to give effect to Australia's obligations under the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of Persons with Disabilities.[39]

1.18 Further, the limitation criteria that would apply to the Statement of Rights is not completely consistent with international human rights law. Subclause 24(2) would require registered providers to take all reasonable and proportionate steps to act compatibly with the Statement of Rights, taking into account that limits on rights may be necessary to balance competing or conflicting rights; the rights and freedoms of others; and compliance with other laws. The explanatory memorandum states that to act compatibly with rights, any act or decision of a registered provider will need to have regard to the Statement of Rights to ensure it does not limit a right under the Statement of Rights, except to the extent that is reasonable and demonstrably justifiable.[40] In deciding whether a limit on a right is reasonable and justifiable, the following factors may be considered:

- the nature of the right affected;
- the nature of the purpose and extent of the limitation, including whether it is consistent with the Statement of Rights;
- the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;
- whether there are any less restrictive and reasonably available ways to achieve the purpose; and
- the balance between the matters mentioned above.[41]

1.19 These factors are generally reflective of the limitation criteria that applies to most rights under international human rights law (that is, the limitation must be prescribed by law, pursue a legitimate objective, be rationally connected to that

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38 Royal Commission into Aged Care Quality and Safety, *Final Report – List of Recommendations* (March 2021), Recommendation 2, p. 206.

39 Clause 5.

40 Explanatory memorandum, p. 81.

41 Explanatory memorandum, pp. 81–82.

objective and be a proportionate means of achieving that objective).[42] However, subclause 24(2) does not distinguish between rights that may be subject to permissible limitations and absolute rights, such as the prohibition on torture and cruel, inhuman or degrading treatment or punishment, which may *never* be subject to any limitations. The explanatory memorandum recognises that absolute rights cannot be limited, including the prohibition against torture and ill-treatment, which is reflected in the right specified in paragraph 23(4)(a) of the Statement of Rights.[43] However, it states that 'balancing or limiting rights in clause 24 is justified, as most rights may be subject to permissible limits'.[44] By not distinguishing between those rights that may and may not be subject to limitations in the bill itself, there appears to be a risk that registered providers may apply the limitation criteria to absolute rights and thus not act compatibly with international human rights law.

1.20 Finally, it is not clear that there would be an effective remedy for any violation of the rights specified in the Statement of Rights. The right to an effective remedy requires the availability of a remedy which is effective with respect to any violation of rights and freedoms recognised by the International Covenant on Civil and Political Rights.[45] It includes the right to have such a remedy determined by competent judicial, administrative or legislative authorities or by any other competent authority provided for by the legal system of the state. This may take a variety of forms, such as prosecutions of suspected perpetrators or compensation to victims of abuse. While limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), States parties must comply with the fundamental obligation to provide a remedy that is effective.[46] In relation to economic, social and cultural rights, while there is some flexibility with respect to the means by which states give effect to the rights in the International Covenant on Economic, Social and Cultural

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42 While the Convention on the Rights of Persons with Disabilities contains no general limitation provision, the general limitation test under international human rights law is applicable, noting that many rights in the Convention on the Rights of Persons with Disabilities are drawn from the International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights.

43 Explanatory memorandum, p. 82.

44 Explanatory memorandum, p. 82.

45 International Covenant on Civil and Political Rights, article 2(3). See, *Kazantzis v Cyprus*, UN Human Rights Committee Communication No. 972/01 (2003) and *Faure v Australia*, UN Human Rights Committee Communication No. 1036/01 (2005), States parties must not only provide remedies for violations of the International Covenant on Civil and Political Rights, but must also provide forums in which a person can pursue arguable if unsuccessful claims of violations of the International Covenant on Civil and Political Rights. Per *C v Australia*, UN Human Rights Committee Communication No. 900/99 (2002), remedies sufficient for the purposes of article 5(2)(b) of the International Covenant on Civil and Political Rights must have a binding obligatory effect.

46 See UN Human Rights Committee, *General Comment 29: States of Emergency (Article 4)* (2001) [14].

Rights, the United Nations (UN) Committee on Economic, Social and Cultural Rights has nevertheless advised that 'appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place'.[47]

1.21 Subclause 24(3) would provide that nothing in the clause 23 (the Statement of Rights) or clause 24 (the effect of the Statement of Rights) creates rights or duties that are enforceable by proceedings in a court or tribunal. The explanatory memorandum states that this approach is in line with the recommendations of the Royal Commission.[48] In its Final Report, the Royal Commission stated:

> Typically, rights are supported by a related enforceable duty. With the exception of the right to freedom from restraint, we do not propose that each of the rights we list in Recommendation 2 should be separately and directly enforceable in the courts. Rather, they should be seen as aspects of a general duty to provide high quality care imposed by the new Act on approved providers.[49]

1.22 As the Statement of Rights does not include the right to freedom from restraint, subclause 24(3) does not include any exceptions with respect to this right. The explanatory memorandum states that clauses 23 and 24 are not enforceable because the Statement of Rights is broad and a one-size-fits-all response to possible breaches of the statement would not be appropriate.[50] It notes that individuals are not, however, limited from raising a complaint with the Complaints Commissioner if they feel that their rights have not been upheld while accessing, or seeking to access, aged care services.[51] The explanatory memorandum further noted that where providers have not acted compatibly with the Statement of Rights, it is likely that they have also failed to comply with other obligations under the bill and may be subject to a civil penalty for breaching those other obligations, such as breaching a condition of their registration.[52]

1.23 Additionally, clause 474 would allow the Commissioner or Complaints Commissioner to give registered providers action notices in relation to a matter relating to the rights of an individual under the Statement of Rights. The action notice must set out various matters including a requirement that the provider examine or investigate the matter and provide a report on the investigation or examination to the Commissioner. A failure to comply with an action notice would attract a civil penalty

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47 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 9: the domestic application of the covenant* (1998) [2].

48 Explanatory memorandum, p. 82.

49 Royal Commission into Aged Care Quality and Safety, *Final Report: Care, Dignity and Respect*, Volume 3A (March 2021), p. 19.

50 Explanatory memorandum, p. 82.

51 Explanatory memorandum, p. 82.

52 Explanatory memorandum, p. 82.

of 30 penalty units (currently $9,390).[53] The Commissioner and System Governor would also be able to give providers compliance notices for non-compliance with a provision in the bill.[54] Failure to take the required action set out in the compliance notice would attract a civil penalty of 60 penalty units (currently $18,780).[55]

1.24 While registered providers may indirectly be held accountable for non-compliance with the Statement of Rights, this would not necessarily provide individuals with a remedy for any rights violations. The only individual remedy identified in the explanatory materials is the ability to make a complaint to the Complaints Commissioner about a provider that is acting incompatibly with the Statement of Rights.[56] The operational details of this complaint process are to be set out in future rules, including how complaints may be made, dealt with and resolved and the actions that may be taken to address complaints.[57] Without this detail, it is difficult to assess whether this complaints process would be sufficient to amount to an effective remedy for the purposes of international human rights law.

## Committee view

1.25 The committee considers that to the extent that registered providers deliver aged care services to individuals compatibly with the rights specified in the Statement of Rights, a number of human rights would be promoted, including the rights to privacy, health, an adequate standard of living, equality and non-discrimination, culture and freedom of expression; the right to be free from exploitation, violence and abuse; and the prohibition against cruel, inhuman or degrading treatment. The committee notes that while a number of rights specified in the Statement of Rights are derived from international human rights law, the statement does not include all human rights to which older persons accessing the aged care system are entitled – that is, all human rights protected under the international human rights law treaties to which Australia is party. The committee considers that key rights that are missing include the rights to life, liberty and security of person, freedom of movement, freedom of religion and the prohibition against torture. The committee further notes that a number of rights recommended for inclusion by the Royal Commission are absent from the Statement of Rights, including rights to liberty, freedom of movement, freedom from restraint and the presumption of legal capacity. The committee considers that it is not clear why these important human rights are not reflected in the Statement of Rights.

1.26 The committee further notes that the limitation clause that would apply to the Statement of Rights does not appear to be consistent with international human rights

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53 Chapter 6, clause 480.

54 Chapter 6, clauses 481 and 482.

55 Chapter 6, clause 487.

56 Chapter 5, clause 358.

57 Chapter 5, clause 361.

law insofar as it does not distinguish between rights that may be subject to permissible limitations and rights that may not (namely, absolute rights). The committee considers there may be a risk that registered providers may apply the limitation criteria to absolute rights and thus not act compatibly with international human rights law. To mitigate this risk, the committee considers that this distinction should be made clear in the bill.

1.27 Finally, the committee notes that it is not clear whether there would be an effective remedy for any violation of the rights specified in the Statement of Rights. While individuals may make a complaint to the Complaints Commissioner with respect to registered providers acting incompatibly with the Statement of Rights, the operational details of this complaint process are to be set out in future rules. The committee considers that without this detail, it is difficult to assess whether this complaints process would be sufficient to amount to an effective remedy for the purposes of international human rights law.

**Suggested action**

1.28 The committee considers the human rights compatibility of this measure may be strengthened if:

(a) all key human rights treaties were included in the objects clause (paragraph 5(a)), including, at a minimum, the International Covenant on Civil and Political Rights; Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Elimination of All Forms of Discrimination against Women; Convention on the Elimination of All Forms of Racial Discrimination; and United Nations Declaration on the Rights of Indigenous Peoples;

(b) all human rights protected in the international human rights law treaties to which Australia is party be specified in the Statement of Rights, including the addition of, at a minimum, the rights to life, liberty and security of person, freedom of movement, freedom of religion and freedom from restraint, and the prohibition against torture;

(c) the Statement of Rights included the right to an effective remedy for any violation of a right specified in the statement;

(d) consideration were given to removing subclause 24(3) so that non-compliance with the Statement of Rights by registered providers may be enforceable by proceedings in a court or tribunal; and

(e) the limitation clause in subclause 24(2) were amended to not apply to absolute rights.

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

## Restrictive practices

1.30 The bill would allow rules to be made regarding the use of restrictive practices in relation to an individual to whom a registered provider is delivering funded aged care services.[58] A restrictive practice is any practice or intervention that has the effect of restricting the rights or freedom of movement of that individual.[59] The bill provides that such rules must require that:

- the restrictive practice only be used as a last resort to prevent harm to the individual or other persons and after consideration of the likely impact of the practice on the individual;
- alternative strategies be used first (and documented);
- the restrictive practice only be used to the extent that is necessary and in proportion to the risk of harm to the individual or other persons;
- the restrictive practice is used in the least restrictive form and for the shortest time necessary;
- informed consent is given to the use of a restrictive practice in relation to the individual; and
- the use of a restrictive practice is monitored and reviewed.[60]

1.31 The rules may provide that a requirement prescribed in the rules (such as those listed above) does not apply if the restrictive practice is necessary in an emergency.[61] Registered providers must comply with any requirements prescribed in the rules as a condition of registration.[62]

1.32 With respect to obtaining informed consent to the restrictive practice, the rules may make provision for the persons or bodies who may give informed consent to the use of a restrictive practice in relation to an individual 'if that individual lacks capacity to give that consent'.[63] If such consent was given by a person or body prescribed in the rules (that is, a substitute decision-maker) and the restrictive practice was used in accordance with any requirements prescribed in the rules, the aged care provider and staff member who used the restrictive practice would be immune from any civil or criminal liability in relation to the use of the restrictive practice.[64]

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58 Chapter 1 clause 18.

59 Chapter 1, clause 17.

60 Chapter 1, subclause 18(1).

61 Chapter 1, subclause 18(3).

62 Chapter 3, clause 162.

63 Chapter 1, subclause 18(2).

64 Chapter 3, clause 163.

## International human rights legal advice

### *Multiple rights*

1.33 The requirements regarding the use of restrictive practices that must be included in the rules (as set out in subclause 18(1) of this bill) are equivalent to the current requirements set out in the *Aged Care Act 1997* (Aged Care Act).[65] The committee has previously considered the requirements in the Aged Care Act and the related legislative instrument when they were first introduced in 2021.[66] As the measure in this bill is equivalent to current provisions in the Aged Care Act, the committee's previous comments remain relevant. In particular, the committee noted that setting out requirements relating to when restrictive practices can be used by aged care providers engages multiple human rights, including:

- *the prohibition on torture or cruel, inhuman or degrading treatment or punishment*:[67] the UN Committee on the Rights of Persons with Disabilities has stated that Australia's use of restrictive practices (which includes chemical and physical restraints) on persons with disability may raise concerns in relation to freedom from torture and cruel, inhuman or degrading treatment or punishment and has recommended that Australia take immediate steps to end such practices.[68] The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has also raised concerns and called for a ban on the use of restraints in the

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65 *Aged Care Act 1997*, section 54-10. The definition of restrictive practice in the bill (clause 17) is also equivalent to the current definition in section 54-9.

66 See, Parliamentary Joint Committee on Human Rights, Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021 and Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], *Report 10 of 2021* (25 August 2021) pp. 63–90. The *Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Act 2021* amended the *Aged Care Act 1997* to require that the Quality of Care Principles must set out certain requirements regarding the use of restrictive practices. The Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 amended the Quality of Care Principles 2014 to set out requirements in relation to the use of restrictive practices and responsibilities of approved providers relating to behaviour support plans.

67 International Covenant on Civil and Political Rights, article 7; Convention against Torture and other Cruel, Inhuman, Degrading Treatment or Punishment, articles 3–5. Article 7 may not be engaged, however, in relation to non-experimental medical treatment, even when given without consent, unless it reaches a certain level of severity: see *Brough v Australia*, UN Human Rights Committee Communication No. 1184/03 (2006) [9.5].

68 UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of* Australia, adopted by the committee at its tenth session, CRPD/C/AUS/CO1 (2013) [35]–[36].

health-care context, noting that such restraint may constitute torture and ill-treatment in certain circumstances;[69]

- *the right to health*: which includes the right to be free from non-consensual medical treatment.[70] Australia also has obligations to provide persons with disability with the same range, quality and standard of health care and programmes as provided to other persons;[71]
- *the right to privacy*: which includes the right to personal autonomy and physical and psychological integrity, and extends to protecting a person's bodily integrity against compulsory procedures.[72] Similarly, no person with disability shall be subjected to arbitrary or unlawful interference with their privacy;[73]
- *the right to freedom of movement and liberty*: the right to liberty prohibits States from depriving a person of their liberty except in accordance with the law, and provides that no one shall be subject to arbitrary detention.[74] The existence of a disability shall also, in no case, justify a deprivation of liberty.[75] The right to freedom of movement includes the right to liberty of movement within a country.[76] A restriction on a person's movement may be to such a degree and intensity that it would constitute a 'deprivation' of

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69 UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez*, A/HRC/22/53 (2013) [63]; UN General Assembly, *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak,* A/63/175 (2008) [55].

70 International Covenant on Economic, Social and Cultural Rights, article 12. See UN Committee on Economic, Social and Cultural Rights, *General Comment No.14: The Right to the Highest Attainable Standard of Health* (2000) [8].

71 Convention on the Rights of Persons with Disabilities. See also UN Committee on Economic, Social and Cultural Rights, *General Comment No.14: The Right to the Highest Attainable Standard of Health* (2000), [8]. The rights of persons with disabilities are relevant insofar as some aged care residents may have physical or mental impairments that constitute a disability.

72 International Covenant on Civil and Political Rights, article 17. See *MG v Germany*, UN Human Rights Committee Communication No. 1428/06 (2008) [10.1].

73 Convention on the Rights of Persons with Disabilities, article 22.

74 International Covenant on Civil and Political Rights, article 9. The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability.

75 Convention on the Rights of Persons with Disabilities, article 14.

76 International Covenant on Civil and Political Rights, article 12.

liberty, particularly if an element of coercion is present.[77] These rights may be engaged and limited by intentional restrictions of voluntary movement or behaviour by the use of a device, or removal of mobility aids, or physical force, and limiting a care recipient to a particular environment;

- *the rights of persons with disability*: as set out in the Convention on the Rights of Persons with Disabilities, including the right to equal recognition before the law and to exercise legal capacity;[78] the right of persons with disabilities to physical and mental integrity on an equal basis with others;[79] and the right to freedom from exploitation, violence and abuse;[80] and
- *the right to equality and non-discrimination*: which provides that everyone is entitled to enjoy their rights without discrimination of any kind, including on the basis of age or disability.[81]

1.34 The committee considered that to the extent that the requirements would strengthen the responsibilities of registered providers by enhancing safeguards regarding the use of restrictive practices, the measure may assist in ensuring the above rights are not limited and may promote other rights. In particular, the requirements that restrictive practices only be used as a last resort; after considering all alternative strategies; to the extent necessary and proportionate; and in the least restrictive form and for the shortest time, would likely serve as important safeguards to ensure better protection around the use of restraints in aged care facilities. However, the committee noted that depending on the adequacy of the safeguards in practice and given the complex interplay of state and territory laws and the common law regulating the use of restraints by aged care providers, the practical operation and effect of the requirements could limit the human rights set out above. The committee considered that the safeguard value of the requirements and the extent to which they would provide sufficient protection so as not to limit the human rights of aged care recipients would depend on how they are applied in practice. The committee noted that some questions remained in relation to the development and implementation of behaviour support plans, the use of restraints in an emergency, the requirement of informed

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77 United Nations Human Rights Committee, *General Comment No.27: Article 12 (Freedom of Movement)* (1999) [7]; see also United Nations Human Rights Council, *Report of the Working Group on Arbitrary Detention*, A/HRC/22.44 (2012) [55] and [57]; *Foka v Turkey*, European Court of Human Rights Application No.28940/95, Judgment (2008) [78]; Gill*an and Quinton v United Kingdom*, European Court of Human Rights Application No.4158/05, Judgment (2010) [54]-[57]; *Austin v United Kingdom*, European Court of Human Rights Application Nos. 39692/09, 40713/09 and 41008/09, Grand Chamber (2012) [57]; *Gahramanov v Azerbaijan*, European Court of Human Rights Application No.26291/06, Judgment (2013) [38]-[45].

78 Convention on the Rights of Persons with Disabilities, article 12.

79 Convention on the Rights of Persons with Disabilities, article 17.

80 Convention on the Rights of Persons with Disabilities, article 16.

81 International Covenant on Civil and Political Rights, article 26.

consent, and the monitoring and review of the use of restrictive practices. The committee recommended amendments to the legislative instrument that set out the requirements to assist with its human rights compatibility.[82]

1.35 In relation to the measure in this bill, as much of the operational detail is to be set out in future rules relating to restrictive practices, in the absence of such rules, it is not possible to conclude whether the requirements set out in the bill would serve as sufficient safeguards so as not to ensure that the human rights of individuals accessing aged care are not impermissibly limited. However, it appears likely that the overall effectiveness of the restrictive practice requirements as a safeguard would be undermined by subclauses 18(2) and (3) of the bill.[83] Subclause 18(2) would allow the rules to prescribe persons or bodies who may give informed consent to the use of a restrictive practice on behalf of an individual who lacks capacity to consent. The consent model in the bill reflects the current consent model under the Aged Care Act. During consultation on the exposure draft of this bill, stakeholders 'expressed concern over the current model which allows for a wide range of individuals, including those who are unqualified to consent to a restrictive practice on behalf of an older person, risking the increase of unnecessary restrictive practices and potential human rights violations'.[84] It appears that allowing prescribed persons to consent to restrictive practices may, in practice, increase the risk of human rights violations, arising from both the use of restrictive practices themselves as well as allowing for substitute decision-making (which itself would engage and limit multiple human rights, as

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82 In particular, the committee considered that the compatibility of the measure with human rights may be assisted were the Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 amended to: (a) specify who within the approved provider may make decisions regarding the use of a restrictive practice, and the criteria on which those decisions are to be made; (b) require all emergency uses of restrictive practices to be reported to the Aged Care Quality and Safety Commission Care Commission; (c) set out a model of supported, rather than substituted, decision-making in relation to obtaining informed consent for the use of a restrictive practice; (d) require that the person or body who monitors and reviews the use of a restrictive practice must be independent from the person who used the restrictive practice, or at a minimum, ensure that a more senior practitioner monitor and review the use of the restrictive practice; and (e) require the Department of Health to table a report in Parliament, at least annually, on the use of restrictive practices in relation to care recipients, including the proportion of restrictive practices used in an emergency.

83 Chapter 1, subclauses 18(2) and (3).

84 Department of Health and Aged Care, *A new Aged Care Act: exposure draft, Consultation feedback report* (May 2024) p. 15. See e.g. National organisations working with older people and carers, *Joint submission* (March 2024), p. 26; pp. 105–107; pp. 156–159

discussed in detail below).[85] Subclause 18(3) would allow the rules to provide that the restrictive practice requirements do not apply to the use of a restrictive practice if it is necessary in an emergency. Neither the bill nor the explanatory materials clarify what constitutes an emergency. The explanatory memorandum only states that an emergency may be behaviourally based and that restrictive practices must only be used in line with good clinical practice, to provide high-quality and safe care to individuals.[86] Without sufficient clarity as to the meaning of an 'emergency', there is a risk that it may be interpreted broadly and in such a way as to be incompatible with human rights.

1.36 Further, it is noted that the measure in the bill does not contain key safeguards with respect to restrictive practices that were recommended by the Royal Commission. The Royal Commission recommended that restrictive practices should:

(a) be prohibited unless:

(i) recommended by an independent expert, accredited for the purpose by the Quality Regulator, as part of a behaviour support plan lodged with the Quality Regulator and reviewed quarterly by the expert, with reports on implementation of the behaviour support plan being provided to the Quality Regulator on a monthly basis; or

(ii) when necessary in an emergency to avert the risk of immediate physical harm, with any further use subject to recommendation by an independent expert, and with a report of the restraint to be provided with reference to certain matters (such as using the practice as a last resort to prevent serious harm) as soon as practicable after the restraint starts to be used; and

(b) only be used subject to certain requirements, such as to the extent necessary and proportionate to the risk of harm.[87]

1.37 The bill does not require restrictive practices to be recommended by an independent expert. Rather, it would be a decision of the aged care provider. In addition, the emergency exception recommended by the Royal Commission is much narrower than the equivalent provision in this bill. Notably, the bill does not include the qualifier of averting the risk of immediate physical harm. It is not clear why these

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85 Similar concerns were raised with the committee by Dr John Chesterman, Queensland Public Advocate, who stated that the amendments made by this instrument effectively render the restrictive practices authorisation requirements 'almost meaningless'. He noted the amendments 'will do nothing to drive down restrictive practice usage; they merely make the authorisation of restrictive practices easier'. See Dr John Chesterman, 'Are we regulating or regularising aged care restrictive practices?', *Australian Ageing Agenda*, 14 December 2022.

86 Explanatory memorandum, p. 72.

87 *Final Report – List of Recommendations* (March 2021), Recommendation 17, p. 221.

additional safeguards recommended by the Royal Commission were not included in clause 18 of the bill.

1.38 In conclusion, given that the use of restrictive practices themselves raise serious human rights concerns, noting the clear position under international human rights law that such practices are not consistent with multiple human rights, including the prohibition of torture and ill-treatment, as well as the vulnerability of those affected by the measure, it is essential that there is effective regulation of these practices, with a view to ultimately eliminating their use. In this way, the restrictive practice requirements set out in subclause 18(1) may serve as safeguards to protect the rights of individuals accessing aged care services, particularly if the requirements had the practical effect of minimising the use of restrictive practices in aged care settings. However, ultimately the strength of these safeguards will depend on the rules and how they are applied in practice. Allowing for the requirements to not apply in an emergency and authorising substitute decision-makers to consent to the restrictive practice on behalf of an individual who is considered to lack capacity, would likely weaken the safeguard value of the requirements and may in practice increase the risk of human rights violations.

***Rights of persons with disability to equal recognition before the law***

1.39 By allowing rules to prescribe persons or bodies who may give consent on behalf of a person who is considered to lack capacity to give consent,[88] the measure also engages and limits the rights of persons with disabilities to equal recognition before the law.[89] While not all individuals accessing aged care services are people with disability, those who are assessed to lack capacity are invariably those with cognitive impairment and thus, in effect, the measure exclusively applies to people with disability. The right to equal recognition before the law includes the right to enjoy legal capacity on an equal basis with others in all aspects of life and in all measures that relate to the exercise of legal capacity, there should be appropriate and effective safeguards to prevent abuse.[90] Such safeguards must ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by an independent and impartial body.[91] The UN Committee on the Rights of Persons with Disabilities has confirmed that there can be no derogation from article 12, which describes the content of the general right to equality before the law under the International Covenant on Civil and Political Rights.[92] In other words, 'there are no

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88 Chapter 1, subclause 18(2).

89 Convention on the Rights of Persons with Disabilities, article 12.

90 Convention on the Rights of Persons with Disabilities, article 12.

91 Convention on the Rights of Persons with Disabilities, article 12(4). See also article 17.

92 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [1], [5].

permissible circumstances under international human rights law in which this right may be limited'.[93] The UN Committee on the Rights of Persons with Disabilities has made clear that practices that deny the right of people with disabilities to legal capacity in a discriminatory manner, such as substitute decision-making regimes, are contrary to article 12 and must be 'abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others'.[94]

1.40 The denial of legal capacity to individuals accessing aged care services who are deemed to lack capacity by enabling a substitute decision-maker to consent to the use of a restrictive practice would therefore engage this right.[95] By denying legal capacity in these circumstances, individuals are also deprived of other human rights, including the right to give consent to medical treatment and healthcare, noting that restrictive practices may include chemical and physical restraints, and the right to be protected from all forms of exploitation, violence and abuse.[96]

1.41 The explanatory memorandum states that measure (as set out in subclause 18(2) of the bill) was originally introduced by the *Aged Care and Other Legislation Amendment (Royal Commission Response) Act 2022* to address issues raised regarding the interaction with current state and territory consent and guardianship laws.[97] It states that:

> [S]ubclause 18(2) will allow for the rules to authorise a hierarchy of persons or bodies to consent to the use of restrictive practices where it is not clear that State and Territory laws currently provide for this authorisation. It is

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93 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [5].

94 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [7]. For a discussion of the academic debate regarding the interpretation and application of article 12, particularly in relation to substitute decision-making, see, eg, Bernadette McSherry and Lisa Waddington, 'Treat with care: the right to informed consent for medical treatment of persons with mental impairments in Australia', *Australian Journal of Human Rights*, vol. 23, issue no. 1, pp. 109–129.

95 The Committee on the Rights of Persons with Disabilities has made clear that practices that deny the right of people with disabilities to legal capacity in a discriminatory manner, such as substitute decision-making regimes, must be 'abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others': *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [7].

96 Convention on the Rights of Persons with Disabilities, articles 16 and 25(d). With respect to persons with disability, the UN Committee on the Rights of Persons with Disabilities has held that 'forced treatment by psychiatric and other health and medical professionals is a violation of the right to equal recognition before the law and infringement of the rights to personal integrity (art. 17); freedom from torture (art. 15); and freedom from violence, exploitation and abuse (art. 16). This practice denies the legal capacity of a person to choose medical treatment and is therefore a violation of article 12 of the Convention': *General comment No. 1 – Article 12: Equal recognition before the law (2014)* [42].

97 Explanatory memorandum, p. 72.

> intended that this interim solution will apply until all State and Territory governments address the current legislative issues. This will ensure that appropriate individuals are able to be authorised to consent to the use of restrictive practices nationally.[98]

1.42 The explanatory memorandum notes that without a clear legal mechanism for providers to approach a person to obtain consent to the use of a restrictive practice where the individual receiving aged care services does not have capacity to consent, there is a heightened risk that restrictive practices will be used without consent and that providers may refuse to use restrictive practices and refuse to take individuals with complex needs into their care.[99] The statement of compatibility similarly states that clarifying consent arrangements would reduce the risk that restrictive practices will be used arbitrarily and inappropriately.[100]

1.43 The committee commented on this measure when it was introduced by the *Aged Care and Other Legislation Amendment (Royal Commission Response) Act 2022*,[101] and subsequently commented on the legislative instrument that specified a hierarchy of persons who can give consent on behalf of persons in aged care to the use of restrictive practices, if the care recipient is assessed to lack capacity to give consent.[102] The committee considered that while the measure did not itself provide legislative authority for the use of restrictive practices, it arguably facilitated the use of restrictive practices by allowing a substitute decision-maker to consent to their use, irrespective of the will and preferences of the individual to whom the practices would apply.[103] This raised serious human rights concerns, noting Australia's obligation to

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98 Explanatory memorandum, p. 72.

99 Explanatory memorandum, p. 72.

100 Statement of compatibility, pp. 16–17 and 23.

101 The committee commented that the Aged Care and Other Legislation Amendment (Royal Commission Response) Bill 2022 was substantially the same as the Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) 2021 which the committee previously considered. As such, the committee reiterates its previous comments as set out in these reports. See Parliamentary Joint Committee on Human Rights, *Report 11 of 2021* (16 September 2021) pp. 2–6; *Report 14 of 2021* (24 November 2021) pp. 2–8 and *Report 1 of 2022* (9 February 2022) pp. 23–39.

102 Parliamentary Joint Committee on Human Rights, Quality of Care Amendment (Restrictive Practices) Principles 2022, *Report 3 of 2023* (15 March 2023), pp. 3–23.

103 See further, Dr John Chesterman, 'Are we regulating or regularising aged care restrictive practices?', *Australian Ageing Agenda*, 14 December 2022.

minimise, and ultimately eliminate, the use of restrictive practices.[104] The committee concluded that the measure appeared to be contrary to the requirements in article 12 of the Convention on the Rights of Persons with Disabilities as it was unclear how it would be determined that a person lacks capacity to consent to a restrictive practice and there was no legislative requirement that the individual be supported or assisted to make their own decisions.

1.44 With respect to this bill, it is similarly unclear how an individual's capacity is to be assessed. Neither the bill nor the explanatory materials provide any guidance in this regard. The UN Committee on the Rights of Persons with Disabilities has made clear that 'perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity'.[105] Thus if a person's cognitive impairment was used as justification for denying legal capacity, such an approach would risk being incompatible with article 12. The bill also does not require that the individual be supported or assisted to consent to the use of a restrictive practice. The UN Committee on the Rights of Persons with Disabilities has emphasised that substitute decision-making should be replaced by supported decision-making.[106] In light of these matters, the measure in subclause 18(2) of the bill does not appear to be compatible with the rights of persons with disability to equal recognition of the law.

***Rights of persons with disabilities to equality and non-discrimination, access to justice and effective remedy***

1.45 The measure differentially treats individuals on the basis of disability by only granting immunity from liability to aged care providers and their staff for the use of a

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104 UN Committee on the Rights of Persons with Disabilities, *Guidelines on the right to liberty and security of persons with disabilities*, A/72/55 (2017) [12]. The Committee called on States parties to 'to protect the security and personal integrity of persons with disabilities who are deprived of their liberty, including by eliminating the use of forced treatment, seclusion and various methods of restraint in medical facilities, including physical, chemical and mechanical restraints. The Committee has found that those practices are not consistent with the prohibition of torture and other cruel, inhuman or degrading treatment or punishment of persons with disabilities, pursuant to article 15 of the Convention'.

105 Committee on the Rights of Persons with Disabilities, General comment No. 1 – Article 12: Equal recognition before the law (2014) [13]. At [15] the Committee criticised the common approaches taken by States parties to assess capacity and deny legal capacity accordingly, including on 'on the basis of the diagnosis of an impairment (status approach), or where a person makes a decision that is considered to have negative consequences (outcome approach), or where a person's decision-making skills are considered to be deficient (functional approach)…In all of those approaches, a person's disability and/or decision-making skills are taken as legitimate grounds for denying his or her legal capacity and lowering his or her status as a person before the law. Article 12 does not permit such discriminatory denial of legal capacity, but, rather, requires that support be provided in the exercise of legal capacity'.

106 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [15]–[16], [21]. The features of a supported decision-making regime are detailed in paragraph [29].

restrictive practice on a person who is deemed to lack capacity to consent (where consent is provided by a substitute decision-maker), whereas those individuals who are deemed to have capacity to consent are afforded greater protection under the law.[107] In this way, the measure limits the right to both equality *before* the law and equality *under* the law as well as the general right to equality and non-discrimination.[108] This differential treatment limits the rights of persons with disabilities to be treated equally and the right to effective access to justice for persons with disabilities on an equal basis with others.[109] Furthermore, by denying individuals who are deemed to lack capacity the ability to pursue a remedy for any violation of their human rights arising from the use of restrictive practices, the measure has implications on the right to an effective remedy (the content of which is outlined above).

1.46 While the right to equal recognition before the law is absolute, the rights to equality and non-discrimination and access to justice may be subject to permissible limitations. Under international human rights law, differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if it is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.[110] However, as the right to legal capacity and equal recognition before the law is a 'threshold right', were the measure to violate article 12, it is likely that it will impermissibly limit associated rights. In this regard, the UN Committee on the Rights of Persons with Disabilities has stated:

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107 Chapter 3, clause 163.

108 Convention on the Rights of Persons with Disabilities, article 5(1); International Covenant on Civil and Political Rights, articles 2 and 26. See Committee on the Rights of Persons with Disabilities, *General comment No. 6 (2018) on equality and non-discrimination* (2018) at [14] where the Committee explained: '"Equality under the law" is unique to the Convention. It refers to the possibility to engage in legal relationships. While equality before the law refers to the right to be protected by the law, equality under the law refers to the right to use the law for personal benefit. Persons with disabilities have the right to be effectively protected and to positively engage…Thus, the recognition that all persons with disabilities are equal under the law means that there should be no laws that allow for specific denial, restriction or limitation of the rights of persons with disabilities, and that disability should be mainstreamed in all legislation and policies'.

109 Convention on the Rights of Persons with Disabilities, articles 5(2), 12 and 13.

110 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]. It is noted that while the Convention on the Rights of Persons with Disabilities contains no general limitation provision, the general limitation test under international human rights law is applicable, noting that many rights in the Convention on the Rights of Persons with Disabilities are drawn from the International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights.

> The right to legal capacity is a threshold right, that is, it is required for the enjoyment of almost all other rights in the Convention, including the right to equality and non-discrimination. Articles 5 and 12 are fundamentally connected, because equality before the law must include the enjoyment of legal capacity by all persons with disabilities on an equal basis with others. Discrimination through denial of legal capacity may be present in different ways, including status-based, functional and outcome-based systems. Denial of decision-making on the basis of disability through any of these systems is discriminatory.[111]

1.47 The explanatory memorandum states that the immunity clause in this bill replicates the immunity provision that was introduced by the *Aged Care and Other Legislation Amendment (Royal Commission Response) Act 2022*. It states that the immunity clause is intended to ensure that relevant individuals are not liable for using restrictive practices based on the consent of a substitute decision-maker. It notes that currently, where providers rely on the consent of a substitute decision-maker who is authorised to give that consent under Commonwealth law, they may not have the requisite authority under the relevant state or territory law. The measure is therefore intended to ensure that providers are not liable to any civil or criminal action in circumstances where they have adhered to the requirements for the use of restrictive practices in clause 18 of the bill (including using a practice with the consent of a substitute decision-maker).[112] The explanatory memorandum and the statement of compatibility state that the measure is not intended to provide a broad immunity to negligence; it would only apply where the practice is used in reliance of a substitute decision-maker and in accordance with requirements prescribed by the rules.[113]

1.48 The committee considered equivalent immunity provisions in 2022, including when it was first introduced by the *Aged Care and Other Legislation Amendment (Royal Commission Response) Act 2022* as an amendment to the Aged Care Act, and concluded that the provisions did not appear to be compatible with the above listed rights.[114] As the immunity clause in this bill is equivalent to the current immunity provision in the Aged Care Act, these same concerns apply. In particular, while addressing gaps in Commonwealth and state and territory legislation and ensuring consistency in consent arrangements would appear to be an important aim, it is not clear that the measure addresses a pressing and substantial concern as required to constitute a legitimate objective for the purposes of international human rights law. It

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111 Committee on the Rights of Persons with Disabilities, *General comment No. 6 (2018) on equality and non-discrimination* (2018) [47].

112 Explanatory memorandum, p. 179.

113 Explanatory memorandum, p. 180; statement of compatibility, p. 35.

114 Parliamentary Joint Committee on Human Rights, Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2022, *Report 1 of 2022* (9 February 2022) pp. 23–39; The immunity provision was considered again in *Quality of Care Amendment (Restrictive Practices) Principles 2022, Report 3 of 2023* (15 March 2023) pp. 3–23.

has also not been established why it is necessary to provide a blanket immunity. As to proportionality, the explanatory materials emphasise that the immunity will not apply where the restrictive practice is used in accordance with the consent that has been provided and with the requirements set out in the rules. However, as the consent is that of a substitute decision-maker, not that of the individual whose rights may be affected (which, in itself, is incompatible with human rights), this does not appear to be an adequate safeguard. If the terms of consent were broad and contrary to the will and preferences of the care recipient, then it may not have safeguard value in practice. As noted above, the restrictive practice requirements may assist to ensure that rights are not limited but the safeguard value of these requirements will ultimately depend on the rules. In the absence of adequate safeguards, the measure does not appear to be compatible with the rights of persons with disabilities to be treated equally or with the requirement that there should be effective access to justice for persons with disabilities on an equal basis with others. By granting immunity from *any* civil and criminal liability, individuals who are denied legal capacity do not appear to have access to an effective remedy for any violation of their rights arising from the use of a restrictive practice against them. The measure therefore does not appear to be compatible with the right to an effective remedy.

## Committee view

1.49 The committee notes that the use of restrictive practices on persons in aged care raises significant human rights issues, as previously considered by the committee on numerous occasions, particularly in its 2019 inquiry into restrictive practices legislation.[115] The committee notes that the measures in this bill relating to restrictive practices reflect current legislation and thus the committee's previous comments on equivalent measures are relevant.

1.50 The committee notes that the bill would allow rules to be made regarding the use of restrictive practices. The committee notes that the bill would require these rules to include certain requirements, such as that a restrictive practice only be used as a last resort to prevent harm; to the extent necessary and in proportion to the risk of harm; and with the informed consent of the individual or another person or body (a substitute decision-maker) if the individual lacks capacity to give that consent. The committee notes that if consent was given by a substitute decision-maker, the bill would grant the aged care provider and staff member who used the restrictive practice

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115 See Parliamentary Joint Committee on Human Rights, *Quality of Care Amendment (Restrictive Practices) Principles 2022* *Report 3 of 2023* (15 March 2023), pp. 3– 23; *Report 1 of 2023* (8 February 2023) pp. 53 –61; *Report 1 of 2022* (9 February 2022) pp. 23– 39; *Report 14 of 2021* (24 November 2021) pp. 2– 8; *Report 11 of 2021* (16 September 2021) pp. 2– 6; *Report 10 of 2021* (25 August 2021) pp. 63– 90; *Report 7 of 2021* (16 June 2021) pp. 2– 10; *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019* (13 November 2019). With respect to restrictive practices in the context of the NDIS, see *Reports 7 of 2018* (14 August 2018); *Report 9 of 2018* (11 September 2018); and *Report 13 of 2018* (4 December 2018).

immunity from any civil or criminal liability in relation to the use of the restrictive practice.

1.51 The committee notes that setting out requirements relating to when restrictive practices can be used by aged care providers engages multiple human rights. To the extent that the requirements would strengthen the responsibilities of providers by enhancing safeguards around the use of restrictive practices, the measure may assist to ensure that rights are not limited. However, the committee notes that as the restrictive practice requirements are to be set out in future rules, it is difficult to properly assess their safeguard value. The committee notes, however, that as is the case currently, allowing for the requirements to not apply in an emergency and authorising substitute decision-makers to consent to the restrictive practice on behalf of an individual who is considered to lack capacity, would likely weaken the safeguard value of the requirements and may in practice increase the risk of human rights violations.

1.52 The committee considers that allowing substitute decision-makers to consent to the use of restrictive practices and granting complete immunity to persons who use restrictive practices in reliance of the consent of substitute decision-makers risks being incompatible with a range of human rights, particularly the rights of persons with disability, noting that it is not clear how a person's capacity will be assessed; there is no requirement to provide for supported, rather than substitute, decision-making; and there is no effective remedy available for persons who are considered to lack capacity for any violation of their rights arising from the use of a restrictive practice. The committee also notes that depending on which persons or bodies are prescribed in the rules to give consent, there may be a risk that allowing a broad range of people who may not have the necessary expertise or qualifications with respect to restrictive practices could have the effect of facilitating the use of restrictive practices, which is inconsistent with Australia's obligation to minimise, and ultimately eliminate, the use of restrictive practices.

1.53 The committee notes that Australia has obligations under the Optional Protocol on the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), and notes the importance of facilitating the oversight of National Preventative Mechanisms, including in facilities providing aged care services.

**Suggested action**

1.54 The committee considers that in drafting the rules relating to restrictive practices, regard should be had to the committee's previous comments and recommendations on equivalent legislation.[116]

1.55 The committee considers the proportionality of this measure may be assisted were the bill amended to incorporate the additional safeguards recommended by the Royal Commission into Aged Care Quality and Safety, including that restrictive practices be prohibited unless recommended by an accredited independent expert or when necessary in an emergency to avert the risk of immediate physical harm, with any further use subject to recommendation by an independent expert.

1.56 The committee recommends that the statement of compatibility be updated to provide a more fulsome assessment of the rights identified above, having regard to the committee's previous comments.

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

## Supporters and guardians

1.58 The bill would allow a person to be registered as a supporter of an individual accessing, or seeking to access, aged are services.[117] A person (including the individual who would be supported), a body or the System Governor (that is, the secretary of the department) would be permitted to initiate an application for registration of a supporter.[118] The System Governor would be permitted to initiate registration of a supporter if they consider that they will make a determination giving that person decision-making authority (pursuant to clause 43 of the bill). The System Governor must register a person who is a guardian or other similar position if they request to be registered as a supporter and the System Governor is satisfied of the matters listed in subclause 37(6). These matters include that:

- the person can comply with the required duties (set out in clause 30); and
- the person who would be a supporter has consented to the registration and the individual who would be supported has consented to the registration of

116 See most recently Parliamentary Joint Committee on Human Rights, *Report 3 of 2023 – Quality of Care Amendment (Restrictive Practices) Principles 2022* (15 March 2023). See also Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021 and Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021, *Report 10 of 2021* (25 August 2021) pp. 63– 90.

117 Chapter 1, clause 37.

118 Chapter 1, subclause 37(2).

the person, unless the proposed supporter is a guardian or other similar person or the registration application was initiated by the System Governor (in which case the consent of individual who would be supported is not required); and

- any other matters prescribed by the rules.[119]

1.59 Clause 43 of the bill would allow the System Governor to make a determination that a supporter has decision-making authority in relation to the individual if they are satisfied that exceptional circumstances exist that justify the making of the determination. The consent of the individual who is being supported would not be required. The legislative note accompanying the clause states that exceptional circumstances may exist if there is an emergency in relation to the individual and there is no guardian or other similar person who is authorised to do a thing or make a decision on behalf of the individual or, if there is such a person, they are unavailable.[120] In order to make the determination, the System Governor must be satisfied that the supporter is able to comply with required duties; the supporter consents to the determination; and the System Governor has taken into consideration any other matters prescribed by the rules.[121] The determination would remain in effect until the earliest of specified events occurs, such as the individual or the decision-making supporter dies; the supporter's registration is cancelled; or a day that is six months after the day the determination is made or a longer period of time if the System Governor and supporter agree.[122]

1.60 Where a supporter is registered without the consent of the individual who would be supported or where a supporter is granted decision-making authority, the individual and the supporter must be notified of the registration. The notice must include information about how the individual can apply for reconsideration of the decision.[123] The decisions to register a person as a supporter of an individual and determine that a supporter has decision-making authority would be reviewable decisions.[124]

1.61 The effect of a determination made under clause 43 would be that the decision-making supporter would be authorised to do anything that may or must be done by the individual who they are supporting, including making decisions on behalf of the individual.[125] The bill also confirms that a person who is a guardian or otherwise has power under the law to make decisions for the individual would also be authorised to

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119 Chapter 1, subclause 37(6).

120 Chapter 1, subclause 43(1).

121 Chapter 1, subclause 43(5).

122 Chapter 1, clause 48. The events are specified in subclause 48(2).

123 Chapter 1, clauses 39, 40, 46 and 47.

124 Chapter 8, clause 557.

125 Chapter 1, subclauses 27(2) and (4).

do any thing that may or must be done on behalf of the individual for the purposes of the bill.[126] A decision-making supporter would not, however, be authorised to give consent in relation to a restrictive practice.[127] As outlined above, the consent arrangements for restrictive practices would be set out in the rules. Anything done by a decision-making supporter would have the effect for the purposes of this bill as having been done by the individual themselves. Thus, if the individual is required to do a thing under the bill and the decision-making supporter fails to do that thing, then the individual would be taken to have failed to comply with the requirement.[128] However, the individual would not commit an offence or be liable to a civil penalty under this bill in relation to any act or omission of a supporter, where the act or omission is done in their capacity as a supporter.[129]

1.62 The bill would require that any information or document that is required or authorised to be given to an individual must also be given to the decision-making supporter or a person who is a guardian or otherwise has the power to make decisions on the individual's behalf.[130] The information or document may only be used for purposes of the bill and in a manner that is consistent with the supporter's obligations and duties.[131]

1.63 Supporters would have duties that they must comply with, including acting in a manner that promotes the will, preferences and personal, cultural and social wellbeing of the individual; acting honestly, diligently and in good faith; and supporting the individual only to the extent necessary for the individual to do the thing.[132] Decision-making supporters would have additional duties, including that they must apply their best endeavours to maintain the ability of the individual to make their own decisions; and refrain from making decisions on behalf of the individual unless they are satisfied that it is not possible for the individual to do, or be supported to do, the thing, or it is possible for the individual to do the thing but they do not want to do the thing themselves.[133] If a substitute decision is being made (of a thing being done), the decision-making supporter must act in a manner that promotes the wellbeing of the individual; act honestly, diligently and in good faith; take reasonable steps to consult with other relevant people; ascertain the will and preferences of the individual (or the likely will and preferences); and act in accordance with those will and preferences.[134] However, the decision-making supporter would be permitted to act in way that is *not*

126 Chapter 1, clause 28.

127 Chapter 1, subclause 27(3).

128 Chapter 1, subclauses 27(5) and (6).

129 Chapter 1, clause 34.

130 Chapter 1 clause 29.

131 Chapter 1, subclause 39(3).

132 Chapter 1, clause 30. Subclause 30(2) sets out the general duties of supporters.

133 Chapter 1, subclause 30(3).

134 Chapter 1. subclause 30(4).

in accordance with the individual's will and preferences if it is necessary to prevent serious risk to the individual's personal, cultural or social wellbeing.[135] If a decision-making supporter does not comply with these duties, the System Governor may suspend and then cancel their registration as a supporter.[136] A supporter's registration may also be suspended and cancelled in other circumstances, including if the supporter causes or is likely to cause various forms of abuse or neglect to the individual or the supporter uses information other than for the purposes of the bill.[137]

1.64 A supporter would commit an offence if they exercise any influence, engage in any conduct or use any information in their capacity as a supporter and do so with the intention of dishonestly obtaining a benefit or dishonestly causing a detriment to another person.[138] However, a supporter would not commit an offence or be liable to a civil penalty under the bill in relation to any act or omission of the individual; or anything done, in good faith, in their capacity as a supporter.[139]

## International human rights legal advice

### *Rights of persons with disability to equal recognition before the law*

1.65 As outlined above, substitute decision-making regimes are generally not compatible with the right of persons with disabilities to equal recognition before the law, which includes the right to enjoy legal capacity on an equal basis with others in all aspects of life.[140] Indeed the UN Committee on the Rights of Persons with Disabilities has made clear that practices that deny the right of people with disabilities to legal capacity in a discriminatory manner, such as substitute decision-making regimes, are contrary to article 12 and must be 'abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others'.[141] Thus the key questions are whether the measure would have the effect of denying an individual's legal capacity on the basis of their disability and whether the measure, in

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135 Chapter 1, subclause 30(5).

136 Chapter 1, clauses 49–54.

137 Chapter 1, clause 49.

138 Chapter 1, clause 36. The penalty is 60 penalty units. The offence would also apply to former supporters in relation to using information dishonestly. See subclause 36(3).

139 Chapter 1, clause 35. This immunity provision is likely to be considered in detail by the Senate Standing Committee for the Scrutiny of Bills in its consideration of this bill and as such will not be dealt with in detail in this entry.

140 Convention on the Rights of Persons with Disabilities, article 12.

141 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [7]. For a discussion of the academic debate regarding the interpretation and application of article 12, particularly in relation to substitute decision-making, see, eg, Bernadette McSherry and Lisa Waddington, 'Treat with care: the right to informed consent for medical treatment of persons with mental impairments in Australia', *Australian Journal of Human Rights*, vol. 23, issue no. 1, pp. 109–129.

authorising decision-making supporters to act and make decisions on behalf of an individual, is a form of substitute decision-making.

1.66 The bill would authorise a decision-making supporter to make decisions on behalf of an individual in 'exceptional circumstances'.[142] The bill does not define what constitutes exceptional circumstances but includes a legislative note that sets out an example of when exceptional circumstances may exist – namely, if there is an emergency and a person does not have a legal guardian or equivalent person authorised under law to make decisions on their behalf, or if there is such a person, they are unavailable. An individual's capacity (or lack therefore) is not expressly stated as a ground for making a determination that a supporter has decision-making authority. Thus, on the face of the legislation, an individual's disability (including as a result of a cognitive or sensory impairment) is not a ground for denying them legal capacity. However, the explanatory memorandum states that a supporter may be given decision-making authority where an individual may not be able to make decisions or do things that are required, for example, to access aged care services.[143] While it is not clear how it is assessed that an individual is unable to make decisions or do things themselves, there appears to be a risk that such an assessment would be based on a person's decision-making capacity. As most people who are assessed to lack capacity are invariably those with cognitive impairment, the measure would almost exclusively apply to people with disability, and thus may have the practical effect of denying people legal capacity on the basis of disability.[144] If this were the case, the measure risks being incompatible with article 12 of the Convention on the Rights of Persons with Disabilities.[145] In this regard, the UN Committee on the Rights of Persons with Disabilities has criticised the common approaches taken by States parties to assess capacity and deny legal capacity accordingly, including:

> …on the basis of the diagnosis of an impairment (status approach), or where a person makes a decision that is considered to have negative consequences (outcome approach), or where a person's decision-making skills are considered to be deficient (functional approach)…In all of those approaches, a person's disability and/or decision-making skills are taken as legitimate grounds for denying his or her legal capacity and lowering his or her status

142 Chapter 1, subclause 49(1).

143 Explanatory memorandum, p. 96.

144 In this way the measure would also engage and limit the right to equality and non-discrimination. As discussed above, if the measure were to be incompatible with the right to equal recognition before the law, as this is a threshold right, it would also likely be incompatible with other associated rights such as the right to equality and non-discrimination. The UN Committee on the Rights of Persons with Disabilities has also emphasised that the denial of legal capacity to persons with disabilities often leads to the deprivation of other fundamental human rights. See Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [8].

145 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [13].

> as a person before the law. Article 12 does not permit such discriminatory denial of legal capacity, but, rather, requires that support be provided in the exercise of legal capacity.[146]

1.67 The UN Committee on the Rights of Persons with Disabilities has stated that substitute decision-making should be replaced by supported decision-making, whereby individuals are supported to exercise their legal capacity.[147] Supports may include peer support, advocacy, assistance with communication or advance planning, whereby a person can state their will and preferences in advance should they be unable to do so at a later point in time. The Committee on the Rights of Persons with Disabilities has noted that 'where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the "best interpretation of will and preferences" must replace the "best interests" determinations'.[148] States are also required to create appropriate and effective safeguards for the exercise of legal capacity to protect persons with disabilities from abuse.[149] Such safeguards must ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person; are free of conflict of interest and undue influence; are proportional and tailored to the person's circumstances; apply for the shortest time possible; and are subject to regular review by an independent and impartial body.[150]

1.68 The measure contains several elements of supported decision-making and some important safeguards to protect individuals from abuse, including:

- requiring decision-making supporters to comply with duties such as endeavouring to maintain the ability of the individual to make their own decisions and refraining from making a substitute decision unless the individual cannot be supported to make the decision or does not want to, and making reasonable efforts to ascertain the will and preferences (or likely will and preferences) of the individual and act in accordance with the will and preferences;

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146 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [15].

147 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [15]–[16], [21]. The features of a supported decision-making regime are detailed in paragraph [29].

148 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [21].

149 Convention on the Rights of Persons with Disabilities, article 12; Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [20]; Convention on the Rights of Persons with Disabilities, article 12(4).

150 Convention on the Rights of Persons with Disabilities, article 12(4). See also article 17.

- suspending and cancelling a decision-making supporter's registration for non-compliance with the above duties or because the supporter causes or is likely to cause various forms of abuse or neglect to the individual;
- the potential to impose a time limit on a decision-making determination;
- requiring an individual to be notified of how to apply for review of decision to register a supporter or determine that they have decision-making authority;
- making it an offence for a supporter to do various things with the intention of dishonestly obtaining a benefit or causing detriment;
- granting immunity to the individual for any act or omission done by a supporter; and
- requiring supporters to inform the System Governor of events or circumstances that may affect their ability or capacity to act as a supporter.

1.69 The measure contains key features of a supported decision-making regime, particularly the requirement that decision-making supporters support the individual to make decisions and supporters make decisions on the basis of the individual's will and preferences.[151] However, the effectiveness of these requirements will depend on how much training and guidance is provided to supporters so as to ensure that they can support the individual to exercise legal capacity in a way that respects their rights, will and preferences and does not amount to substitute decision-making.[152]

1.70 Additionally, there are still some circumstances where a decision-making supporter can act in a way that is *not* in accordance with an individual's will and preferences, namely if it is necessary to prevent serious risk to the individual's personal, cultural, or social wellbeing. The bill does not provide any guidance as to what would constitute a serious risk or what is meant by an individual's personal, cultural or social wellbeing. The explanatory memorandum states that when this is necessary will depend on the individual's unique circumstances.[153] For example, if an individual wanted to end their life in another country due to cultural beliefs, it would not be appropriate for a decision-making supporter to override that preference because they do not have that same cultural background. The explanatory memorandum notes that the decision-making supporter should consult carefully with other people, such as family or carers, to understand the will and preferences of the

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151 The Committee on the Rights of Persons with Disabilities has identified the key features of supported decision-making regimes. See, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [29].

152 See Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [17] and [18].

153 Explanatory memorandum, p. 91.

individual.[154] However, it does not provide sufficient clarity as how the exception to acting in accordance with an individual's will and preferences is likely to be applied in practice or what is meant by an individual's personal, cultural or social wellbeing. Given the ordinary meaning of these terms, there appears to be a risk that the exception may be interpreted broadly in practice, and may therefore undermine the effectiveness of the safeguard to act in accordance with an individual's will and preferences. If, in practice, this exception resulted in a decision-making supporter making a decision based on the best interests of the individual as opposed to the individual's will and preferences, the measure may be considered to be a substitute decision-making regime under international human rights law.[155]

1.71 In conclusion, while it is not clear on the face of the legislation the ground on which a person's capacity would be denied and a substitute decision-maker consequently appointed, there appears to be a risk that the measure would invariably apply to people with disability. If the measure had the practical effect of denying people legal capacity on the basis of disability, it risks being incompatible with the right to equal recognition before the law. The measure contains several key elements of a supported decision-making regime and important safeguards to protect individuals against abuse. However, by allowing decision-making supporters to not act in accordance with an individual's will and preferences in certain circumstances, there is a risk that the measure could still constitute a form of substitute decision-making under international human rights law.

## Committee view

1.72 The committee notes that the bill establishes a supporter framework by which a person may be registered as a supporter of an individual and that supporter may be given decision-making authority to act and make decisions on behalf of the individual in exceptional circumstances. The committee notes that while it is not clear on the face of the legislation the ground on which a person's capacity would be denied and a supporter would consequently be granted decision-making authority, there appears to be a risk that the measure would invariably apply to people with disability. Having regard to the clear position under international human rights law that a person's disability must never be grounds for denying legal capacity, the committee considers

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154 Explanatory memorandum, p. 91.

155 See Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [27]. The Committee characterised substitute decision-making regimes as 'systems where (i) legal capacity is removed from a person, even if this is in respect of a single decision; (ii) a substitute decision-maker can be appointed by someone other than the person concerned, and this can be done against his or her will; and (iii) any decision made by a substitute decision-maker is based on what is believed to be in the objective "best interests" of the person concerned, as opposed to being based on the person's own will and preferences'.

there to be a risk that this aspect of the measure may be incompatible with the right to equal recognition before the law.

1.73 The committee further notes that Australia has an obligation to replace substitute decision-making with supported decision-making. The committee considers that the measure contains several key elements of supported decision-making, including requiring decision-making supporters to support the individual to make decisions and generally act in accordance with the individual's will and preferences (although noting that there is an exception to this duty). The measure also contains important safeguards to protect individuals against abuse, such as making it an offence for supporters to do various things with the intention of dishonestly obtaining a benefit or causing detriment. The committee considers, however, that the effectiveness of the duties imposed on supporters and the other safeguards accompanying the measure will depend on how the measure operates in practice. For instance, whether supporters are provided with sufficient training and guidance so as to ensure that they can support the individual to exercise legal capacity in a way that respects their rights, will and preferences and does not amount to substitute decision-making.

**Suggested action**

1.74 The committee considers the human rights compatibility of this measure may be assisted were the bill to be amended to clarify:

(a) what constitutes exceptional circumstances for the purposes of making a determination that a supporter has decision-making authority; and

(b) what is meant by an 'individual's personal, cultural or social wellbeing' in the context of a decision-making supporter acting in a way that is not in accordance with the individual's will and preferences if necessary to prevent serious risk to one of those things.

1.75 The committee recommends that consideration be given to ensuring the provision of training and guidance to supporters in order that they can support the individual to exercise legal capacity in a way that respects their rights, will and preferences and does not amount to substitute decision-making.

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

## Publication of banning orders

1.77 The bill would empower the Commissioner to make a banning order, prohibiting or restricting an entity (which includes an individual) from delivering

funded aged care services generally or in a relation to a specified type of service.[156] The Commissioner would also be empowered to make a banning order prohibiting or restricting an individual from being involved in the delivery of such services.[157] The operator of an aged care digital platform (representing that the entity can deliver a service in the Commonwealth aged care system) would be required to check and display on the platform whether a banning order against the entity has been or is in force.[158]

1.78 The bill would also require the Commissioner to establish and maintain both a register of banning orders,[159] and a provider register (which must include details about any associated banning orders).[160] A register of banning orders would be required to include a range of information, including: the name of the entity; business location (if any); the details of the banning order (including any conditions); if an application has been made for revocation, reconsideration, or external review, which has not been finally determined – a statement to this effect; and any other information prescribed by legislative instrument. These requirements would apply even if a banning order was no longer in force (unless it had been revoked or the decision to make an order had been set aside).[161] The Commissioner would be required to keep the register up to date, and maintain the register in any form they consider appropriate.[162] The bill provides that rules may be made to provide for the correction of information on the register, and the publication of the register in whole or in part, or of specified information entered on the register.[163]

1.79 A provider register would be required to include a range of information about registered aged care providers, including: if a banning order is in force against the provider, information about the banning order; and the name of any worker or responsible person of a provider against whom a banning order is in force (or was in force), and information about the banning order.[164] The Commissioner may publish the register, in whole or part, on the Commissioner's website, or publish any of the information entered on the register.[165] The bill provides that rules may be made to

156 Chapter 6, clause 497. The term 'entity' is defined in Chapter 1, clause 7.

157 Chapter 6, clause 498.

158 Chapter 3, clause 188.

159 Chapter 6, clause 507.

160 Chapter 3, clause 141.

161 Chapter 6, subclause 507(2).

162 Chapter 6, subclause 507(3)–(4).

163 Chapter 6, subclause 507(5)–(6).

164 Chapter 3, subclause 141(1)–(6).

165 Chapter 3, subclause 141(7).

provide for the correction of information on the register and the publication of the register in whole or in part, or of specified information entered on the register.[166]

## International human rights legal advice

### *Right to privacy*

1.80 Insofar as a register which includes information about banning orders may help to ensure that unsuitable people who may present a risk to aged care recipients are not engaged in the provision of their care, this measure appears to promote the rights to health and, as many people in aged care live with disability, the rights of people with disability.

1.81 However, by providing that the register of banning orders may be made public, including the names and other identifying information in relation to the individuals subject to those orders, the measure also engages and limits the right to privacy. The right to privacy protects against arbitrary and unlawful interferences with an individual's privacy and attacks on reputation.[167] It 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 also includes the right to control the dissemination of information about one's private life.

1.82 The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective, be rationally connected to that objective and proportionate to achieving that objective.

1.83 The statement of compatibility briefly identifies that this engages and limits the right to privacy.[168] It states, generally, that the objective of the measures in the bill is to promote the rights of aged care recipients, and to protect them from exploitation and abuse.[169] Protecting the safety of vulnerable aged care recipients is a legitimate objective for the purposes of international human rights law. Making information about banned individuals accessible to the public, including future employers, is likely to be effective to achieve that objective.

1.84 The key question is whether the measure is proportionate. In assessing the proportionality of the measure, relevant considerations include whether the limitation is only as extensive as is strictly necessary; whether there are other less rights restrictive means to achieve the objective; and whether there are appropriate safeguards accompanying the measure.

1.85 The scope of personal information published on the register is relevant in considering whether the limitation on the right to privacy is only as extensive as is

166 Chapter 3, subclause 141(8).

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

168 Statement of compatibility, p. 18.

169 Statement of compatibility, p. 14.

strictly necessary. The statement of compatibility does not assess the scope of information that may be included on the provider register. In relation to the banning order register, it states that the bill specifies the details of additional information which should be included in relation to each individual against whom a banning order has been made at any time, when it should be included, and how the information included in the register can be accessed and corrected.[170] It states that by specifying the types of information that will be included in the register and explicitly requiring the Commissioner to keep the register up to date, the limitations on the right to privacy are only so far as are legitimate and necessary for the purposes of ensuring the safety and wellbeing of individuals accessing funded aged care services. While the scope of information required to be included by the bill is clear, legislative instruments may be made in relation to both registers which may require the inclusion of additional information.[171] As such, the scope of information published on the register could be expanded to be much broader in practice. In this regard, the explanatory memorandum states that:

> It is intended that the rules may specify additional information to be included on the [banning order] register, for example where additional information is necessary to identify who has a common name. The purpose is to ensure that individuals accessing, or seeking to access funded aged care services and their representatives have sufficient information to identify the individual against whom the banning order has been made.[172]

1.86 The explanatory memorandum provides no detail as to what this could require, however having regard to comparable prior measures, it appears that this could include additional identifying information such as a person's date of birth or town of residence.[173] As such, it appears likely that rules made pursuant to these measures would broaden the scope of personal information which may be included on a register, and this would exacerbate the interference with a person's privacy.

1.87 In considering whether the limitation on the right to privacy is no more than is strictly necessary, it is not clear if either register needs to be published on the Commissioner's website (and therefore be accessible to the general public) in order to achieve the stated objective of protecting aged care recipients. The bill provides that rules may be made to provide for the publication of the banning order register in whole or in part, or of specified information entered on the register,[174] and states that the Commissioner may publish the provider register, in whole or part, on their website,

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170 Statement of compatibility, p. 18.

171 Chapter 6, subclause 507(1)(i); Chapter 3, subclauses 141(4)(e), 141(5)(d), and 141(6)(d).

172 Explanatory memorandum, p. 376.

173 See, for example, Parliamentary Joint Committee on Human Rights, Aged Care Quality and Safety Commission Amendment (Code of Conduct and Banning Orders) Rules 2022 [F2022L01457], *Report 2 of 2023* (8 March 2023) p. 99.

174 Chapter 6, subclause 507(5)–(6).

or publish any of the information entered on the register.[175] Consequently, the bill would permit the publication of both registers online. It would appear, however, that it may be as effective to provide access only to employers in the aged care sector, noting this would appear to be sufficient to ensure persons banned from the sector are not employed professionally in that sector in future. In particular, it appears that aged care sector workers would be employed by aged care providers, and not by aged care recipients directly. As such, the fact that a particular person is subject to an aged care sector banning order would appear to be of most immediate regulatory significance to an aged care service provider screening prospective staff (rather than, for example, to the general public or to aged care recipients themselves). Aged care service providers would be required to screen employees prior to their employment, including by reference to relevant registers. It is not clear why the register cannot be made available to all aged care providers, and any other organisation employing workers in the aged care sector, without the need to make the register publicly available.

1.88 As to safeguards, the statement of compatibility states that the measures only enable the collection, use and disclosure of personal information in accordance with the permissions set out under the relevant secrecy provisions.[176] The presence of offences for unauthorised disclosure, and the operation of the *Privacy Act 1988* (the Privacy Act), would likely serve as important safeguards (although noting that the application of the Privacy Act is not a complete answer to an assessment of whether a measure is accompanied by sufficient safeguards).[177] While it is not explicitly identified as a safeguard, the ability for persons to request the correction of the register, and the Commissioner's power to make corrections, may ensure that the registers do not unintentionally and incorrectly implicate another person for conduct giving rise to a banning order. However, it is not clear that the Commissioner would have the discretion to not publish certain information on the register (for example, because of personal safety concerns held by the person in question). Further, while the Commissioner would be required to ensure that the banning order register is kept 'up to date', it is unclear whether this would include a requirement to proactively correct inaccurate, incomplete, irrelevant or misleading information. Further, the

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175 Chapter 3, subclause 141(7).

176 Statement of compatibility, pp. 18–19.

177 Compliance with the Australian Privacy Principles (APPs) and the *Privacy Act 1988* (Privacy Act) are not a complete answer to concerns about interference with the right to privacy for the purposes of international human rights law. The APPs contain a number of exceptions to the prohibition on use or disclosure of personal information for a secondary purpose, including where its use or disclosure is authorised under an Australian Law, which may be a broader exception than permitted in international human rights law. There is also a general exemption in the APPs on the disclosure of personal information for a secondary purpose where it is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body.

requirement to maintain a provider register does not appear to require that the register is kept up to date (or otherwise include any requirement that the Commissioner must ensure that the register contains correct and complete information, and does not include misleading information). Noting that these would constitute fundamental features of a register, it is not clear why such safeguards are not included in the bill itself.

1.89 Further, the statement of compatibility does not particularise whether and how these powers would be subject to independent oversight, and whether a decision to include information on a register, or to not amend the register, would be reviewable.

1.90 As such, it is not clear that the requirement to establish and maintain these registers would constitute proportionate limits on the right to privacy.

## Committee view

1.91 The committee notes that the bill would empower the Commissioner to make banning orders prohibiting or restricting an entity (which includes an individual), or an individual worker, from engaging in the delivery of funded aged care services generally or in relation to a specified type of service. The committee notes that the bill would require the Commissioner to establish and maintain both a register of banning orders, and a provider register (which must include details about any associated banning orders). The committee notes that, insofar as a register which includes information about banning orders may help to ensure that unsuitable people who may present a risk to aged care recipients are not engaged in the provision of their care, this measure appears to promote the rights to health and, as many people in aged care live with disability, the rights of people with disability.

1.92 However, the committee considers that by providing that the register of banning orders may be made public, including the names and other identifying information in relation to the individuals subject to those orders, the measure also engages and limits the right to privacy. The committee notes that the right to privacy may be permissibly limited. In this regard, the committee considers that protecting the safety of vulnerable aged care recipients is a legitimate objective for the purposes of international human rights law, and that making information about banned individuals accessible to the public, including future employers, is likely to be effective to achieve that objective. However the committee notes the absence of information as to why other less rights restrictive alternatives (such as making registers accessible only within the sector) would be ineffective to achieve the stated objective, the breadth of personal information which may be included on a register, and the absence of information as to whether and how these powers would be subject to independent oversight, and whether a decision to include information on a register, or to not amend the register, would be reviewable. As such, the committee considers that it is not clear that the requirement to establish and maintain these registers would constitute proportionate limits on the right to privacy.

**Suggested action**

1.93 The committee considers that the proportionality of the measure may be assisted were the bill amended to:

(c) amend section 141 and 507 to require the Commissioner to ensure that the register contains correct and complete information, and does not include misleading information; and to empower the Commissioner to not include information on a register in certain circumstances; and

(d) identify whether a decision to include information on a register, or to not amend the register, would be reviewable.

1.94 The committee recommends that the statement of compatibility be updated to provide a more fulsome assessment of the compatibility of these measures with the right to privacy, and in particular to set out: what safeguards would apply to these measures; whether a decision to include information on a register, or to not amend the register, would be reviewable; whether the exercise of powers related to the registers would be subject to independent oversight and review (and if so, how).

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

## Information-sharing

1.96 Several aspects of the bill would provide for the sharing, use and disclosure of information including personal information, subject to an overarching prohibition against unauthorised disclosure. Chapter 7 of the bill would establish a framework for information sharing, including the use and disclosure of protected information in certain circumstances. These provisions would permit the use and disclosure of 'relevant information'. 'Relevant information' means information obtained or generated by a person in the course of (or for the purposes of) performing functions or duties, or exercising powers under this bill, or assisting another person to perform such functions or duties.[178] Relevant information may include personal information.[179]

1.97 Clause 537 would authorise a person to use or disclose relevant information in a range of circumstances including:

- in the course of performing a duty or function under or in connection with the bill;

178 Chapter 1, section 7 (definitions).

179 Statement of compatibility, p. 21.

- where authorised by any Australian law;
- if the person reasonably believes that the use or disclosure is necessary to lessen or prevent a serious threat to the safety, health or wellbeing of an individual seeking to access, or accessing, funded aged care services; and
- for the purpose of exercising a power or facilitating the performance of a function under a worker screening law (including National Disability Insurance Scheme worker screening).

1.98 Clause 538 would authorise an entrusted person to disclose relevant information to the minister, but would not authorise disclosure of information if disclosure of de-identified information would achieve the same purpose. An entrusted person would also be authorised to disclose information in order to obtain legal advice or another legal service, and in order to assess a person's needs for different aged care services.

1.99 Clause 539 would permit the System Governor (the secretary of the department) and an appointed Commissioner to disclose relevant information in a range of circumstances, including where it will facilitate: functions, duties or powers of Commonwealth bodies; representatives of an individual accessing, or seeking to access, funded aged care services; the continuation of funded aged care services; research or policy development; law enforcement and revenue protection; maintenance of professional standards; and 'certified purposes'. It would permit them to disclose information to: Centrelink;[180] Medicare;[181] a further twenty specified public bodies (including the Fair Work Commission, Australian Competition and Consumer Commission);[182] and a department or authority prescribed by rules which has some regulatory, compliance or enforcement function related to aged care.[183]

## International human rights legal advice

### *Right to privacy*

1.100 By providing for the use and disclosure of personal information, these measures engage and limit 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.[184] It also includes the right to control the dissemination of information about one's private life.

1.101 The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the

180 Chapter 7, subclause 539(1).

181 Chapter 7, subclause 539(2).

182 Chapter 7, subclauses 539(3)-(4).

183 Chapter 7, subclause 539(4).

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

measure must pursue a legitimate objective and be rationally connected to (that is, effective to achieve) and proportionate to achieving that objective.

1.102 The statement of compatibility identifies that these measures engage and limit the right to privacy. It states that information-sharing facilitates the provision of safe and high quality supports and services to individuals accessing funded aged care services, protect individuals from exploitation, violence and abuse and provide equal recognition before the law.[185] It also states that the intention is to enable Commonwealth departments and authorities 'to more efficiently share information to better carry out their respective functions, including responding promptly to cross-sector risks regarding providers to ensure the better protection of the safety of individuals accessing funded aged care services, including persons with disability'.[186] These would constitute legitimate objectives under international human rights law, and would the measures would appear to be rationally connected (that is, effective to achieve) those objectives. The statement of compatibility provides the following example of how information-sharing may meet these objectives in practice:

> [The provision of information to other Commonwealth or State bodies for the purposes of that body] could include disclosing personal information about a person's circumstances, the supports they receive, and details of complaints or allegations made by them about an entity providing supports or services. This information may be disclosed to authorities such as the Office of the Inspector-General of Aged Care, the NDIS Quality and Safeguards Commission and other regulatory bodies or law enforcement agencies for the purposes of investigation of allegations or complaints, or facilitating the performance of functions or duties or the exercise of powers of the body.[187]

1.103 In order to be proportionate, a limitation on the right to privacy should only be as extensive as is strictly necessary to achieve its legitimate objective and must be accompanied by appropriate safeguards. The UN Human Rights Committee has stated that legislation must specify in detail the precise circumstances in which interferences with privacy may be permitted.[188]

1.104 In this regard, the statement of compatibility states that the disclosure of information between Commonwealth departments and authorities include the following safeguards against arbitrary interference with privacy:

- information must only be shared for the purpose of the performance of functions or exercise of powers of the receiving body; and

185 Statement of compatibility, p. 21.

186 Statement of compatibility, p. 22.

187 Statement of compatibility, p. 21.

188 *NK v Netherlands*, UN Human Rights Committee Communication No.2326/2013 (2018) [9.5].

- any secondary disclosure of information, including protected information, is limited to the purpose of the exercise of the functions or powers of the receiving body.[189]

1.105 This would appear to constrain the purposes for which information may be shared under these measures. However, receiving bodies may have a wide range of legislative powers and functions, meaning that information could be shared for a very wide range of reasons. With respect to clause 539, the statement of compatibility states that any additional bodies which may be prescribed by the rules for the purposes of information disclosure must have regulatory, compliance or enforcement functions in relation to the provision of care, support, treatment or other related services or assistance, or functions of screening persons for suitability.[190] Consequently, it would appear that entities may not be prescribed by legislative instrument where they have no connection to the provision of aged care services broadly. However, no information is provided as to why an individual's consent to such sharing and disclosure should not be obtained.

1.106 However, clause 539 would also permit the disclosure of relevant information for research purposes, where an entity is carrying out research into funded aged care services on behalf of the Commonwealth, if the System Governor or Commissioner reasonably believes the information is necessary for the research.[191] A legislative note indicates that disclosure of relevant information that is personal information is not necessary for the research if the research could be carried out with de-identified information. The explanatory memorandum states that this requires a decision maker to consider and de-identify data if appropriate. This may serve as an important safeguard, however, it appears that a research project could be proposed which could not be conducted without access to identifiable information, in which case this provision would appear to authorise disclosure of a range of personal information about a potentially significant number of individuals without their direct knowledge or consent. The statement of compatibility provides no detail in relation to this specific measure, and it is unclear whether consideration was given to require the consent of individuals in question if any identifiable information were to be disclosed for research purposes, and if not, why this was not included. Further, it is unclear why the provision does not permit *only* the disclosure of de-identified information for research purposes.

1.107 The statement of compatibility states that the information shared would be subject to the protected information provisions in the bill, as well as the general protections under the *Privacy Act 1988*. In this regard, clause 542 provides that a court or other similar body or person may only require a person to disclose protected information in certain circumstances. The explanatory memorandum states that this ensures that protected information is only released 'in limited circumstances generally

189 Statement of compatibility, p. 22.

190 Statement of compatibility, p. 22.

191 Chapter 7, subclause 539(7).

consistent with the purpose for which the information was obtained or where there is written consent'.[192] This may have safeguard value in practice. However, with respect to the Privacy Act, compliance with the Australian Privacy Principles (APPs) and the Privacy Act are not a complete answer to concerns about interference with the right to privacy for the purposes of international human rights law. This is because the APPs contain a number of exceptions to the prohibition on use or disclosure of personal information for a secondary purpose, including where its use or disclosure is authorised under an Australian Law,[193] which may be a broader exception than permitted in international human rights law. There is also a general exemption in the APPs on the disclosure of personal information for a secondary purpose where it is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body.[194]

1.108 Further, a 2022 review of the Privacy Act (the review) identified numerous inadequacies in the Act in protecting privacy and personal information. It made several recommendations to strengthen privacy protections, including requiring that the collection, use and disclosure of personal information must be fair and reasonable in the circumstances, which would involve consideration of a range of factors such as the potential adverse impact or harm to the individual, whether any privacy impact is proportionate to the benefit, and whether there are less intrusive means of achieving the same objective.[195] The government's recent response to the review agreed to a number of recommendations and agreed in principle with others, such as the recommendation with respect to fair and reasonable handling of personal information.[196]

1.109 A further consideration in assessing the proportionality of a limitation on human rights is whether the measure in question is subject to independent oversight, and whether an individual can seek review of decisions that may limit their rights. In this regard, the explanatory memorandum states that designating the secretary of the department as the 'System Governor' with specific functions under the bill 'are intended to establish the System Governor as the steward of the Commonwealth's aged care system and give them responsibility for its operation and oversight'.[197] This would likely have an important value as an oversight mechanism (albeit one which is

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192 Explanatory memorandum, p. 400.

193 APP 9; APP 6.2(b).

194 APP; 6.2(e).

195 Attorney-General's Department, *Privacy Act Review: Report 2022* (February 2023) Recommendation 12, pp. 1, 8.

196 Australian Government, *Government Response: Privacy Act Review Report* (September 2023) p. 27.

197 Chapter 5, clause 339 sets out the functions of the 'System Governor', which would include ongoing review of the administration of the aged care system. See, explanatory memorandum, p. 297.

not independent). The statement of compatibility does not provide information regarding oversight of the sharing of information, and complaints if a person considers that their personal information has been inappropriately disclosed. For example, it does not identify whether an affected person could make a complaint to the System Governor, the Aged Care Commissioner, Aged Care Complaint Commissioner, or to other complaints bodies such as the Commonwealth Ombudsman, the Office of the Australian Information Commissioner or the Australian Human Right Commission.

1.110 The statement of compatibility does not provide any specific information as to the availability of review of actions under the bill which may breach an individual's right to privacy. It is noted that the bill would require an independent review of the operation of the bill five years after it has commenced operation.[198] The System Governor would also have review functions in respect of administration of the aged care system.[199] However, it is not clear what specific safeguard value these review mechanisms would offer with respect to the right to privacy.

## Committee view

1.111 The committee notes that several aspects of the bill would provide for the sharing, use and disclosure of information including personal information, subject to an overarching prohibition against unauthorised disclosure.

1.112 The committee notes that the bill would permit information-sharing to broadly facilitate the provision of safe and high-quality supports and services to individuals accessing funded aged care services, protect individuals from exploitation, violence and abuse and provide equal recognition before the law. The committee considers that these are clearly legitimate objectives under international human rights law, and notes their importance, and considers that the sharing of personal information would be effective to achieve those objectives.

1.113 However, the committee considers that it is not clear that these proposed measures would be sufficiently circumscribed, accompanied by sufficient safeguards, and subject to independent oversight and review. The committee considers that some of the safeguards in the bill could be strengthened in a manner which would assist their proportionality, and would not appear to frustrate their overall policy intention. The committee further considers that the statement of compatibility should be amended to provide additional information regarding the proposed operation of the many measures which would authorise the disclosure of personal information.

**Suggested action**

1.114 The committee considers that the proportionality of the measure may be assisted were the bill amended as follows:

198 Chapter 8, clause 601.

199 Chapter 5, clause 339.

(a) amend subclause 539(7) to provide that personal information may only be disclosed for research purposes where it has been de-identified, or otherwise where individuals have consented to the disclosure of their identifiable personal information for the specific research purpose;

(b) require an independent review of the privacy implications of the information-sharing scheme after a specified period of operation;

1.115 The committee recommends that the statement of compatibility be updated to provide a more fulsome assessment of the compatibility of these measures with the right to privacy, and in particular:

(c) what review mechanisms in the bill may have safeguard value with respect to the right to privacy, and how;

(d) whether and how the information-sharing scheme would be subject to independent oversight, and whether such oversight would offer safeguard value in respect of the right to privacy;

(e) to whom a person affected by the disclosure of their personal information could complain, and what remedies such entities may offer;

(f) why the bill would not require the consent of an affected individual to the disclosure of their personal information under any of the proposed measures, and whether requiring the consent of individuals would be ineffective to achieve the stated objectives of the measures; and

(g) whether subclause 539(7) would permit the disclosure of identifiable personal information for research purposes as a matter of law, and why the bill does not require that individuals must consent to such disclosure.

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

# Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024[200]

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|---|---|
| **Purpose** | This bill seeks to amend the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006,* and related legislation, including to: extend the scheme to additional services regarded as being higher-risk; simplify some obligations for participants; apply the scheme to virtual assets; and introduce a new AUSTRAC examination power. |
| **Portfolio** | Attorney-General |
| **Introduced** | House of Representatives, 11 September 2024 |
| **Rights** | Criminal process rights; fair trial; life; torture or cruel, inhuman or degrading treatment or punishment |

## Abrogation of privilege against self-incrimination

1.117 Schedule 9 of the bill seeks to amend the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the Act) to expand existing section 169, which abrogates the privilege against self-incrimination for the purposes of giving information or producing a document under existing information gathering powers. Section 169 currently provides that information given or documents produced may be used in civil and criminal proceedings under the Act, and proceedings under the *Proceeds of Crime Act 2002* that relate to the Act. The bill would amend section 169 to provide that information given or documents produced may also be used in criminal proceedings for an offence against a provision covered by the definition of 'money laundering', 'financing of terrorism' or 'proliferation financing' as defined in section 5 of the Act.[201] The explanatory materials state that this could include proceedings relating to offences against state or territory laws that relate to money laundering, financing of terrorism or proliferation financing where information is collected by the Australian Transaction Reports and Analysis Centre (AUSTRAC) under section 167.[202] The effect would be that a person would be unable to refuse to answer a question or produce a document on the grounds that it might tend to incriminate them, and the information they have provided or the document they have produced could then be used to investigate and charge them in relation to an expanded range of related offences.

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200 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024, *Report 9 of 2024*; [2024] AUPJCHR 66.

201 Schedule 9, Part 2, item 17. Offences are contained in Part 12 of the Act.

202 The explanatory materials do not identify any specific offences, or the full scope of offences, to which this abrogation of the privilege against self-incrimination may operate.

1.118 Schedule 9 also seeks to introduce a new examination power, empowering AUSTRAC to require persons to answer questions in private and produce documents or things related to money laundering or terrorism financing.[203] A person would be required to attend for examination, take an oath or affirmation if requested, answer questions and produce documents or things, and sign a transcript of the examination if requested. Proposed section 172K would abrogate the privilege against self-incrimination in relation to this proposed power, meaning that it would not be a reasonable excuse to fail or refuse to answer a question, produce a document or sign a record on the basis that it might incriminate you or expose you to a penalty. However, the statement or the fact the person has signed the transcript record would only be admissible in a proceeding relating to providing false or misleading information (a use immunity). This would apply both in relation to the statement or the signing of the record and if, before making an oral statement in answer to a question or signing a record, the individual claims that the statement or the signing of the record might tend to incriminate them.[204]

## International human rights legal advice

### *Right to a fair trial and criminal process rights*

1.119 By abrogating the privilege against self-incrimination, these measures engage and limit the right to a fair trial and related criminal process rights. The right to a fair trial and fair hearing is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.[205] Specific guarantees of the right to a fair trial in the determination of a criminal charge include minimum guarantees in criminal proceedings, such as the right not to incriminate oneself.

1.120 The statement of compatibility identifies that the right to a fair trial is limited.[206] In relation to section 169, the statement of compatibility states that the bill would 'clarify' the abrogation, while maintaining the existing safeguards in section 169. It states that the proposed expanded abrogation 'is reasonable, necessary and proportionate, as it balances the rights and interests of the individual with benefits to the public that arise from the investigation and prosecution of serious criminal offences such as money laundering and the financing of terrorism'.[207] However, this amendment would fundamentally alter section 169 by expanding the proceedings in relation to which a person would effectively be required to testify against themselves. This would narrow the already limited safeguard value of section 169 considerably. In relation to the criminal proceedings identified (all of which appear to be substantive

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203 Schedule 9, item 3, proposed Division 2.

204 Schedule 9, item 3, proposed subsection 172K(2).

205 International Covenant on Civil and Political Rights, article 14.

206 Statement of compatibility, pp. 20–21.

207 Statement of compatibility, p. 21.

criminal offences to which AUSTRAC's regulatory role relates), the privilege against self-incrimination would be completely abrogated. It is not clear that this abrogation would balance the rights and interests of the individual with benefits to the public, noting that it would remove a fundamental element of the right to a fair trial.

1.121 In relation to proposed section 172K, the statement of compatibility notes that information or documents provided as part of the examination scheme may only be used in civil or criminal proceedings insofar as they relate to the falsity of the information or document provided.[208] This is a partial 'use' immunity, restricting the subsequent admission of evidence of the fact of a disclosure made under compulsion, or of the information disclosed, in a proceeding against the individual who was compelled to provide it. However, section 172K does not include a derivative use immunity, meaning that any information derived (directly or indirectly) from the information the person was compelled to provide would be admissible against them. The explanatory memorandum states that 'The Guide to Framing Commonwealth Offences indicates that where a law excludes the privilege against self-incrimination as in section 172K, it is "usual to include a use immunity or a derivative use immunity provision"'.[209] However, it fails to identify that section 172K does not itself include a derivative use immunity provision. The statement of compatibility does not identify the absence of a derivative use immunity in relation to section 172K. As such, it is not clear what (if any) consideration has been given in relation to its inclusion, and there is no justification as to its absence.

1.122 The absence of a derivative use immunity significantly limits the safeguard value of section 172K. Professor Jeremy Gans, an expert in criminal law at the University of Melbourne, has described the limited value of a use immunity:

> "I'm going to ask you a question that you must answer. I have good news and bad news. The good news is: no-one can use your answer against you in court. The bad news: my question is 'Please tell me where I can find evidence that someone can use against you in court.' You can't refuse to answer, or you'll go to jail. You can't lie, or you'll go to jail. If you tell me where the evidence is, your prosecutor will use it to send you to jail."
>
> In short, use immunity is useless. That is, except in cases where the only evidence against a criminal suspect is in his or her head, use immunity provides no protection against compelled self-incrimination.[210]

1.123 The proposed expanded abrogation of the privilege against self-incrimination in section 169, and the absence of a derivative use immunity in relation to section

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208 Statement of compatibility, p. 20.

209 Explanatory memorandum, p. 143.

210 Professor Jeremy Gans, *Submission no. 77 to Australian Law Reform Commission Freedoms Inquiry Interim Report* (2015), pp. 4–5.

172K, may risk being incompatible with the right to a fair trial and criminal process rights.

## Committee view

1.124 The committee notes that this bill seeks to amend the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* including to expand an existing abrogation of the privilege against self-incrimination, and to introduce a new partial abrogation of the privilege against self-incrimination in relation to the proposed AUSTRAC examination powers.

1.125 The committee notes that this bill has been referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 13 November 2024. To ensure that the committee's comments are available to inform this inquiry, the committee offers its recommendations without first seeking a response from the minister in order that they will be available to the Attorney-General and the Parliament for timely consideration.

1.126 The committee notes that section 169 abrogates the privilege against self-incrimination for the purposes of giving information or producing a document under existing AUSTRAC information gathering powers in relation to civil and criminal proceedings under the Act, and related proceedings under the *Proceeds of Crime Act 2002* that relate to the Act. The committee notes that this bill seeks to expand that to provide that information given or documents produced may also be used in criminal proceedings for a state or territory offence against a provision covered by the definition of 'money laundering', 'financing of terrorism' or 'proliferation financing'. The committee notes that this would fundamentally alter section 169 by expanding the proceedings in relation to which a person would effectively be required to testify against themselves. The committee considers that there is a risk that this would be incompatible with the right to a fair trial, which in the determination of a criminal charge includes a minimum guarantee of the right to not to incriminate oneself.

1.127 In relation to proposed section 172K, the committee notes that this would partially abrogate the privilege against self-incrimination, but that information required to be provided would only be admissible in limited proceedings. However, the committee notes that the proposed provision does not also include a derivative use immunity, meaning that information derived from an answer could be admissible in relation to criminal proceedings, and that no explanation is provided in the explanatory materials as to why this immunity is not provided. The committee notes that it is not clear what (if any) consideration has been given in relation to the inclusion of a derivative use immunity, and there is no justification as to its absence. The committee considers that there is a risk that this may be incompatible with the right to a fair trial.

**Suggested action**

1.128 The committee recommends that consideration be given to the inclusion of a derivative use immunity in proposed section 172K.

1.129 The committee recommends that the statement of compatibility be updated to provide information in relation to a derivative use immunity.

1.130 The committee draws these human rights concerns to the attention of the Attorney-General and the Parliament.

## Significant civil penalties

1.131 Several schedules of the bill would create new provisions, contravention of which would be subject to a civil penalty.[211] The maximum civil penalty under the Act is 20,000 penalty units for individuals (currently $6.26 million).[212]

## International human rights legal advice

*Criminal process rights*

1.132 The potential severity of civil penalties under the Act may mean that some may be regarded as criminal penalties under international human rights law.

1.133 Under Australian law, civil penalty provisions are dealt with in accordance with the rules and procedures that apply in relation to civil matters (the burden of proof is on the balance of probabilities).

1.134 In assessing whether a civil penalty may be considered criminal, it is necessary to consider:

- the domestic classification of the penalty as civil or criminal (although the classification of a penalty as 'civil' is not determinative as the term 'criminal' has an autonomous meaning in human rights law);
- the nature and purpose of the penalty: a civil penalty is more likely to be considered 'criminal' in nature if it applies to the public in general rather than a specific regulatory or disciplinary context, and where there is an intention to punish or deter, irrespective of the severity of the penalty; and
- the severity of the penalty.

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211 For example, Schedule 9, Part 2, item 6, proposed section 49A (notice to obtain documents or provide information in certain circumstances); item 16, section 167 (authorised officer may obtain documents or information); Schedule 4, item 22, section 167 (providing legal professional privilege notice).

212 *Anti-Money Laundering and Counter-Terrorism Financial Act 2006*, section 175.

1.135 The statement of compatibility identifies that the civil penalties in the bill may engage the right to a fair trial and fair hearing.[213] It states that the provisions 'would form part of a regulatory regime aimed at ensuring compliance' and would not be for the purpose of punishment.[214] As to their potential severity, the statement of compatibility states that while 'the maximum pecuniary penalties that can be applied under section 150 of the Act' are high, these penalties are appropriate given the nature of the sectors and entities being regulated and the illicit financing risks they face.[215] However, it does not provide information in relation to any of the other civil penalty provisions to be introduced. While most of the proposed civil penalties would apply to reporting entities with obligations under the Act (and so appear to fall within a regulatory framework),[216] it appears that some may potentially capture people who are not directly subject to this regulatory framework. For example, proposed section 49B provides that the AUSTRAC CEO may require a person to provide information or documents to assist them with obtaining or analysing information to support efforts to combat financial crimes.[217] The explanatory memorandum states that this power is intended to enable AUSTRAC to collect information from reporting entities 'and other persons', but does not identify whether this would be restricted to participants in the regulatory framework in practice.[218] As such, it appears that such a notice could be given to family or associates of a person who is suspected of having engaged in conduct in breach of the Act, as a matter of law. In such cases, a civil penalty for contravention by someone who is not a direct participant in the regulatory scheme may be regarded as punishment, noting the potential severity of the penalty.

1.136 If this civil penalty provision were considered to be 'criminal' for the purposes of international human rights law, this does not mean that the relevant conduct must be turned into a criminal offence in domestic law nor does it mean that the civil penalty is illegitimate. Instead, it means that the civil penalty provisions in question must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the International Covenant on Civil and Political Rights, including the right to be presumed innocent until proven guilty according to law.[219]

1.137 The right to be presumed innocent until proven guilty according to law requires that the case against a person be demonstrated on the criminal standard of proof (beyond all reasonable doubt). Because the standard of proof applicable in civil penalty proceedings is lower (requiring proof only on the balance of probabilities),

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213 Statement of compatibility, pp. 19–20.

214 Statement of compatibility, p. 19.

215 Statement of compatibility, p. 19.

216 See, for example, Schedules 1–3.

217 Schedule 9, Part 2, item 6, proposed section 49B.

218 Explanatory memorandum, p. 147.

219 International Covenant on Civil and Political Rights, article 14(2).

there is a risk that the civil penalty in proposed section 49B may, in certain cases, not comply with this criminal process right.[220]

## Committee view

1.138 The committee notes that the bill seeks to amend the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* to introduce numerous civil penalty provisions, and amend some existing civil penalty provisions. The committee notes that the maximum civil penalty under the Act for an individual is 20,000 penalty units (currently $6.26 million).

1.139 The committee considers that, given the potential severity of civil penalties under the Act, where those penalties may be applied to people who are not a direct participant in the scheme, there may be a risk that those penalties would be regarded as criminal under international human rights law. The committee notes that if this were the case, they must be shown to be consistent with the criminal process guarantees, including the right to be presumed innocent until proven guilty according to law. The committee notes that as they are characterised as civil penalties under Australian law, those requirements would not be met.

**Suggested action**

1.140 The committee recommends that the statement of compatibility be updated to provide a more fulsome assessment of the compatibility of each civil penalty created (or otherwise amended) by the bill, in particular whether any of those penalties may operate in relation to persons who are not direct participants in the scheme this Act seeks to regulate (for example, proposed section 49B).

1.141 The committee draws these human rights concerns to the attention of the Attorney-General and the Parliament.

## Sharing AUSTRAC information internationally

1.142 Schedule 5 of the bill seeks to amend section 127 of the Act. This provides that the AUSTRAC Chief Executive Officer (CEO), or the head of a designated agency or department, may disclose 'AUSTRAC information' to a foreign country or agency where they consider it appropriate, and the government of the foreign country, or the foreign agency, has given an undertaking for: protecting the confidentiality of the information; controlling the use that will be made of the information; and ensuring that the information will be used only for the purpose for which it is disclosed to the government of the foreign country or to the foreign agency. The amendments seek to

220 UN Human Rights Committee, General Comment 32: Article 14: Right to equality before courts and tribunals and to a fair trial (2007) para. [30]: 'The presumption of innocence, which is fundamental to the protection of human rights… guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt'.

repeal the list of designated agencies and departments currently contained in the Act, and instead provide that agencies or departments may be prescribed by legislative instrument.[221]

1.143 'AUSTRAC information' means information obtained by, or generated by, an AUSTRAC entrusted person under or for the purposes of this Act; information obtained by an AUSTRAC entrusted person under or for the purposes of any other law of the Commonwealth or a law of a state or a territory; information obtained by an AUSTRAC entrusted person from a government body; or financial transaction report information (within the meaning of the *Financial Transaction Reports Act 1988*).[222]

## International human rights legal advice

*Right to life; freedom from torture or cruel, inhuman or degrading treatment or punishment*

1.144 There may be a risk that the disclosure of certain information to foreign governments and entities, particularly information about alleged criminal activity, may in certain circumstances expose a person to a risk of the death penalty or to torture or other cruel treatment. Consequently, this measure may engage the right to life and freedom from torture and other cruel, inhuman or degrading treatment or punishment. This is not identified in the statement of compatibility so no assessment of the bill's compatibility with these rights is provided.

1.145 The right to life imposes an obligation on Australia to protect people from being killed by others or from identified risks.[223] While the imposition of the death penalty is not absolutely prohibited under international law, it does prohibit states which have abolished the death penalty (such as Australia) from exposing a person to the death penalty in another state. The provision to other countries of information that may be used to investigate and convict someone of an offence to which the death penalty applies is also prohibited.[224] International law absolutely prohibits torture and cruel,

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221 Schedule 5, items 4-5.

222 However, it is noted that Schedule 11 of the bill seeks to repeal the *Financial Transaction Reports Act 1988*.

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

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

inhuman or degrading treatment or punishment.[225] There are no circumstances in which it will be permissible to subject this right to any limitations.

1.146 The definition of AUSTRAC information would appear to capture a potentially broad scope of information. Noting that AUSTRAC seeks to disrupt money laundering, terrorism financing and other serious crime, it would also appear likely that AUSTRAC information may include information about alleged criminal activity internationally, which may relate to crimes for which the punishment may include the death penalty, or for which the investigation and punishment may lead to a risk of torture or other cruel treatment. While section 127 requires the AUSTRAC CEO or a relevant agency or department to consider whether it is appropriate in all circumstances to share information (which may provide scope to consider risks associated with the death penalty or cruel treatment), it is not clear that the decision-maker would be required to have regard to those matters. It is also unclear what, if any, guidelines are provided to assist decision-makers in identifying and considering any such risks, and how to manage them. It is also unclear whether other safeguards exist in the legislative scheme more broadly to protect against such risks.

1.147 Consequently, there may be a risk that the sharing of information pursuant to section 127 of the Act may, in some circumstances, expose a person to the risk of the death penalty or to torture or other cruel treatment. Were this the case, this would be incompatible with Australia's obligations under international human rights law.

***Committee view***

1.148 The committee notes that the bill seeks to amend the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* in relation to the sharing of AUSTRAC information internationally.

1.149 The committee considers that there may be a risk that the disclosure of certain information to foreign governments and entities, particularly information about alleged criminal activities, may in certain circumstances expose a person to a risk of the death penalty or to torture or other cruel treatment. Consequently, the committee considers that this measure may engage the right to life and freedom from torture and other cruel, inhuman or degrading treatment or punishment, which is not identified in the statement of compatibility.

**Suggested action**

1.150 The committee recommends that the statement of compatibility be updated to assess whether and how this measure is compatible with the right to life and freedom from torture and other cruel, inhuman and degrading treatment or punishment, including information as to whether there are guidelines to assist decision-makers in identifying and considering any risks that a person may be

225 International Covenant on Civil and Political Rights, article 7, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

exposed to the death penalty or to torture as a result of the sharing of particular information, and if so, how those risks are managed. The committee recommends that, in the event compatibility cannot be assured, that amendments to the bill be considered to address this.

1.151 The committee draws these human rights concerns to the attention of the Attorney-General and the Parliament.

# Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024[226]

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|---|---|
| **Purpose** | The bill seeks to amend the *Broadcasting Services Act 1992* and related legislation to establish a scheme by which the Australian Communications and Media Authority may require digital communications platform providers to regulate misinformation and disinformation on their platforms. |
| **Portfolio** | Communications |
| **Introduced** | House of Representatives, 12 September 2024 |
| **Rights** | Multiple rights |

## Regulating digital content

1.152 This bill seeks to amend the *Broadcasting Services Act 1992* and related legislation to empower the Australian Communications and Media Authority (ACMA) to establish a regulatory framework requiring digital communications platform providers (providers) to manage the risk of certain content constituting misinformation and disinformation on their platforms.[227]

1.153 The proposed amendments would empower ACMA to:

- obtain information and documents;[228]
- approve and register enforceable misinformation codes developed by sections of the digital platforms industry;[229]
- determine misinformation standards for sections of the digital platforms industry in certain circumstances (for example, if the codes developed by industry are not regarded as sufficient or have failed in practice);[230]

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226 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024, *Report 9 of 2024*; [2024] AUPJCHR 67.

227 Schedule 1, item 2, proposed Schedule 9. By way of background, in February 2021, a voluntary Australian Code of Practice on Disinformation and Misinformation was launched, requiring signatories to commit to measures to address misinformation and disinformation on their services. However, the explanatory memorandum notes that several major digital communications platform providers (including X) are not signatories to the voluntary code. Explanatory memorandum, p. 3.

228 Schedule 1, item 2, proposed Schedule 9, ss 33–34.

229 Schedule 1, item 2, proposed Schedule 9, ss 42–46.

230 Schedule 1, item 2, proposed Schedule 9, ss 54–64.

- publish information relating to misinformation and disinformation.[231]

1.154 These requirements would be enforceable and subject to civil penalties, remedial directions, and infringement notices.[232]

1.155 Schedule 9 would require providers to publish their: policy or policy approach in relation to misinformation and disinformation, and media literacy plan (setting out the measures the provider will take to enable end-users of their platforms to better identify misinformation and disinformation).[233]

1.156 The bill would also enable ACMA to make rules: requiring digital communications platform providers to make and retain records and to prepare reports consisting of information contained in those records; and requiring digital communications platform providers to implement and maintain a process for handling complaints and resolving disputes about misinformation and disinformation.[234]

1.157 A 'digital communications platform' means a digital service that is: a connective media service; a content aggregation service; an internet search engine service; a media sharing service (terms defined further in the subsection); or a service determined by the minister.[235] Dissemination of content using a digital service will be 'misinformation' where the content contains information that is reasonably verifiable as false, misleading or deceptive; it is provided on the digital service to one or more end-users in Australia; and the provision of the content is reasonably likely to cause or contribute to 'serious harm'.[236] This content would be regarded as 'disinformation' where, in addition to the above criteria, there are: grounds to suspect that the person disseminating, or causing the dissemination of, the content intends that the content deceive another person; or the dissemination involves 'inauthentic behaviour'.[237]

1.158 The term 'serious harm' refers to a harm which has significant and far-reaching consequences for the Australian community (or a segment of it), or an individual in Australia. The types of harm covered would include: harm to the operation or integrity of electoral or referendum processes; harm to public health; vilification of a group in society distinguished by a protected characteristic (e.g. race, sexual orientation,

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231 Schedule 1, item 2, proposed Schedule 9, ss 38–39.

232 Schedule 1, item 2, proposed Schedule 9, ss 72–74.

233 Schedule 1, section 17. This would not obligate the publication of personal information.

234 Schedule 1, item 2, proposed Schedule 9, ss 25–30; 66; and 82.

235 Schedule 1, item 2, proposed section 5. This may not include an internet carriage service, or an SMS or MMS service.

236 Schedule 1, item 2, proposed subsection 13(1).

237 Schedule 1, item 2, proposed subsection 13(2). 'Inauthentic behaviour' would refer to: dissemination involving the use of an automatic system that is reasonably likely to mislead an end-user; there are grounds to suspect the dissemination is part of a coordinated action that is reasonably likely to mislead; where there are grounds to suspect it uses an arrangement for the purposes of avoiding action by the provider to comply with a law; or in circumstances prescribed by legislative instrument. See, Schedule 1, item 2, proposed section 15.

intersex status, disability); intentionally inflicted physical injury to a person in Australia; or imminent damage to critical infrastructure in Australia.[238]

1.159 In determining whether the provision of certain content on a digital service is reasonably likely to cause or contribute to serious harm, regard must be had to a range of matters, including: the subject matter of the content; the potential reach and speed of the dissemination; the author; and the purpose of dissemination; and may include further matters determined by legislative instrument.[239]

1.160 A code or standard would require participants to implement measures to 'prevent or respond to' misinformation or disinformation on the platform; and enable an assessment of compliance with the measures.[240] The explanatory materials do not identify what such measures may be, but the minister's second reading speech states that they may include obligations such as: reporting tools, links to authoritative information, support for fact checking and demonetisation of disinformation.[241] The bill states that nothing would *require* a digital communications platform provider to either remove content that was not disinformation involving inauthentic behaviour, or prevent an end-user from using a platform where that end-user is not engaged in disinformation involving inauthentic behaviour.[242]

1.161 These obligations would not apply to the dissemination of: parody or satire, 'professional news content', or reasonable dissemination of content for any academic, artistic, scientific or religious purpose.[243] Further, a code or standard must not contain requirements relating to the content or encryption of 'private messages' or Voice over Internet Protocol (VoIP) communications (phone calls over the internet).[244]

## International human rights legal advice

### *Multiple rights*

1.162 By seeking to regulate the dissemination of information on digital platforms that may cause serious harm in Australia, this bill may promote several human rights

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238 Schedule 1, item 2, proposed section 14.

239 Schedule 1, item 2, proposed subsection 13(3).

240 Schedule 1, item 2, proposed section 47.

241 The Hon. Michelle Rowland MP, Minister for Communications, second reading speech, *House of Representatives Hansard*, 12 September 2024, p. 7. Further, the voluntary Australian Code of Practice on Disinformation and Misinformation (2021) requires signatories to develop and implement measures which may include policies, labelling false content, removing content propagated by inauthentic behaviours, providing transparency about action taken, or demoting the ranking of content that may expose users to disinformation or misinformation. Demonetisation of disinformation appears to refer to cutting financial incentives for purveyors of disinformation to ensure that they do not benefit from advertising revenue, for example.

242 Schedule 1, item 2, proposed section 67.

243 Schedule 1, item 2, proposed section 16.

244 Schedule 1, item 2, proposed section 45–46.

including: the right to health (in relation to the dissemination of inaccurate or baseless healthcare and medical content); equality and non-discrimination (in relation to the dissemination of information that vilifies people of a particular race or gender identity); the right to participate in public affairs (in relation to the dissemination of inaccurate or misleading information about elections or referendums); and the right to security of the person (in relation to information which may cause a person or persons to be at risk of physical harm).

1.163 The right to health is the right to enjoy the highest attainable standard of physical and mental health.[245] It is a right to have access to adequate health care (including reproductive and sexual healthcare) as well as to live in conditions that promote a healthy life (such as access to safe drinking water, housing, food, and a healthy environment).[246] The right to equality and non-discrimination 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.[247] The right to take part in public affairs includes guarantees of the right of Australian citizens to stand for public office, to vote in elections and to have access to positions in public service.[248] The right to security of the person[249] requires the state to take steps to protect people against interference with personal integrity by others. This includes protecting people who are subject to death threats, assassination attempts, harassment and intimidation (including providing protection from domestic violence). Further, with respect to the existence of these rights in the digital space, the UN Human Rights Council has observed that the human rights which people have offline must also be protected online.[250]

1.164 The statement of compatibility accompanying this bill is comprehensive and detailed.[251] It sets out detailed domestic and international case studies in which the dissemination of certain information online has caused or contributed to serious

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245 International Covenant on Economic, Social and Cultural Rights, article 12(1).

246 UN Economic, Social and Cultural Rights Committee, *General Comment No. 14: the right to the Highest Attainable Standard of Health* (2000) [4]. See also, *General Comment No. 12: the right to food (article 11)* (1999); *General Comment No. 15: the right to water (articles 11 and 12)* (2002); and *General Comment No. 22: the right to sexual and reproductive health* (2016).

247 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.

248 UN Human Rights Council, *General Comment No.25: Article 25, Right to participate in public affairs, voting rights and the right of equal access to public service* (1996).

249 International Covenant on Civil and Political Rights, article 9(1).

250 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).

251 Statement of compatibility, pp. 5–21.

harms. In relation to the right to security of the person, it states that smear campaigns which have incorrectly alleged that a person has engaged in wrong-doing have provoked public outrage:

> The misinformation campaign that followed the attacks in Bondi, Sydney in April 2024, wrongly identifying a Jewish Australian as responsible for the attacks and resulting in death threats to that individual, provides an example, as does the misinformation campaign that targeted a Gold Coast doctor in February 2022, which also included death threats, following claims on social media that two girls died after being vaccinated for COVID-19 at his practice. Other examples from around the world include false reports about child abductions spread on social media and messaging apps in France in 2019, which prompted vigilante attacks against Roma people; and a video that went viral in India in 2018, falsely identifying five individuals as child kidnappers, prompting a mob attack on those individuals.[252]

1.165 In relation to medical misinformation, the statement of compatibility states that:

> The potential for health-related misinformation and disinformation to undermine the right to the highest attainable standard of health has been firmly established since the COVID-19 pandemic. Misinformation and disinformation that might have this effect could relate to how a disease is spread, the safety and effectiveness of vaccines or other preventive health measures, or health treatment options not supported by clinical data. Many studies have found that misinformation and disinformation of this nature can undermine public trust in expert guidance and government-led public health interventions, and consequently influence peoples' behaviour in a way that negatively impacts public health outcomes…Health-related misinformation and disinformation online is particularly pernicious. Research during the COVID-19 pandemic found that in the first 11 months of 2020, 5 health and lifestyle websites promoting false health information received 10 times more interactions on social media (comments, likes and shares) than the World Health Organisation and the Centre for Disease Control combined.[253]

1.166 By referencing peer reviewed academic studies and related research examining the presence of medical misinformation, its prevalence and effects on different groups in society, the statement of compatibility establishes that the measure is likely directed towards a legitimate objective, and seeks to address an issue which is broadly of pressing and substantial concern.

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252 Statement of compatibility, p. 8.

253 Statement of compatibility, pp. 13–14.

1.167 The statement of compatibility also provides detailed analysis of observations made by United Nations bodies in relation to the spread of misinformation or disinformation that vilifies certain groups in society:

> UN human rights bodies have taken the view that vilification can constitute discrimination, if it has the effect of nullifying or impairing the exercise by one person or group of their human rights and fundamental freedoms, on an equal footing with others. For example, in relation to a complaint made against Canada by a school teacher regarding his dismissal from a teaching position, the Human Rights Committee found that the teacher had discriminated against Jewish children by disseminating anti-Semitic beliefs. The Committee said that the dissemination of anti-Semitic material contributed to the creation of a 'poisoned environment' that interfered with the provision of education for Jewish children. In a similar vein, in its observations on a report by Russia to the Human Rights Committee in 2009, the Committee expressed concern about 'the systematic discrimination against individuals on the basis of their sexual orientation…, including hate speech and manifestations of intolerance and prejudice'…In 2023, UN human rights experts recognised that the spread of hatred and hate speech against marginalised groups undermines their rights, and called upon 'social media companies to urgently address posts and activities that advocate hatred and constitute incitement to discrimination, in line with international standards for freedom of expression.[254]

1.168 The provision of this detailed information outlining the expectations on States parties by the United Nations as to how to address the dissemination of certain types of misinformation and disinformation assists considerably in an assessment of why the proposed framework is necessary.

### *Rights to freedom of expression; privacy*

1.169 However, by seeking to monitor and regulate the dissemination of information on digital platforms, the bill also engages and limits the right to freedom of expression. Further, by enabling ACMA to: approve codes or standards (which may include provisions relating to the use and disclosure of personal information), make rules (which may require providers to retain records including personal information), and require providers to provide information and documents about misinformation and disinformation which could include personal information, it also engages and limits the right to privacy.

1.170 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.[255] The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and

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254 Statement of compatibility, pp. 10–13.

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

expression has stated that 'the right to freedom of expression includes expression of views and opinions that offend, shock or disturb'.[256] The UN Human Rights Committee has also stated that the right to freedom of expression encompasses expression that may be regarded as deeply offensive and insulting, although such expression may be restricted in accordance with articles 19(3) and 20 of the International Covenant on Civil and Political Rights (which obliges States parties to prohibit by law any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence).[257]

1.171 The right to freedom of expression carries with it special duties and responsibilities and accordingly may be subject to limitations that are necessary to protect the rights or reputations of others,[258] national security, public order, or public health or morals.[259] Such limitations must be prescribed by law, be rationally connected to the objective of the relevant measures and be proportionate.[260] Noting the important status of this right under international human rights law, restrictions on the right to freedom of expression must be construed strictly and any restrictions must be justified in strict conformity with the limitation clause in article 19(3), including restrictions justified on the basis of article 20.[261]

1.172 In the context of misinformation and disinformation, the United Nations special rapporteur on the promotion and protection of the right to freedom of opinion and expression Ms Irene Khan, has stated that:

> In the context of disinformation, two points are worth noting. Firstly, the right to freedom of expression applies to all kinds of information and ideas, including those that may shock, offend or disturb, and irrespective of the truth or falsehood of the content. Under international human rights law, people have the right to express ill-founded opinions and statements or indulge in parody or satire if they so wish. Secondly, the free flow of information is a critical element of freedom of expression and places a

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256 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) [37].

257 UN Human Rights Committee, *General comment No. 34: Article 19: Freedoms of opinion and expression*, CCPR/C/GC/34 (2011) [11] and [38].

258 Restrictions on this ground must be constructed with care. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [28].

259 The concept of 'morals' derives from myriad social, philosophical and religious traditions. This means that limitations for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [32].

260 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [21]–[36].

261 UN Human Rights Committee, *General comment No. 34: Article 19: Freedoms of opinion and expression*, CCPR/C/GC/34 (2011) [2]–[3], [21]–[22], [52].

> positive obligation on States to proactively put information of public interest in the public domain, and promote plural and diverse sources of information, including media freedom. It can be a valuable tool for countering disinformation.[262]

1.173 The special rapporteur has noted that any limitation of disinformation 'must establish a close and concrete connection to the protection of one of the legitimate aims stated in article 19(3). The prohibition of false information is not in itself a legitimate aim under international human rights law'.[263] Further, with respect to the importance of freedom of expression to democracy and the enjoyment of other human rights and freedoms, it has been noted that:

> [I]nternational human rights law affords particularly strong protection to expressions on matters of public interest, including criticism of Governments and political leaders and speech by politicians and other public figures, and to media freedom. This does not mean that disinformation in the context of political speech can never be restricted, but that any such restriction requires a high threshold of legality, legitimacy, necessity and proportionality. For instance, electoral laws may justifiably forbid the propagation of falsehoods relating to electoral integrity, but such a restriction must be narrowly construed, time-limited and tailored so as to avoid limiting political debate.[264]

1.174 In relation to the right to privacy, this right includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.[265] It also includes the right to control the dissemination of information about one's private life. The right to privacy protects against arbitrary and unlawful interferences with an individual's privacy and attacks on reputation.[266] It may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary,

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262 Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan, *Disinformation and freedom of opinion and expression* (2021) A/HRC/47/25 [38].

263 Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan, *Disinformation and freedom of opinion and expression* (2021) A/HRC/47/25 [40].

264 Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan, *Disinformation and freedom of opinion and expression* (2021) A/HRC/47/25 [42].

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

266 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).

the measure must pursue a legitimate objective and be rationally connected to (that is, effective to achieve) and proportionate to achieving that objective.

1.175 The statement of compatibility identifies that the bill engages and limits these rights.[267]

*Legitimate objective*

1.176 The statement of compatibility states that the measures in the bill which limit freedom of expression are aimed specifically at addressing the risk posed by misinformation and disinformation and will reduce the risk that content disseminated on digital communications platforms will cause or contribute to one of the types of 'serious harm'.[268] In this respect, it states that each of the types of serious harm set out in the bill are directed towards a permissible basis on which freedom of expression may be limited:

> (h) harm to the operation or integrity of electoral or referendum process; vilification of certain groups in society; intentionally inflicted physical injury to an individual in Australia (directed towards protecting the rights of others);
>
> (i) harm to public health (directed towards protecting public health); and
>
> (j) imminent damage to critical infrastructure or disruption of emergency services in Australia; or imminent harm to the Australian economy (directed towards protecting public order).

1.177 These bases for seeking to regulate the dissemination of certain information on digital communications platforms would appear likely to be directed towards a legitimate objective under international human rights law. The statement of compatibility provides numerous case studies (both domestic and international) to illustrate the existence of a pressing concern in relation to many of these types of serious harm.[269] This is an important consideration, noting that 'the directness of the causal relationship between the speech and the harm, and the severity and immediacy of the harm, are key considerations in assessing whether the restriction is necessary'.[270]

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267 Statement of compatibility, pp. 17–21.

268 Statement of compatibility, pp. 18–20.

269 Statement of compatibility, pp. 7–14. There is no information in the statement of compatibility to demonstrate the existence of a pressing and substantial concern in relation to threats to damage critical infrastructure or disrupt emergency services, or do cause imminent harm to the economy, in Australia. However, the explanatory memorandum does identify numerous international case study examples (pp. 56–57).

270 Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan, *Disinformation and freedom of opinion and expression* (2021) A/HRC/47/25 [41].

*Rational connection*

1.178 Under international human rights law, it must also be demonstrated that any limitation on a right has a rational connection to the objective sought to be achieved. The key question is whether the relevant measure is likely to be effective in achieving the objective being sought.

1.179 In this regard, the bill seeks to establish a high-level regulatory framework, which the statement of compatibility describes as 'core transparency obligations on digital communications platform providers' and regulatory powers 'focused on systems and processes, rather than the regulation of actual content'.[271] The bill would empower ACMA to approve codes and make standards to compel providers to prevent and respond to mis and disinformation. ACMA would also have enforcement powers, and providers would be subject to potentially significant civil penalties for breaches of a standard or codes. A code or standard may require a provider to do a range of things in respect of content on their platforms. The scheme would not apply to content meeting certain definitions (e.g. professional news content or satire) and would not require providers to regulate 'private messages'. The scheme would not require a provider to remove content (other than content where the dissemination is disinformation that involves inauthentic behaviour, or prevent an end-user from using a platform where the end-user is not engaged in disinformation that involves inauthentic behaviour.[272] However, equally, the bill states that nothing in the scheme would *prevent* a provider from removing content or blocking end-users.[273]

1.180 Consequently, it would appear likely that the high-level scheme proposed by the bill would likely be effective at addressing the risk posed by misinformation and disinformation by reducing the risk that content which may cause each of the types of 'serious harm' may be disseminated. However, there may be a risk that the type of content which is subsequently subject to regulation by providers extends *beyond* such content (which is a question of proportionality, and discussed further below).

*Proportionality*

1.181 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: whether a proposed limitation is sufficiently circumscribed; whether it is accompanied by sufficient safeguards; whether any less rights restrictive alternatives could achieve the same stated objective; and whether there is the possibility of oversight and the availability of review.

1.182 As to whether the measure is sufficiently circumscribed, the bill seeks to establish a high-level regulatory framework. The key terms in the bill (misinformation,

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271 Statement of compatibility, p. 20.

272 Schedule 1, proposed section 67.

273 Schedule 1, proposed subsection 67(2).

disinformation) are defined broadly, and would appear to encompass a potentially wide range of content. However, the bill would only seek to regulate content where its dissemination may cause or contribute to 'serious harm'. The term 'serious harm' refers to harm which has significant and far-reaching consequences for the Australian community (or segment of it), or an individual in Australia. The bill provides that in determining whether the provision of certain content on a digital service is reasonably likely to cause or contribute to serious harm, regard must be had to a range of matters, including: the subject matter; the potential reach and speed of the dissemination; the author; and the purpose of dissemination; and may include further matters determined by legislative instrument.[274] When these proposed definitions are assessed together, they suggest that the scheme would only *require* the regulation of content which, if disseminated, would be reasonably likely to cause or contribute to serious harms. However, this would not *prevent* a digital service provider platform from regulating content in circumstances outside the scope of scenarios contemplated by the bill so as to avoid the risk of a civil penalty for non-compliance. For example, if an individual end-user posted factually incorrect content regarding an upcoming local election in their area, the platform provider could remove the content on the basis that is incorrect and relates to electoral matters (an area contemplated by the bill), even if that end-user had a very small following and so the dissemination of their views would be unlikely to have a tangible impact on that election or lead to any other tangible harm. In this respect, international human rights law bodies have cautioned against the risk that online content regulation schemes have a 'chilling effect' on the right to freedom of expression:

> The trend that sees States delegating to online platforms "speech police" functions that traditionally belong to the courts has continued. The risk with such laws is that intermediaries are likely to err on the side of caution and "over-remove" content for fear of being sanctioned. The German Network Enforcement Act, adopted in 2018 and recently amended, allows users to flag content that they believe is illegal under certain provisions of the Criminal Code and obliges platforms to remove the "violating content" within a short period of time or face heavy fines. Although the German statute does not prohibit or penalize disinformation, it has been cited by other countries seeking to introduce unduly restrictive intermediary laws or social media regulations that would enable the removal of "fake news" without a judicial or even a quasi-judicial order.[275]

1.183 Further, the proposed rules, codes and/or standards, which would contain the detail of what providers would be required to regulate on their platforms, would be contained in delegated legislation. Section 44 of the bill provides examples of matters

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274 Schedule 1, item 2, proposed subsection 13(3).

275 Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan, *Disinformation and freedom of opinion and expression* (2021) A/HRC/47/25 [58].

that may be dealt with in a code or standard, but the list is not exhaustive. These examples include: providing reporting tools, links to authoritative information, support for fact checking and demonetisation of disinformation.[276] Some of these examples appear to require providers to contextualise, rather than remove, content constituting disinformation. Further, the bill provides that ACMA may only approve a code (or otherwise determine a standard) where they are satisfied that it is reasonably appropriate and adapted, and goes no further than is reasonably necessary to achieve its aims.[277] This overarching requirement may assist in ensuring that any code or standard would constitute a proportionate limit. However, it would appear that this safeguard could be further strengthened by requiring ACMA to have regard to freedom of expression in approving a code or determining a standard. Further, it appears that nothing would prevent a provider from regulating more content than is specified in a code or standard.

1.184 As to provisions in the bill which may provide for the monitoring of personal information, the statement of compatibility notes that ACMA's power to make rules requiring providers to make and retain records relating to misinformation and disinformation, requires ACMA to 'consider' the privacy of end-users.[278] Such rules must not require providers to make or retain records regarding the *content* of 'private messages' (discussed further below) or VoIP communications, and ACMA must not require an individual to provide information or documents relating to content which they themselves posted on a platform. The statement of compatibility states that ACMA's regulatory powers are not designed to address the behaviour of individual end-users, but rather, the way in which digital communications platform providers manage the risk of misinformation and disinformation on their platforms. These measures may have the capacity to serve as important safeguards with respect to the right to privacy, noting however that the extent to which compliance (and purported compliance) with the scheme may limit the right to privacy may only be apparent in practice.

1.185 The subject matter proposed to be excluded from the regulatory scheme is a relevant consideration in assessing its proportionality. In this regard, the bill proposes that 'professional news content' would not be subject to regulation.[279] This would refer to news content issues or events that are relevant in engaging persons in public debate and in informing democratic decision-making; current issues or events of

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276 Schedule 1, proposed section 44. By way of comparison, the current Voluntary Australian Code of Practice on Disinformation and Misinformation provides a list of measures which providers may implement (such as labelling false content, providing trust indicators, providing technology to assist users to verify the accuracy of content, or exposing metadata to users about the source of content). See, Digital Industry Group Inc, *Australian Code of Practice on Disinformation and Misinformation* (2022), [5.9].

277 Schedule 1, proposed paragraph 47(1)(d)(iv), proposed subsection 54(b).

278 Statement of compatibility, p. 17.

279 Schedule 1, proposed section 16.

public significance for persons at a local, regional, national or international level; and current issues or events of interest to persons. This appears to be a broad exclusion providing for the reporting of legitimate news stories. In this regard, international human rights law experts have emphasised the important role of free media, stating that 'the best way of addressing disinformation and misinformation is by fact-checking on the basis of independent information through independent free media'.[280] 'Professional news content' would refer to news content produced by a person who produces and publishes news content online in a range of formats, where that person is subject to formalised editorial and other standards and has editorial independence from the subjects of the person's news coverage.[281] The explanatory memorandum states that this definition would extend to the republication of a professional news article by an individual person.[282] However, it would not appear to extend to the work of 'citizen journalists' (journalism conducted by people who are not professional journalists), which could limit the value of this exclusion. The explanatory memorandum states that editorial standards should provide a mechanism for managing complaints about the news content, as well as standards relating to accuracy and impartiality.[283] However, it does not explain why the independent reporting of public events by an individual who is not subject to such standards should necessarily be subject to the scheme. Further, the bill does not appear to contemplate that foreign jurisdictions may establish legal and regulatory frameworks that effectively prevent journalists from reporting freely via state-sanctioned publications or outlets.[284] In such circumstances, there may be a risk that such journalists may be unable to benefit from this exclusion. As such, the value of this exclusion for professional news content may be limited in practice.

1.186 As to other exclusions from the proposed framework, the bill provides that ACMA must not approve a code (or part of a code), or determine a standard, that contains requirements related to the content or encryption of 'private messages'.[285] A message would be 'private' where it is a message sent by one user to a number of other end users to be set by legislative instrument, or otherwise not exceeding 1,000 end-users. As to why a private message sent to over 1,000 recipients should be subject to this regulatory scheme, the explanatory memorandum states:

> The number 1,000 has been chosen as a conservative threshold that exceeds any scientifically accepted limits on the number of meaningful

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280 United Nations High Commissioner for Human Rights, *Expert seminar on legal and economic threats to the safety of journalists* (2024) A/HRC/55/39 [8].

281 Schedule 1, proposed subsection 16(2).

282 Explanatory memorandum, p. 64.

283 Explanatory memorandum, p. 64

284 See, for example, Amnesty International '*Russia: Kremlin's ruthless crackdown stifles independent journalism and anti-war movement'* (March 2022).

285 Schedule 1, proposed section 45.

> relationships humans can maintain at a time. Although this is an ongoing area of study in psychology, the most cited number, known as Dunbar's Number, is 150. Dunbar observes that groups with more than 150 members start to become unstable and can fragment. Therefore, when a person sends a message to over 1,000 recipients (or other number specified in the digital platform rules), even on a so-called 'private' social media page or instant message group for example, it can be reasonably assumed that there is a significant potential for the content to be re-disseminated without the explicit consent of the original creator of the message. These messages cannot reasonably be considered private and are not intended to be captured as private messages for the purposes of Schedule 9.[286]

1.187 As to why it is proposed that the rules may set a lower figure, the explanatory memorandum states that this would allow the number to be informed by information on misinformation complaints and any additional information regarding misinformation and disinformation on digital communications platforms obtained by ACMA.[287] This additional information assists in an assessment of what safeguard value this protection of private messages would have in practice. It would appear that ACMA could obtain information in practice indicating that certain messages sent to a low number of end-users (as few as two end-users) should be subject to regulation, which would significantly limit the safeguard value of this exclusion. Furthermore, while the statement of compatibility states that ACMA's regulatory powers are not designed to address the behaviour of individual end-users,[288] it appears that nothing would *prevent* a provider from monitoring and regulating the content of private messages, and there may be a risk that providers do seek to monitor such content in practice (for example, with a view to proactively identifying risks of future disinformation being disseminated on the platform by particular end-users).

1.188 As to the availability of review, the bill notes that digital platform rules which may be made may themselves provide that certain decisions of ACMA are subject to review in the Administrative Review Tribunal.[289] Such rules may require providers to implement and maintain complaints and dispute handling processes, which must comply with minimum standards.[290] However, it is not clear that any such decisions made under the rules would directly enable individuals to seek a review of decisions made to regulate or otherwise moderate content. While such rules may require providers to maintain complaints processes (which may have the effect of protecting the right of individuals to freedom of expression) it is not clear what such complaints processes would be required to include, at a minimum, and whether this would include (for example) the ability to seek the republication of information or some amendment

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286 Explanatory memorandum, p. 27.

287 Explanatory memorandum, p. 27.

288 Statement of compatibility, p. 17.

289 Schedule 2, item 15.

290 Schedule 1, section 25.

to a fact-checking flag on specific content, or the ability to otherwise make submissions in relation to certain content. In this respect, it is also unclear what (if any) remedy an individual would have access to if a digital platform provider engaged in conduct in purported compliance with this scheme and that resulted in a breach of the right to freedom of expression.[291]

1.189 As to oversight, the bill provides that ACMA is required to maintain oversight of the scheme. It would be required to prepare an annual report in relation to the scheme,[292] and to review the scheme after three years of operation, including an assessment of its impact on freedom of expression.[293] Noting that ACMA is an independent statutory body, this may serve as an important safeguard.[294] However, it would appear that requiring ACMA to have regard to the right to freedom of expression (and other human rights) in approving codes or determining standards under the scheme would have a more immediate safeguard value.

*Conclusion*

1.190 It appears that the bill is directed towards a legitimate objective which is broadly of pressing and substantial concern, and would likely be rationally connected to (that is, capable of achieving) that objective. However, questions remain as to whether the scheme would constitute a proportionate limit on the right to freedom of expression and the right to privacy in practice. While the bill does establish several broad safeguards which would assist with the proportionality of the measure, and provide for regular review of the operation of the scheme, much of the detail of what the scheme would require providers to do would be set out in delegated legislation. Further, there may be a risk that, in practice, providers over-regulate content on their platforms in order to avoid the risk of a civil penalty for non-compliance with this scheme, meaning that the extent of the limitation on the right to freedom of expression (and privacy) may only become apparent as a matter of practice.

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291 The right to an effective remedy requires the availability of a remedy which is effective with respect to any violation of rights and freedoms recognised by the International Covenant on Civil and Political Rights. It includes the right to have such a remedy determined by competent judicial, administrative or legislative authorities or by any other competent authority provided for by the legal system of the state. International Covenant on Civil and Political Rights, article 2(3).

292 Schedule 1, proposed section 69.

293 Schedule 1, proposed section 70.

294 The United Nations special rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ms Irene Khan, has observed that regulatory proposals, which focus on transparency and due process obligations can make a positive contribution to the protection of human rights and greater public accountability of platforms. However, for the regulatory measures to work properly, the independence of the oversight body or regulator must be assured and scrupulously respected. See, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan, *Disinformation and freedom of opinion and expression* (2021) A/HRC/47/25 [59].

## Committee view

1.191 The committee notes that this bill seeks to amend the *Broadcasting Services Act 1992* and related legislation to empower the Australian Communications and Media Authority (ACMA) to establish a regulatory framework requiring digital communications platform providers (providers) to manage the risk of certain content constituting misinformation and disinformation on their platforms.

1.192 The committee notes that seeking to regulate the dissemination of content on digital communications platforms, where that dissemination may cause or contribute to serious harm, may engage and promote numerous human rights including: the right to health (in relation to the dissemination of inaccurate or baseless healthcare and medical content); equality and non-discrimination (in relation the dissemination of information that vilifies people of a particular race or gender identity); the right to participate in public affairs (in relation to the dissemination of inaccurate or misleading information about elections or referendums); and the right to security of the person (in relation to information which may cause a person or persons to be at risk of physical harm). In this respect, the committee considers that the statement of compatibility is extensive and comprehensively outlines the expectations of United Nations bodies as to how States parties are to address the dissemination of certain types of misinformation and disinformation. The committee notes that the provision of a detailed statement of compatibility has, in relation to this bill, considerably assisted in the committee's consideration of the compatibility of the bill.

1.193 The committee notes that, in seeking to regulate the dissemination of certain content, the bill also engages and limits the right to freedom of expression and the right to privacy. The committee considers that the bill is directed towards a legitimate objective which is broadly of pressing and substantial concern, and would likely be rationally connected to (that is, capable of achieving) that objective. However, the committee considers that some questions remain as to whether the scheme would constitute a proportionate limit on the right to freedom of expression and the right to privacy in practice. The committee notes that the bill establishes several broad high-level safeguards which would assist with its proportionality, and provides for regular review of the operation of the scheme by ACMA. However, the committee notes that much of the detail of what the scheme would require providers to do in practice would be set out in delegated legislation. Further, the committee considers that there may be a risk that, in practice, providers may regulate content on their platforms in a manner which is beyond the scope of what would be required by this scheme in order to avoid the risk of a civil penalty for non-compliance. The committee considers that this may mean that the extent of the limitation on the right to freedom of expression (and to privacy) may only be apparent as a matter of practice.

1.194 The committee notes that it will assess the compatibility of any future legislative instruments made pursuant to this scheme.

**Suggested action**

1.195 The committee considers the proportionality of this measure may be assisted were sections 47 and 54 of the bill amended to require ACMA to have regard to the right to freedom of expression (as recognised under international human rights law) in approving a code or determining a standard.

1.196 The committee recommends that consideration be given to whether the proposed scheme would appropriately protect content produced by 'citizen journalists' who are not subject to formalised editorial standards.

1.197 The committee recommends that the statement of compatibility be updated to identify what (if any) remedy an individual may access if compliance (or purported compliance) with the proposed scheme resulted in a breach of their right to freedom of expression or privacy.

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

# Criminal Code Amendment (Hate Crimes) Bill 2024[295]

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|---|---|
| **Purpose** | The bill seeks to amend offences in the *Criminal Code Act 1995* relating to urging violence, and introduce new offences for threatening force or violence against groups or members of a group, and expand the attributes of targeted groups to include sex, sexual orientation, gender identity, intersex status and disability. The bill further seeks to replace the fault element of 'intent' with 'recklessness' and remove the good faith defence for urging or threatening violence in relation to these offences |
| **Portfolio** | Attorney-General |
| **Introduced** | House of Representatives, 12 September 2024 |
| **Rights** | Children's rights; equality and non-discrimination; freedom of expression; freedom of religion |

## Expansion of offences for urging and threatening violence and public display of prohibited symbols

1.199 The *Criminal Code Act 1995* (Criminal Code) currently contains offences for intentionally urging another person or a group to use force or violence against a person or a group, with the intention that force or violence will occur, where the targeted group or a member of a group is distinguished by race, religion, nationality, national or ethnic origin or political opinion (sections 80.2A and 80.2B).[296] The bill would amend these offences to provide that a person may be guilty of an offence where they are reckless as to whether the force or violence will occur.[297] (Currently, for a person to be guilty of an offence, they must intend for the force or violence to occur.) The bill would also amend these offences to expand the list of protected attributes to include 'sex, sexual orientation, gender identity, intersex status and disability'.[298]

1.200 The bill would also make it an offence, punishable by up to five years imprisonment, to *threaten* to use force or violence against a group or a member of a group on the basis of the expanded protected attributes, where a reasonable member of the group would fear the threat would be carried out.[299] Where such a threat, if

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295 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Criminal Code Amendment (Hate Crimes) Bill 2024, *Report 9 of 2024*; [2024] AUPJCHR 68.

296 Criminal Code, sections 80.2A and 80.2B.

297 Schedule 1, items 3,6, 11 and 14.

298 Schedule 1, items 4, 7, 12 and 15.

299 Schedule 1, item 19, proposed section 80.2BA.

carried out, would threaten the peace, order and good government of the Commonwealth, the offence would be punishable by seven years imprisonment.[300]

1.201 Currently, the bill provides a defence to the existing urging force or violence offences, if the person who took the action, in good faith:

- tries to show that the Sovereign, Governor-General, State Governors, their advisers or a person responsible for the government of another country are mistaken;
- points out, with a view to reforming, errors or defects in the government, the Constitution, legislation or administration of justice;
- urges a person to attempt to lawfully procure a change in law, policy or practice in Australia or internationally;
- points out matters that are producing, or have a tendency to produce, feelings of ill-will or hostility between different groups, in order to remove that;
- does anything in connection with an industrial dispute or matter; or
- publishes a report or commentary about a matter of public interest.[301]

1.202 The bill seeks to disapply this defence in relation to the offences of urging or threatening violence.[302]

1.203 The Criminal Code also criminalises the public display of prohibited symbols.[303] A person commits an offence if they cause a prohibited symbol to be displayed in a public place in certain circumstances (including that the conduct is likely to offend, insult, humiliate or intimidate a reasonable person who is a member of a group of persons distinguished by race, colour, sex, language, religion, political or other opinion or national or social origin because of their membership of that group).[304] The bill seeks to amend those offences to expand the relevant groups of persons to include those distinguished by 'sexual orientation, gender identity, [and] intersex status'.[305]

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300 Schedule 1, item 19, proposed section 80.2BB.

301 Criminal Code, section 80.3.

302 Schedule 1, item 20, proposed substituted subsection 80.3(1).

303 Per Criminal Code, section 80.2F, a prohibited symbol is 'displayed in a public place' if it is capable of being seen by a member of the public who is in a public place or the prohibited symbol is included in a document, such as a newspaper or magazine, film, video or television program, that is available or distributed to the public or a section of the public (including via the internet). Per section 80.2E, a 'prohibited symbol' is defined as the Nazi hakenkreuz, the Nazi double sig rune, a symbol that a terrorist organisation or its members use to identify the organisation, and something that so nearly resembles these things that it is likely to be confused with, or mistaken for, that thing.

304 Criminal Code, subsections 80.2H(7) and 80.2HA(7).

305 Schedule 1, item 20.

## Preliminary international human rights legal advice

### *Multiple rights*

1.204 To the extent that expanding offences and introducing new offences for displaying prohibited hate symbols and urging or threatening violence against groups or members of groups with protected attributes would deter and prevent the commission of violent offences, the measures could promote several human rights, including the rights to life and security of person, the right to equality and non-discrimination, and the prohibition against inciting national, racial or religious hatred.[306] The right to life imposes an obligation on the state to protect people from being killed by others or identified risks.[307] The United Nations (UN) Human Rights Committee has stated that the duty to protect life requires States parties to 'enact a protective legal framework that includes effective criminal prohibitions on all manifestations of violence or incitement to violence that are likely to result in the deprivation of life'.[308] The right to security of person requires the state to take steps to protect people against interference with personal integrity by others. This includes protecting people who are subject to death threats, assassination attempts, harassment and intimidation.[309] The right to equality and non-discrimination 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

306 International Covenant on Civil and Political Rights, articles 6 (right to life) and 9 (right to security of person), 20 (prohibition against racial and religious discrimination and hatred) and article 26 (equality and non-discrimination); Convention on the Elimination of All Forms of Racial Discrimination, article 4.

307 UN Human Rights Committee, *General Comment No. 36: article 6 (right to life)* (2019) [3]: the right should not be interpreted narrowly and it 'concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity'.

UN Human Rights Committee, *General Comment No. 6: article 6 (right to life)* [5]: the right should not be understood in a restrictive manner. It requires States to adopt positive measures, noting that it would be desirable for State parties to take all possible measures to reduce infant mortality and increase life expectancy.

308 United Nations Human Rights Committee, *General Comment No. 36: article 6 (right to life)* (2019) [20].

309 The UN Human Rights Committee has stated that measures taken in respect of article 20, namely laws prohibiting the advocacy of national, racial or religious hatred, 'constitute important safeguards against infringements of the rights of religious minorities and of other religious groups to exercise the rights guaranteed by articles 18 and 27, and against acts of violence or persecution directed toward those groups'. See UN Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993) [9].

and non-discriminatory protection of the law.[310] Article 20 of the International Covenant on Civil and Political Rights obliges states to prohibit by law any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

1.205 However, by criminalising certain forms of expression, including communicating information or ideas publicly where it amounts to urging or threatening violence and the display of prohibited symbols, the measures also engage and limit the right to freedom of expression. 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.[311] The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has stated that 'the right to freedom of expression includes expression of views and opinions that offend, shock or disturb'.[312] The UN Human Rights Committee has also stated that the right to freedom of expression encompasses expression that may be regarded as deeply offensive and insulting, although such expression may be restricted in accordance with articles 19(3) and 20 of the International Covenant on Civil and Political Rights (which obliges States parties to prohibit by law any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence).[313]

1.206 The right to freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order, or public health or morals. Additionally, such limitations must be prescribed by law, be rationally connected to the objective of the measures and be proportionate.[314] Noting the important status of this right under international human rights law, restrictions on the right to freedom of expression must be construed strictly and any restrictions must be justified in strict conformity with the limitation clause in article 19(3), including restrictions justified on the basis of article 20.[315]

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310 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.

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

312 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) [37].

313 UN Human Rights Committee, *General comment No. 34: Article 19: Freedoms of opinion and expression*, CCPR/C/GC/34 (2011) [11] and [38].

314 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [21]-[36].

315 UN Human Rights Committee, *General comment No. 34: Article 19: Freedoms of opinion and expression*, CCPR/C/GC/34 (2011) [2]–[3], [21]–[22], [52].

1.207 Additionally, as the offences would apply to children (from the age of 10),[316] the measures would engage and limit the rights of the child. Children have special rights under human rights law taking into account their particular vulnerabilities.[317] All children under the age of 18 years are guaranteed these rights, without discrimination on any grounds, including the right to freedom of expression.[318] Australia is required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.[319] This requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.[320]

1.208 Further, if the offences for urging and threatening violence, and the prohibition on publicly displaying certain prohibited symbols, had the effect of restricting the ability of people of certain religious groups to worship, practise or observe their religion, these measures may engage and limit the right to freedom of religion, particularly the right to demonstrate or manifest religious or other beliefs.[321] This may also engage and limit the right to equality and non-discrimination (which is described above). The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts, including ritual and ceremonial acts, the building of places of worship, the wearing of religious dress, and preparing and distributing religious texts or publications.[322]

*Legitimate objective and rational connection*

1.209 The statement of compatibility briefly identifies that the bill would limit the rights to freedom of expression and freedom of religion, but does not identify that the bill engages the rights of the child. It states that the measures would combat the

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316 *Crimes Act 1914*, sections 4M and 4N provide that a child under 10 cannot be liable for an offence and a child aged 10–14 can be liable but only if they know their conduct is wrong.

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

318 UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [5]. See also International Covenant on Civil and Political Rights, articles 2 and 26. The right to freedom of expression is protected by article 13 of the Convention on the Rights of the Child.

319 Convention on the Rights of the Child, article 3(1).

320 UN Committee on the Rights of Children, *General Comment 14 on the right of the child to have his or her best interest taken as primary consideration* (2013). The UN Committee on the Rights of the Child has said: 'the expression "primary consideration" means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child'. See also *IAM v Denmark*, UN Committee on the Rights of the Child Communication No.3/2016 (2018) [11.8].

321 International Covenant on Civil and Political Rights, article 18. See UN Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993).

322 UN Human Rights Committee, General Comment No. 22: Article 18 (Freedom of thought, conscience or religion) (1993) [4].

increasing prevalence of hate speech involving calls to force and violence and would promote community respect and understanding.[323] It states that the limitations are necessary to protect the community from force or violence that can cause significant harm, prevent the compromise of national security and public order, and assist law enforcement in intervening early to prevent threats from being carried out and to prevent the lives and physical security of targeted individuals being compromised.[324] These would broadly appear to constitute clear legitimate objectives under international human rights law, and expanding the scope of the offences would appear to be rationally connected to (that is, effective to achieve) those objectives.

*Proportionality*

1.210 In assessing whether the limitations on these rights are proportionate to the objectives being sought, it is necessary to consider whether the limitations are sufficiently circumscribed and whether the measures are accompanied by sufficient safeguards.

1.211 The breadth of the measures is relevant in considering whether the limitations are sufficiently circumscribed. In relation to the offences for urging or threatening violence, reducing the fault element regarding whether the violence or force the person is urging will actually occur to recklessness, and expanding the offences to cover more groups with protected attributes, expands the scope of conduct which may be criminalised. The statement of compatibility states that the existing fault element of intent sets the bar so high that conduct which should attract criminal liability is not captured, and that amending it to recklessness will align the offence with the standard fault elements in the Criminal Code and common law.[325] Capturing a greater range of conduct directed at groups with protected attributes may provide protection to a greater range of persons. However, it may be that the requirement of 'intention' provides an important protection for the right to freedom of expression in practice, and enables consideration of the context in which the communication is given.[326] As such, there may be a risk that the amended offence could capture a broader range of conduct in a manner which impermissibly limits the rights to freedom of expression and religion.

1.212 As to the proposed removal of the defence of acting in good faith, the statement of compatibility states that this would make clear that urging force or

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323 Statement of compatibility, p. 5.

324 Statement of compatibility, pp. 12–13.

325 Statement of compatibility, p. 6.

326 In relation to section 80.2 of the Criminal Code (an offence for sedition), the Australian Law Reform Commission stated that the focus should be on providing that a person *intentionally* urges the use of force or violence and to consider the context in which it is made rather than relying on defences after a person has been found to satisfy all the elements of the offence: see, Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia* (Report 104, July 2006) p. 259.

violence against people on the basis of their protected attributes can never be done in 'good faith', and would remove an avenue for a defendant to avoid criminal responsibility if they engage in conduct of this kind.[327] It states that the rights of individuals to communicate ideas in a manner that falls short of urging force or violence would not be affected by these expanded offences.[328] However, if the urging of force or violence can never be performed in good faith, it is not clear why it is therefore necessary to remove the defence. Despite these offences having been in operation since 2010,[329] no information is provided as to whether this defence has been relied on in practice in circumstances which have been regarded as inappropriate or too broad. The explanatory memorandum indicates that this proposal reflects recommendations made by the Australian Law Reform Commission (ALRC) in 2006.[330] However, the ALRC stated that rather than attempt to protect freedom of expression through a 'defence' that arises after a person has been found to satisfy all the elements of the offence, it would be better in principle and in practice to reframe the criminal offences in such a way that they do not extend to legitimate activities or unduly impinge on freedom of expression in the first place.[331] As the bill proposes lessening the fault element attaching to one aspect of the offences, it does not appear that the proposed amendments are consistent with the ALRC's recommendation.

1.213 In relation to the public display of prohibited symbols, the statement of compatibility provides very limited analysis of whether these measures constitute a permissible limit on human rights. The committee previously considered these measures in detail and concluded that depending on how the measures are implemented in practice, there may be a risk that they are incompatible with the rights to freedom of expression, freedom of religion and equality and non-discrimination.[332] As this bill seeks to expand the protected groups in relation to whom these offences would operate, those human rights concerns remain relevant. In this regard, the committee previously made several recommendations to assist with the proportionality of the measure which do not appear to have been implemented.[333]

1.214 As to the rights of the child, there is a clear position under international human rights law that the minimum age of criminal responsibility should be at least 14 years

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327 Statement of compatibility, p. 9.

328 Statement of compatibility, p. 13.

329 Sections 80.2A and 2B were introduced in 2010 pursuant to the National Security Legislation Bill 2010.

330 Explanatory memorandum, p. 39 in reference to Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia* (ALRC Report 104, 2006).

331 Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia* (ALRC Report 104, 2006) [2.70].

332 Parliamentary Joint Committee on Human Rights, *Report 8 of 2023* (2 August 2023) pp. 22–45 and *Report 9 of 2023* (6 September 2023) pp. 61–94.

333 Parliamentary Joint Committee on Human Rights, *Report 9 of 2023* (6 September 2023) pp. 93–94.

and that the best interests of the child should be prioiritised, including by way of non-judicial alternatives to prosecution and detention of children accused of terrorist offences. As children aged as young as 10 could be charged with any of these offences, there therefore appears to be a significant risk that the measures are not compatible with the rights of the child.

*Concluding remarks*

1.215 While the measures broadly pursue objectives which would be regarded as legitimate objectives for the purposes of international human rights law and are rationally connected to those objectives, it is unclear whether the proposed limitations on the rights to freedom of expression, religion and equality and non-discrimination would be proportionate in all circumstances. There is a risk that, in practice, the offences could capture a greater range of conduct that may be offensive and insulting but the prohibition of which may constitute an impermissible limit on the rights to freedom of expression and religion. In relation to the offences related to urging violence, this risk appears to be particularly pronounced given the proposed removal of the defence of acting in good faith. Further, in the absence of any requirement to consider non-judicial alternatives to prosecution and detention of children or any other legislative safeguards to protect the rights of the child with respect to any of these offences, there is a significant risk that the measures are not compatible with the rights of the child.

## Committee view

1.216 The committee notes that the bill seeks to expand existing offences in the Criminal Code for intentionally urging another person or a group to use force or violence against a person or a group, including by reducing one relevant fault element to recklessness, expanding the list of protected attributes to include sex, sexual orientation, gender identity, intersex status and disability, and removing the existing defence of acting in good faith. The committee notes that the bill would also make it an offence, punishable by up to five years imprisonment, to threaten to use such force or violence. The bill would also expand existing offences for publicly displaying prohibited symbols to include circumstances where the conduct is likely to offend, insult, humiliate or intimidate a reasonable person who is a member of a group of persons including persons distinguished by sexual orientation, gender identity, and intersex status.

1.217 The committee considers that in seeking to expand existing offences and introduce new offences, the bill would likely promote numerous human rights, including the rights to life and security of person, the right to equality and non-discrimination, and the prohibition against inciting national, racial or religious hatred.

1.218 However, the committee notes that by criminalising certain forms of expression, including communicating information or ideas publicly where it amounts to urging or threatening violence and the display of prohibited symbols, the measures

also engage and limit the rights to freedom of expression and religion, and the right to equality and non-discrimination.

1.219 The committee notes that it extensively considered the offences relating to public display of prohibited symbols when they were introduced in 2023, at which time it raised several human rights concerns.[334] The committee notes that it recommended 10 amendments to the bill to assist with its compatibility, and that it does not appear that those amendments were made. Consequently, the concerns the committee previously raised remain relevant to this measure.

1.220 The committee considers that these measures are broadly directed towards important and legitimate objectives of protecting vulnerable people in society and preventing violence and harm. In relation to the public display of prohibited symbols, the committee considers that in circumstances where the measures restrict expression that reaches the threshold of hate speech, it would likely constitute a permissible limitation on the right to freedom of expression. However, the committee remains concerned that there is a risk that in some circumstances, depending on how the measures are implemented by law enforcement in practice, the measures may not be fully compatible with the rights to freedom of expression, freedom of religion and equality and non-discrimination.

1.221 In relation to urging violence, the committee considers that while protecting an expanded list of groups with protected attributes and lowering one fault element to recklessness will capture a broader range of conduct, which may help protect vulnerable groups from violence, there is a risk that in practice the offences could capture a greater range of conduct, including conduct that may be offensive and insulting, but the prohibition of which may constitute an impermissible limit on the rights to freedom of expression and religion.

1.222 The committee considers that in the absence of any requirement to consider non-judicial alternatives to prosecution and detention of children or any other legislative safeguards to protect the rights of the child with respect to any of these offences, there is a significant risk that the measures are not compatible with the rights of the child.

**Suggested action**

1.223 The committee recommends that consideration be given to the amendments the committee proposed in relation to public display of prohibited symbols in *Report 9 of 2023*.

1.224 The committee recommends that the statement of compatibility be updated to provide a more fulsome assessment of compatibility with the right to

334 Parliamentary Joint Committee on Human Rights, *Report 8 of 2023* (2 August 2023) pp. 22–45 and *Report 9 of 2023* (6 September 2023) pp. 61–94.

freedom of expression, freedom of religion, and equality and non-discrimination, and to assess the compatibility of these measures with the rights of the child.

1.225 The committee draws these human rights concerns to the attention of the Attorney-General and the Parliament.

# Fair Work (Registered Organisations) Amendment (Administration) Bill 2024

# Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024[335]

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| **Purpose** | The bill amends the *Fair Work (Registered Organisations) Act 2009* to provide for the administration of the Construction and General Division of the Construction, Forestry and Maritime Employees Union and its branches, and amends the *Fair Work Act 2009* to restrict 'removed persons' from being a bargaining representative for an employee or employer<br>The determination provides for the scheme of administration |
| **Portfolio** | Employment and Workplace Relations |
| **Introduced** | Senate, 12 August 2024<br>*Finally passed both Houses, 20 August 2024*<br>Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024 [F2024L01056] registered 23 August 2024 (*exempt from Parliamentary disallowance)* |
| **Rights** | Right to freedom of association; work; privacy; prohibition against retrospective criminal laws |

## Involuntary administration of part of the CFMEU

*Background*

1.226 The Fair Work (Registered Organisations) Amendment (Administration) Bill 2024, now Act (the amending Act),[336] provides for the involuntary administration of the Construction and General Division of the Construction, Forestry and Maritime Employees Union (CFMEU) and its branches, if the minister is satisfied it is in the public interest. 'Administration' means that the day-to-day functioning of the Construction and General Division of the CFMEU is in the hands of an administrator appointed by the General Manager of the Fair Work Commission.

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335 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Fair Work (Registered Organisations) Amendment (Administration) Bill 2024 and Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024, *Report 9 of 2024*; [2024] AUPJCHR 69.

336 This bill was subject to several amendments made in the Senate. This entry considers the bill as it finally passed the Parliament.

1.227 The explanatory materials accompanying the amending Act state that serious allegations have been raised about the conduct of some officials and associates of the CFMEU's Construction and General Division, including 'allegations of corruption, criminal conduct and other serious misconduct including bullying and harassment and general disregard for workplace laws'.[337]

1.228 The amending Act received Royal Assent on 22 August 2024. On 23 August 2024, the Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024 (the determination) was registered on the Federal Register of Legislation to determine a scheme for the administration of the Construction and General Division of the CFMEU and its branches pursuant to the amending Act. The determination came into force that day.

*The administration scheme*

1.229 The amending Act provides that the Construction and General division of the CFMEU will be subject to administration for between three and five years.[338] The scheme for administration must provide for certain matters, including:

- suspension or removal of officers and declarations that offices are vacant;
- the taking of disciplinary actions by the administrator, including expulsion of members and disqualification of officers for up to five years;
- the termination of employment of employees of the Construction and General Division or its branches;
- the timing of elections of officers;
- the making of an alteration of the rules of the Construction and General Division by the administrator; and
- obligations for the administrator to cooperate with any inquiry into conduct of the CFMEU, or officers or employees or former officers or employees of the CFMEU or any of its branches, divisions or parts, being undertaken by any law enforcement agency or regulator (including the Fair Work Ombudsman or the Fair Work Commission).[339]

1.230 In making a decision regarding the scheme, the minister is not required to observe any requirements of the natural justice hearing rule.[340]

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337 Fair Work (Registered Organisations) Amendment (Administration) Bill 2024, explanatory memorandum, p. 2.

338 Fair Work (Registered Organisations) Amendment (Administration) Bill 2024, subsection 323A(2), subsection 323D(2A) and section 323E.

339 Fair Work (Registered Organisations) Amendment (Administration) Bill 2024, subsections 323B(3) and (4A).

340 Fair Work (Registered Organisations) Amendment (Administration) Bill 2024, subsection 323B(4).

1.231 The amending Act requires that the CFMEU bears the costs of the administration,[341] and is required to indemnify the administrator in respect of any and all claims, proceedings or complaints made in connection with the administrator's exercise or non-exercise of functions, powers and duties under the scheme.[342]

1.232 While under administration, the administrator has control of the property and affairs of the Construction and General Division and its branches, and may perform any function, and exercise any power, that the Division or its branches, or any officers of them, could perform or exercise if it were not under administration, acting in the best interests of the members and having regard to the objects of the CFMEU.[343]

1.233 The determination sets out specific arrangements for the administration. It lists 292 offices in the union which are vacated (and the name of each person occupying those offices),[344] and requires each of those officers to return property associated with their office (including passwords and other access requirements for email accounts).[345]

1.234 The determination also provides for the powers, functions and duties of the administrator, which include, in addition to those listed in the amending Act, that the administrator:

- can exercise all the powers and duties of specific parts of the CFMEU;[346]
- can appoint one or more persons as Divisional Trustee of the Construction and General Division (or of a branch) and can transfer into the name of that person any property held by the administrator on trust for the CFMEU;[347]
- can terminate the appointment of an auditor and can suspend officers or delegates or terminate employees of the CFMEU or provide for disciplinary action;[348]

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341 Fair Work (Registered Organisations) Amendment (Administration) Bill 2024, section 323J.

342 Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024, section 16.

343 Fair Work (Registered Organisations) Amendment (Administration) Bill 2024, subsection 323K(1) and subsection 323K(5).

344 Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024, Annexure B.

345 Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024, section 5.

346 Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024, paragraphs 6(1)(a), (b) and (c): These are the Divisional Conference, Divisional Executive, Divisional Branch Council, Divisional Branch Management Committee and Administered Division and Administered Divisional Branches.

347 Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024, paragraph 6(1)(d).

348 Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024, paragraphs 6(1)(e), (f) and (g), and section 12.

- can refer conduct of current or former officers to any body established, or officeholder appointed, by or under any Australian law;[349]
- can commence and discontinue proceedings in the name of the CFMEU;[350]
- can request the minister exercise their power to vary or revoke the scheme;[351]
- can delegate in writing to a person nominated by the administrator any of the powers, functions or duties of the administrator under the scheme;[352]
- can employ or otherwise engage persons at the expense of the CFMEU to assist in performing the administrator's functions;[353]
- can undertake investigations into past and/or current practices of the administered division and branches;[354]
- can make changes to the rules where the administrator considers it necessary and appropriate to ensure the lawful and effective operation of the Construction and General Division, and to encourage members to participate in, and encourage the democratic functioning and control of, the Construction and General Division;[355]
- can establish and implement policies to ensure the Construction and General Division will be representative of and accountable to its members, and operate lawfully and effectively, and to encourage members to participate in its affairs, and encourage its democratic functioning and control;[356]
- must cause to be kept and maintain a copy of the register of members of the CFMEU;[357]

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349 Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024, paragraph 6(1)(h).

350 Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024, paragraph 6(1)(i).

351 Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024, paragraph 6(1)(j).

352 Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024, subsection 6(3).

353 Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024, section 8.

354 Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024, paragraph 9(1)(a).

355 Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024, paragraph (1)(b).

356 Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024, paragraph 9(1)(c).

357 Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024, paragraph 9(1)(d).

- must give the minister reports about the administration of the scheme;[358]
- must establish a complaints procedure;[359]
- may appoint a Special Purpose Auditor to undertake a special purpose audit and prepare independent reports into the affairs of the Construction and General Division;[360] and
- may arrange for the conduct of elections for offices that are vacant.[361]

## International human rights legal advice

### *Rights to freedom of association and the right to form and join trade unions*

1.235 By providing for a compulsory scheme of administration of part of the CFMEU, including giving an administrator control of the day-to-day activities and removing persons from offices of leadership in the union and determining the timing of further elections of officers, this measure engages and limits the right to freedom of association and the right to form and join trade unions.

1.236 The right to freedom of association guarantees everyone the right 'to form trade unions for the protection of [their] interests'.[362] It includes the right of each person to join the trade union of their choice, and the right of trade unions to function freely.[363] The content of the right is set out further below.

1.237 The statement of compatibility accompanying the amending Act identifies that the bill engages the right to freedom of association.[364] The determination is exempt from parliamentary disallowance, so no statement of compatibility is required. As such, no analysis of the human rights compatibility of the determination is provided.

*When the right may be permissibly limited*

1.238 The right to freedom of association and the right to form and join trade unions may be limited in certain circumstances. Generally, to be capable of justifying a limitation on human rights, the measure must address a legitimate objective, be rationally connected to that objective and be a proportionate way to achieve that objective. In relation to the right to freedom of association, limitations are only

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358 Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024, section 10.

359 Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024, section 11.

360 Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024, section 13.

361 Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024, section 14.

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

363 International Covenant on Economic, Social and Cultural Rights, article 8.

364 Statement of compatibility (located in the revised explanatory memorandum), pp. 5-7.

permissible where they are 'prescribed by law' and 'necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others'.[365] In relation to the right to form and join trade unions, limitations are only permissible where they are 'prescribed by law' and 'are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others'. Further, no limitations on the right to freedom of association are permissible if they are inconsistent with the guarantees of freedom of association and the right to collectively organise contained in the International Labour Organization (ILO) Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize (Convention No. 87). Australia has ratified this convention.[366]

1.239 ILO Convention No. 87 protects the right of workers to autonomy of union processes including electing their own representatives in full freedom, organising their administration and activities and formulating their own programs without interference.[367] It also protects unions from being dissolved, suspended or de-registered and protects the right of workers to form organisations of their own choosing.[368] It provides that domestic law shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in the Convention.[369]

1.240 The ILO has clarified the importance of providing for the independence of trade unions to manage their internal functioning without interference from government to the greatest extent possible. Any administration over a union must be directed at coordinating the union to organise themselves and conduct free elections, and be subject to judicial oversight and review.[370] The ILO has stated that the right of workers' organisations 'to elect their own representatives freely is an indispensable condition for them to be able to act in full freedom and to promote effectively the interests of their members'.[371] It has stated that for this right to be fully acknowledged, 'it is essential that the public authorities refrain from any intervention which might impair

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

366 See further, Ratifications of ILO conventions: Ratifications for Australia.

367 ILO Convention No.87, article 3.

368 ILO Convention No.87, articles 2, 4. See, also, *ILO Digest of decisions and principles of the Committee on Freedom of Association*, Sixth Edition (2018).

369 ILO Convention No.87, article 8(2).

370 *ILO Digest of decisions and principles of the Committee on Freedom of Association*, Sixth Edition (2018), right of organizations to elect their representatives in full freedom (pp. 110–124), particularly the removal of executive committees and the placing of the organization under control (p. 122–124).

371 *ILO Digest of decisions and principles of the Committee on Freedom of Association*, Sixth Edition (2018) [589].

the exercise of this right, whether it be in determining the conditions of eligibility of leaders or in the conduct of the elections themselves'.[372]

1.241 With respect to the importance of trade unions having independence to manage their internal affairs, the ILO has stated:

> The principle of trade union pluralism is grounded in the right of workers to come together and form organizations of their own choosing, independently and with structures which permit their members to elect their own officers, draw up and adopt their by-laws, organize their administration and activities and formulate their programmes without interference from the public authorities and in the defence of workers' interests.
>
> Legislation which accords to the Minister the discretionary right to investigate the internal affairs of a trade union merely if he considers it necessary in the public interest, is not in conformity with the principles that workers' organisations should have the right to their administration and activities without any interference on the part of the public authorities which would restrict this right or impede the lawful exercise thereof.[373]

1.242 The ILO has further considered that placing a union under administration on the grounds that it is necessary due to corrupt management of the union 'would seem incompatible with the freedom of association in a normal period'.[374] Further, where an administrator is appointed, the ILO has stated that any reorganisation of a union 'should be left to the trade union organisations themselves and that the administrator should confine himself to coordinating the efforts made by the unions to bring this about' and must be 'temporary and aimed solely at permitting the organization of free elections'.[375]

1.243 The ILO has articulated other aspects that comprise the right, including that:

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372 *ILO Digest of decisions and principles of the Committee on Freedom of Association*, Sixth Edition (2018) [589].

373 *ILO Digest of decisions and principles of the Committee on Freedom of Association*, Sixth Edition (2018) [483] and [674].

374 *ILO Digest of decisions and principles of the Committee on Freedom of Association*, Sixth Edition (2018) [656]. The ILO has stated at [659] that where trade union leaders have been removed from office by an administrative authority (because the administrative authorities considered these trade union leaders incapable of maintaining "discipline" in their unions), the Committee on Freedom of Association has considered that such measures were "obviously incompatible with the principle that trade union organizations have the right to elect their representatives in full freedom and to organize their administration and activities".

375 *ILO Digest of decisions and principles of the Committee on Freedom of Association*, Sixth Edition (2018) [663].

- the executive should not have control over the internal rules and constitution of a union;[376]
- it is for the union to elect representatives free from interference from the executive (which includes the executive controlling when elections occur);[377] and
- provisions governing the financial operations of workers' organisations should not be such as to give the public authorities discretionary powers over them.[378]

1.244 The ILO has also commented on the importance of 'full and frank' consultation in relation to proposed legislation affecting trade union rights, and in particular in ensuring that drafts of laws are submitted to organisations for consultation well before consideration by Parliament.[379]

1.245 The statement of compatibility accompanying the amending Act notes that article 8(1) of the ILO Convention No. 87 provides that '[i]n exercising the rights provided for in this Convention, workers and employers and their respective organisations, like other persons or organised collectives, shall respect the law of the land'.[380] However, it does not assess any of the other requirements contained in the convention.

*Legitimate objective*

1.246 Any limitation on a right must be shown to be aimed at achieving a legitimate objective. In relation to the right to form and join trade unions, as noted above, a legitimate objective is one that is necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.[381] The right to freedom of association additionally provides that a legitimate objective may be one that is necessary for public safety and the protection of public

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376 *ILO Digest of decisions and principles of the Committee on Freedom of Association*, Sixth Edition (2018) [569].

377 *ILO Digest of decisions and principles of the Committee on Freedom of Association*, Sixth Edition (2018) [589].

378 *ILO Digest of decisions and principles of the Committee on Freedom of Association*, Sixth Edition (2018) [682].

379 *ILO Digest of decisions and principles of the Committee on Freedom of Association*, Sixth Edition (2018) [1541] and [1543]. To this end, the explanatory statement to the determination states that 'given the urgent need to determine whether to place the Division and its branches into administration, being satisfied it is in the public interest to do so, it was not reasonably practicable to undertake consultation'.

380 Statement of compatibility, p. 6.

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

health or morals.[382] A legitimate objective must address an area of public or social concern that is pressing and substantial enough to warrant limiting the right.

1.247 The statement of compatibility states that the amending Act pursues the legitimate objective of 'ensuring that registered organisations are functioning effectively to be able to serve the interests of their members' and to 'address governance issues within elements of the Division'.[383] The explanatory materials state that 'serious allegations' have been raised about the conduct of some officials and associates of the CFMEU's Construction and General Division, including 'allegations of corruption, criminal conduct and other serious misconduct including bullying and harassment and general disregard for workplace laws'.[384] They state that the General Manager of the Fair Work Commission formed the view that the majority of branches of the Construction and General Division were no longer able to function effectively, including in the interests of members, and that there were no effective means under the relevant rules to address the situation.[385] The explanatory materials state that the General Manager therefore applied to the Federal Court of Australia for a declaration to that effect. However, the Federal Court of Australia had not determined that application when the amending Act was passed into law.

1.248 To the extent that the alleged conduct referred to in the explanatory materials did occur as a matter of fact, and such conduct had the effect that the union was unable to function effectively, the measure may be directed at protecting public order and the rights and freedoms of others, and may seek to address a pressing and substantial concern. However, it is unclear whether the conduct referred to has been proven. Further, noting that the General Manager of the Fair Work Commission had applied to the Federal Court of Australia for a declaration, it is not clear why the existing legal mechanisms would have been ineffective to address the concerns identified. Consequently, while the stated aims of the measure may be capable of constituting a legitimate objective for the purposes of international human rights law, questions remain as to its necessity.

*Rational connection*

1.249 Under international human rights law, it must also be demonstrated that any limitation on a right has a rational connection to the objective sought to be achieved. The key question is whether the measure is likely to be effective in achieving the objective being sought. In this regard, the effect of being placed into administration is that the Construction and General Division of the CFMEU is no longer controlled by its senior officials, and the management of the organisation is in the hands of an administrator. To the extent that senior officials in the organisation did engage in

382 International Covenant on Economic, Social and Cultural Rights, article 8(1)(a).

383 Statement of compatibility, p. 6.

384 Explanatory memorandum, p. 2.

385 Explanatory memorandum, p. 4.

conduct which impaired the lawful functioning of the union, placing parts of the union into involuntary administration and giving an administrator the power to vacate officers, change rules, investigate prior conduct and hold elections may be effective to address allegations of misconduct and achieve this objective.

*Proportionality*

1.250 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. Another relevant factor in assessing whether a measure is proportionate is whether there is the possibility of oversight and the availability of review.

1.251 As to whether the measure is sufficiently circumscribed, these parts of the CFMEU are subject to administration for between three and five years. While the explanatory materials state that it is anticipated 'that redressing governance issues will take up to 5 years', no information is provided as to why a minimum period of three years is necessary, and why a shorter period of time would not be effective. In this regard, the determination provides that all union offices set out in Annexure B (292 offices) are vacated and the appointments of all current office-holders are terminated, and that those offices will remain vacated for the duration of the administration.[386] However, no detail is provided as to why each of those offices are required to be vacated. In addition, the amending Act gives broad powers to the administrator affecting the make-up and internal functioning of the organisation. The determination further provides extensive powers, functions and duties of the administrator, including control over offices and employment,[387] making of rules,[388] and dealing with property and the financial administration of the union.[389] Further, the matters that may be included in the scheme for administration are non-exhaustive and the administrator may lawfully impose further requirements on the union. As such, it is not clear that the measure is sufficiently circumscribed.

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386 Fair Work (Registered Organisations) Amendment (Administration) Bill 2024, paragraph 323B(3)(b)(c) and (f); Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024, subsection 4(1)(a).

387 Fair Work (Registered Organisations) Amendment (Administration) Bill 2024, paragraph 323B(3)(b)(c) and (f); Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024, section 3 and Annexure B.

388 Fair Work (Registered Organisations) Amendment (Administration) Bill 2024, paragraph 323B(3)(g) and section 323H; Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024, paragraph 9(1)(b).

389 Fair Work (Registered Organisations) Amendment (Administration) Bill 2024, section 323K; Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024, section 5.

1.252 As to the presence of safeguards, the statement of compatibility states that 'checks and balances are proposed (including reporting to the Minister and oversight from the General Manager of the Commission (General Manager) and the possibility of early termination of the administration in limited circumstances)'.[390] It states that this is to ensure that the proposed administration 'achieves the intended outcomes and is not in place for any longer than is necessary'. It further states that 'the administrator must be satisfied that they are acting in the best interests of the members of the Division (and its branches), including by having regard to the lawful objects of the CFMEU', which ensures that the bill 'balances the objective of protecting the interests of members and guaranteeing the democratic functioning of the CFMEU under the temporary stewardship of the administrator'.[391] These measures have the capacity to serve as safeguards. However, given the degree of impact the administration has on the operation and independence of the trade union, and the extent to which these safeguards rely on a minimum period of three years of administration and the discretion of the administrator to consider the best interests of the members, they appear to offer minimal safeguard value.

1.253 The availability of oversight is relevant to assessing proportionality. In this regard, the ILO has stated that where there is interference by public authorities in the functioning and administration of a trade union, there should be 'a procedure for appeal to an impartial and independent judicial body, not only to ensure the right of defence (which normal judicial procedure alone can guarantee), but to avoid any risk of excessive or arbitrary interference in the free functioning of organizations'.[392] The amending Act provides that the General Manager of the Fair Work Commission may terminate the appointment of the administrator and appoint another person as administrator.[393] This may have safeguard value, although it would appear to be discretionary. Further, it is not clear that there would be judicial oversight relating to the administration scheme. The minister is not required to observe any requirements of the natural justice hearing rule in making a decision in establishing the scheme for administration,[394] and there appears to be no procedure for individuals to appeal decisions made against them by the administrator. The determination also provides that the CFMEU shall indemnify the administrator in respect of any and all claims, proceedings or complaints made in connection with the administrator's exercise or non-exercise of any of the functions, powers and duties under this scheme.[395] While

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390 Statement of compatibility, pp. 6–7.

391 Statement of compatibility, p. 7.

392 *ILO Digest of decisions and principles of the Committee on Freedom of Association*, Sixth Edition (2018) [563].

393 Fair Work (Registered Organisations) Amendment (Administration) Bill 2024, section 323C.

394 Fair Work (Registered Organisations) Amendment (Administration) Bill 2024, subsection 323B(4).

395 Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024, section 16.

the administrator is required to report to the minister regarding the administration of the scheme,[396] it is not clear what safeguard value this may offer in practice with respect to the right to freedom of association.

1.254 Consequently, it has not been clearly established that the scheme for involuntary administration established by these measures is consistent with the guarantees of freedom of association and the right to collectively organise contained in ILO Convention No. 87, and therefore whether the measure would constitute a permissible limit on the right to freedom of association. In particular, while the explanatory materials refer to alleged conduct relating to the administration and operation of parts of the CFMEU, it is not clear that such conduct has been established as a matter of law, or that the scheme of administration would constitute a proportionate limit on the right to freedom of association in practice.

## Committee view

1.255 The committee notes that the Fair Work (Registered Organisations) Amendment (Administration) Bill 2024 (now Act) and the Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024 (the determination) provide for a scheme for the administration of the Construction and General Division of the Construction, Forestry and Maritime Employees Union (CFMEU) and its branches.

1.256 The committee considers that the background to these measures is a significant consideration. The committee notes that serious allegations have been raised about the conduct of some officials and associates of the CFMEU's Construction and General Division, including allegations of corruption, criminal conduct and other serious misconduct including bullying and harassment and general disregard for workplace laws. The committee considers that these are serious allegations, and notes that this measure seeks to respond to those specific matters, and does not apply to other trade unions. The committee notes that opportunity was given to the union to respond to these allegations in the Federal Court of Australia, and this opportunity was not taken. The committee notes that insufficient action was taken to respond to the serious allegations of criminal and corrupt behaviour.

1.257 The committee notes the international human rights legal advice that while the explanatory materials accompanying the amending Act refer to alleged conduct relating to the administration and operation of parts of the CFMEU, the committee notes that these are allegations that have not been finally determined by a court. The committee notes that providing for the involuntary administration of a trade union engages and limits the right to freedom of association. The committee considers that, as allegations have not been finally determined by a court, there may be questions as to whether it has been clearly established that the scheme for involuntary

396 Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024, subsection 10(1).

administration established by these measures is consistent with the guarantees of freedom of association and the right to collectively organise contained in International Labour Organization (ILO) Convention No. 87, and therefore whether the measure would constitute a permissible limit on the right to freedom of association.

1.258 The committee further notes that the determination is exempt from disallowance, meaning that a statement of compatibility is not required to be provided. However, the committee reiterates that where a legislative instrument engages and limits human rights it expects a statement of compatibility to be provided.

**Suggested action**

1.259 The committee recommends that a statement of compatibility with human rights be prepared in relation to the determination providing an assessment of the compatibility of the determination with the right to freedom of association and the right to form and join trade unions (having regard to the guarantees of freedom of association and the right to collectively organise contained in ILO Convention No. 87).

1.260 However, as the amending Act has now passed, and the involuntary administration scheme has commenced, the committee makes no further comment.

## Suspension and termination of offices

1.261 The amending Act provides that the scheme must provide for the suspension or removal of offices.[397] The determination provides that all offices in the Construction and General Division and branches identified in Annexure B (292 offices) are vacated and will remain vacated for the duration of the administration.[398] Further, to the extent that any person is an employee or paid official of the CFMEU by reason of that person holding an office vacated as a result of the determination, that employment or paid position is terminated.[399]

397 Fair Work (Registered Organisations) Amendment (Administration) Bill 2024, subsection 323B(3).

398 Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024, paragraph 3(1)(a). Annexure B of the determination lists offices in: the Construction and General Victoria-Tasmania Division Branch, the Construction and General South Australian Divisional Branch, the Construction and General New South Wales Divisional Branch, the Construction and General Queensland-Northern Territory Divisional Branch, Construction and General Divisional Trustees, and some positions in the Construction and General Divisional Executive and Construction and General Divisional Conference.

399 Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024, paragraph 3(1)(b).

1.262 The amending Act also amends the *Fair Work Act 2009* to provide that any person who has their position removed, suspended or terminated as a result of the administration (a 'removed person') may not be a bargaining representative in relation to any union without a certificate from the Fair Work Commission.[400] The effect is that every person listed in Annexure B of the determination is a removed person, along with any person employed in the CFMEU because a person listed in Annexure B hired them, and any person who left on or after 1 July 2024 if the administrator believes they would have ensured that person ceased to be an officer, employee or workplace delegate. The Fair Work Commission must not grant the certificate during the period of disqualification under the scheme of administration (between three years and five years).[401]

1.263 After the period of disqualification, the Fair Work Commission may, on application, grant a removed person a certificate to be a bargaining representative if satisfied that the person is a fit and proper person to be a bargaining representative, having regard to:

- the reasons the person became a removed person, including whether they engaged or allegedly engaged in misappropriation of the funds of the organisation, a substantial breach of the organisation's rules, or gross misbehaviour or gross neglect of duty;[402]
- whether the person has ever been convicted of an offence against a law of the Commonwealth, state or territory or a foreign country involving fraud or dishonesty, intentional use of violence against another person, or intentional damage or destruction of property;[403]

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400 Schedule 1, item 1B, section 177A, Fair Work (Registered Organisations) Amendment (Administration) Bill 2024. A person is also a 'removed person' if, on or after 1 July 2024 and before the administration of the Construction and General Division and its branches, the person chose to cease to be an officer, be employed, or ceased to be a workplace delegate, and during the period of administration, the administrator formed the opinion that had the person not made that choice, the administrator would have taken action under the scheme of administration to ensure the person ceased to be an officer, employee or workplace delegate: see, subsection 177A(2).

401 Fair Work (Registered Organisations) Amendment (Administration) Bill 2024, paragraph 177A(10)(a). The Fair Work Commission must also not grant the certificate at any time while the removed person is not eligible to be a candidate for an election, or to be elected or appointed to an office in an organisation under subsection 215(1) of the *Fair Work (Registered Organisations) Act 2009*.

402 Fair Work (Registered Organisations) Amendment (Administration) Bill 2024, paragraph 177A(8)(a).

403 Fair Work (Registered Organisations) Amendment (Administration) Bill 2024, paragraph 177A(8)(b).

- the general character of the person;[404] and
- any other matters the Fair Work Commission considers relevant.[405]

1.264 Civil penalty provisions up to 600 penalty units (currently $187, 800) apply if a removed person becomes a candidate for election to office, is appointed as an officer, or is employed or engaged by a union without holding a certificate.[406]

## International human rights legal advice

### *Rights to work; just and favourable conditions of work; privacy; effective remedy*

1.265 Providing for individuals to be disqualified from holding office in, or employed by, a union and preventing 'removed persons' from being a bargaining representative in another union engages and limits the right to work and the right to just and favourable conditions at work. Further, listing the names of all office-holders who are terminated in the determination and providing that certain persons are 'removed persons' engages and limits the right to privacy.

1.266 The right to work provides that everyone must be able to freely accept or choose their work, and includes a right not to be unfairly deprived of work.[407] The right to just and favourable conditions of work includes the right of all workers to adequate and fair remuneration, safe working conditions, and the right to join trade unions.[408] The right to privacy protects against arbitrary and unlawful interferences with an individual's privacy and attacks on reputation.[409]

1.267 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.

1.268 The statement of compatibility accompanying the amending Act briefly identifies that these measures engage and limit the right to just and favourable

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404 Fair Work (Registered Organisations) Amendment (Administration) Bill 2024, paragraph 177A(8)(c).

405 Fair Work (Registered Organisations) Amendment (Administration) Bill 2024, subsection 177A(9).

406 Fair Work (Registered Organisations) Amendment (Administration) Bill 2024, section 323MB.

407 International Covenant on Economic, Social and Cultural Rights, articles 6–8. See also, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18: the right to work (article 6)* (2005) [4].

408 See, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18: the right to work (article 6)* (2005) [2].

409 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).

conditions of work.[410] It does not identify that providing for the termination of employment limits the right to work, or that providing for the termination of employment including by publishing the names of persons whose employment is terminated (and restricting their employment in related roles in future) limits the right to privacy.[411]

1.269 In relation to the right to just and favourable conditions of work, the statement of compatibility states that restrictions relating to 'removed persons' are necessary 'to address serious allegations' made against members and associates.[412] It states that these restrictions ensure that the actions taken by an administrator 'are effective and durable', and that alleged non-compliance and poor governance within the division would be 'properly addressed'. It states that the restrictions are necessary 'to ensure the integrity of the bargaining process' and would ensure that an administrator can 'quickly address issues contributing to a culture of alleged non-compliance' and ensure it cannot be transferred elsewhere (for example, by 'removed persons' moving to another registered organisation).[413]

1.270 Protecting the integrity of union bargaining processes broadly and addressing non-compliance with Australian laws are likely to address issues of public or social concern for the purposes of international human rights law. However, it is not clear that it is necessary to vacate the offices in numerous branches of the Construction and General Division and all people employed under them to achieve this objective, rather than (for example) addressing allegations of corruption, criminal misconduct and non-compliance with workplace laws through the courts. In particular, it is not clear which of those terminated office-holders have engaged in (or otherwise facilitated or countenanced) the alleged conduct to which this scheme of administration relates. In this regard, ILO Termination of Employment Convention No. 158 states that a worker shall not be terminated unless there is 'a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service', and that 'a worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct…'.[414] In relation to trade unions, the ILO has stated that 'the removal by the Government of trade union leaders from office is a serious infringement of the free exercise of trade union rights'.[415]

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410 Statement of compatibility, p. 7.

411 The statement of compatibility identifies only that requiring the administrator to give certain reports to the minister, and the General Manger, engages the right to privacy. See, p. 10.

412 Statement of compatibility, p. 7.

413 Statement of compatibility, p. 7.

414 Termination of Employment Convention (1982) (ILO Convention No. 158), articles 4 and 11.

415 *ILO Digest of decisions and principles of the Committee on Freedom of Association*, Sixth Edition (2018) [986].

1.271 To the extent that certain members of the CFMEU have engaged in (or otherwise facilitated) unlawful and/or corrupt conduct, terminating the positions of offices in the Construction and General Division may be rationally connected to (that is, effective to achieve) the objective being sought. However, it is not clear that terminating every office-holder listed in the determination (and persons they have employed and who have not had any allegations of misconduct against them), would be rationally connected to this objective. In this respect it is noted that the explanatory material accompanying the determination is very brief and contains no detail as to the operation of the scheme itself or the content of the annexures naming each office holder who is terminated.

1.272 As to proportionality, the breadth of the measure is a key consideration. The measure vacates 292 offices and the employment of those office-holders. No information is provided as to whether each (or any) of those individual workers have been subject to an individualised assessment of whether there is a reasonable basis on which to terminate their office. Rather, the measure would appear to operate as a blanket measure. 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. The determination publicly lists the name of each office-holder who is terminated (and the name of each office-holder whose office is not terminated). The statement of compatibility states that the measure 'would be time-limited, and would enable removed persons to apply (to an impartial umpire, the Commission) for an exemption on grounds they are fit and proper'.[416] However, this would appear to have safeguard value only in relation to a worker who seeks to be a bargaining representative in relation to a different union, and only once a period of disqualification has ended. Further, it would have no safeguard value with respect to a person's employment in the CFMEU, nor would it serve as a safeguard in relation to the interference with the terminated worker's right to privacy and reputation.

1.273 In addition, the fit and proper person test which a terminated worker would be required to satisfy to engage in future similar work requires the Fair Work Commission to have regard to a number of matters, including whether the person allegedly engaged in particular kinds of conduct as well as the general character of the person and any other matter the Fair Work Commission considers relevant. This would appear to encompass a potentially broad range of matters, meaning that questions remain as to whether this aspect of the measure is sufficiently circumscribed.

1.274 As to oversight and the availability of review, it is noted that the minister is not required to observe any requirements of the natural justice hearing rule in making a decision in setting up the scheme for administration (which includes the termination

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416 Statement of compatibility, p. 7.

of various positions).[417] Consequently, it would appear that any oversight of the operation of the scheme, including by the judiciary, may have limited scope. Further, it would appear that there is no opportunity for individuals to make submissions or respond to their suspension or termination, no opportunity to appeal this decision,[418] and no oversight by the judiciary. As noted above, the ILO has emphasised the importance of judicial oversight over a scheme of administration, stating that 'there should be a procedure for appeal to an impartial and independent judicial body so as to avoid any risk of excessive or arbitrary interference in the free functioning of organizations'.[419]

1.275 As such, while the aims of protecting the integrity of union bargaining processes and addressing non-compliance with Australian laws would seem to address issues of public or social concern such as to amount to a legitimate objective, and the removal of individuals from prescribed offices may be effective to achieve that objective, it is unclear whether it is necessary to vacate 292 offices and all people employed in them. This is particularly the case given where it is not established these individuals have engaged in the alleged conduct that the measure seeks to address, and where allegations against certain individuals do not appear to have been assessed by the courts. It is also not established that the measure is a proportionate limit on these rights having regard to the extent of the interference with these human rights, the breadth of the measure, the lack of safeguards, and the apparent absence of the capacity for judicial oversight over the administration of the scheme.

1.276 Further, to the extent that these measures were to result in a breach of rights recognised under the International Covenant on Civil and Political Rights (including the right to privacy and reputation), the measures would engage the right to an effective remedy. The right to an effective remedy requires the availability of a remedy which is effective with respect to any violation of rights (including the right to privacy).[420] It includes the right to have such a remedy determined by competent judicial, administrative or legislative authorities or by any other competent authority provided for by the legal system of the state. In this regard, the amending Act gives the administrator immunity from civil liability for any action undertaken in good faith in

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417 Fair Work (Registered Organisations) Amendment (Administration) Bill 2024, subsection 323B(4).

418 Fair Work (Registered Organisations) Amendment (Administration) Bill 2024, section 323R.

419 *ILO Digest of decisions and principles of the Committee on Freedom of Association*, Sixth Edition (2018) [563].

420 International Covenant on Civil and Political Rights, article 2(3). See, *Kazantzis v Cyprus,* UN Human Rights Committee Communication No. 972/01 (2003) and *Faure v Australia,* UN Human Rights Committee Communication No. 1036/01 (2005), States parties must not only provide remedies for violations of the ICCPR, but must also provide forums in which a person can pursue arguable if unsuccessful claims of violations of the ICCPR. Per *C v Australia*, UN Human Rights Committee Communication No. 900/99 (2002), remedies sufficient for the purposes of article 5(2)(b) of the ICCPR must have a binding obligatory effect.

relation to the scheme.[421] As such, it is not clear that an affected person whose rights were impermissibly limited by the administration scheme would have access to an effective remedy in respect of the breach, and it is not clear in relation to whom they could bring a cause of action. Consequently, it is not clear that these measures are compatible with the right to an effective remedy.

## Committee view

1.277 The committee notes that the measures: provide for the removal of office-holders in the CFMEU (and the termination of their employment); disqualify those persons from holding office in, or being employed by, a union; and prevent those persons from being a bargaining representative in another union without permission.

1.278 The committee considers that these measures engage and limit the right to work, the right to just and favourable conditions of work, and the right to privacy and reputation. The committee notes that the statement of compatibility accompanying the amending Act only identified that these measures engage and limit the right to just and favourable conditions of work, meaning that no assessment of the amending Act's compatibility with these rights is provided.

1.279 The committee considers that while protecting the integrity of union bargaining processes and addressing non-compliance with Australian laws are likely to address issues of public or social concern such as to amount to a legitimate objective, and the removal of individuals in offices may be effective to achieve that objective, it is unclear whether it is necessary to vacate 292 offices and all people employed under them, where it is not clear that it has been established that these individuals engaged in the alleged conduct that the measure seeks to address. The committee considers that questions remain as to whether the measures are a proportionate limit on rights. The committee further considers that it is not clear that the measures, to the extent they may result in an impermissible breach of the right to privacy and reputation, are compatible with the right to an effective remedy.

**Suggested action**

1.280 The committee recommends that a statement of compatibility be provided to accompany the determination, providing an assessment of the compatibility of the measures with the right to work, the right to just and favourable conditions of work, and the right to privacy and reputation.

1.281 However, as these measures are now in force, the committee makes no further comment.

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421 Fair Work (Registered Organisations) Amendment (Administration) Bill 2024, section 323N.

## Retrospective application of anti-avoidance provision

1.282 A person who has engaged in (or been involved in) conduct or a course of conduct that results in another person or body being prevented from taking action under the scheme, or prevents the administrator from effectively administering the scheme, is liable to a civil penalty of 600 penalty units (currently $187, 800).[422] A person would be 'involved in' such conduct where they have aided, abetted, counselled or procured the contravention; induced the contravention, whether by threats or promises or otherwise; been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or have conspired with others to effect the contravention.[423] These provisions apply retrospectively in relation to conduct engaged in on or after 1 July 2024.[424]

## International human rights legal advice

### *Prohibition against retrospective criminal laws*

1.283 A civil penalty provision may engage criminal process rights under the International Covenant on Civil and Political Rights where the penalty may be regarded as 'criminal' for the purpose of international human rights law. In assessing whether a civil penalty may be considered criminal, it is necessary to consider:

- the domestic classification of the penalty as civil or criminal (although the classification of a penalty as 'civil' is not determinative as the term 'criminal' has an autonomous meaning in human rights law);
- the nature and purpose of the penalty: a civil penalty is more likely to be considered 'criminal' in nature if it applies to the public in general rather than a specific regulatory or disciplinary context, and where there is an intention to punish or deter, irrespective of the severity of the penalty; and
- the severity of the penalty.[425]

1.284 If the civil penalty provision were considered to be 'criminal' for the purposes of international human rights law, this does not mean that the relevant conduct must be turned into a criminal offence in domestic law, nor does it mean that the civil penalty is illegitimate. Instead, it means that the civil penalty provision in question must be shown to be consistent with the criminal process guarantees set out in articles

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422 Fair Work (Registered Organisations) Amendment (Administration) Bill 2024, section 323P and subsection 323Q(1). The provision is also subject to an offence of imprisonment for 2 years or 3,000 penalty units: see subsection 323P(5).

423 Fair Work (Registered Organisations) Amendment (Administration) Bill 2024, subsection 323Q(2).

424 Fair Work (Registered Organisations) Amendment (Administration) Bill 2024, Schedule 1, item 9.

425 Parliamentary Joint Committee on Human Rights, *Guidance Note 2: Offence provisions, civil penalties and human rights* (December 2014).

14 and 15 of the International Covenant on Civil and Political Rights, including the prohibition against retrospective criminal laws. Article 15 of the International Covenant on Civil and Political Rights prohibits retrospective criminal laws. This requires that laws not impose criminal liability for acts that were not criminal offences at the time they were committed, and not impose greater penalties than those which would have been available at the time the acts were done. The prohibition against retrospective criminal law is absolute and may never be subject to permissible limitations.

1.285 The statement of compatibility identifies that these measures may engage criminal process rights.[426] As to the nature and purpose of the penalty, it states that the penalties would not apply to the public at large but would instead be limited to those who have certain interactions with any administration or an individual who is a removed person. It further states that the penalties are intended to be severe to ensure adequate deterrence (against avoidance and certain un-cooperative conduct), promote an effective administration and protect the operation of the broader workplace relations system.[427]

1.286 It would appear that this civil penalty may apply to people outside a particular regulatory framework, noting that a person would be liable to this civil penalty provision if they have been 'involved in' a contravention of the anti-avoidance provision. The concept of 'involvement in' is broadly defined, and the anti-avoidance provision itself, is also framed in broad terms, such that this provision may capture a wide range of persons. For example, it would appear that a member of the public could be liable to a penalty if they have indirectly, by omission, been party to conduct which has the effect that the administrator is unable to take some action under the scheme.[428] Other factors which suggest that the penalty would be considered 'criminal' for the purposes of international human rights law include the stated objective of the provision being deterrence and the fact that the maximum penalty of 600 penalty units is considerable. Consequently, there would appear to be a risk that this penalty may be regarded as criminal under international human rights law.

1.287 If this provision were regarded as criminal under international human rights law, it would need to be demonstrated to be consistent with criminal process guarantees contained in the International Covenant on Civil and Political Rights. However, as a civil penalty provision, those guarantees would not be available, and that requirement would not be met. Further, the retrospective application of the penalty may risk breaching the absolute prohibition against retrospective criminal laws.

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426 Statement of compatibility, p. 9.

427 Statement of compatibility, p. 9.

428 Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024, paragraph 12(a)(i).

## Committee view

1.288 The committee notes that the amending Act provides that a person who has engaged in (or been involved in) conduct or a course of conduct that results in another person or body being prevented from taking action under the scheme, or prevents the administrator from effectively administering the scheme, is liable to a civil penalty of 600 penalty units (currently $187,800).

1.289 The committee notes that civil penalty provisions may be considered 'criminal' for the purposes of international human rights law, having regard to their potential severity and application. The committee considers that there may be a risk that this penalty may be regarded as criminal under international human rights law, and notes that if this were the case, it would not be consistent with criminal process guarantees contained in the International Covenant on Civil and Political Rights, and that the retrospective application of the penalty may, therefore, risk breaching the absolute prohibition against retrospective criminal laws.

1.290 However, as the amending Act is now in force the committee makes no further comment.

# Chapter 2
# Concluded matters

2.1 The committee considers a response to matters raised previously by the committee.

2.2 Correspondence relating to these matters is available on the committee's website.[1]

## Bills

## Better and Fairer Schools (Information Management) Bill 2024[2]

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|---|---|
| **Purpose** | This bill seeks to amend the *Student Identifiers Act 2014* to extend the unique student identifier scheme to all primary and secondary school students. The bill sets out how a schools identifier for an individual student would be assigned, verified, collected, used and disclosed |
| **Portfolio** | Education |
| **Introduced** | House of Representatives, 15 August 2024 |
| **Rights** | Children's rights; education; privacy |

2.3 The committee requested a response from the minister in relation to the bill in *Report 8 of 2024*.[3]

### Expanding the unique student identifier scheme

2.4 This bill would amend the *Student Identifiers Act 2014* (Student Identifiers Act) to extend the unique student identifier (USI) scheme to all primary and secondary school students. Currently, this scheme only applies to higher education students

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1 See https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports

2 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Better and Fairer Schools (Information Management) Bill 2024, *Report 9 of 2024*; [2024] AUPJCHR 70.

3 Parliamentary Joint Committee on Human Rights, *Report 8 of 2024* (11 September 2024) pp. 9–27.

(including university, TAFE and nationally recognised training students).[4] A USI is an individual education number that is designed to remain with a person for life and is required for a student to be eligible for Commonwealth assistance and obtain their qualification or statement of attainment.[5] This bill would enable the assignment of a 'schools identifier' to school students – a unique education number that may later be used as a 'student identifier' for the purposes of higher education. The bill sets out how a schools identifier would be assigned, verified, collected, used and disclosed.

2.5 The bill would enable specified entities—including an approved authority for the school, a prescribed public body of the state or territory in which the school is located, and an entity prescribed by the regulations—to apply to the Student Identifiers Registrar (the Registrar) for the assignment of a schools identifier to an individual student.[6] The application must include the individual's 'school identity management information', which is to be defined by the regulations.[7] If such an application is made, the Registrar must assign a schools identifier to the individual if they have not already been assigned a student identifier or a schools identifier.[8] The individual must be notified of the Registrar's decision, either by the Registrar or the applicant.

2.6 The bill would enable an individual or specified entities, such as a registered training organisation or higher education provider, to apply to the Registrar for validation of a schools identifier.[9] The effect of validating a schools identifier is that the identifier is considered to be a student identifier for the purposes of the Student Identifiers Act, meaning that an individual can use the same identifier for higher education.[10] If an application for validation of a schools identifier is made, the Registrar must validate the identifier if the identity of the individual has been verified; the

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4 The *Education Legislation Amendment (2020 Measures No. 1) Act 2020* amended the *Higher Education Support Act 2003* to provide that all new higher education students commencing study from 1 January 2021, and all students (including existing students) from 1 January 2023, are required to have a USI in order to be eligible for Commonwealth assistance. The Act also amended the *VET Student Loans Act 2016* to provide that all applications for VET student loans made on or after 1 January 2021 must include a student's USI. The Parliamentary Joint Committee on Human Rights commented on this Act when it was first introduced as a bill. See *Report 8 of 2020* (1 July 2020) pp. 28–31 and *Report 10 of 2020* (26 August 2020) pp. 11–19.

5 Office of the Student Identifiers Registrar, *What is a Unique Student Identifier (USI)?* (26 August 2024).

6 Schedule 1, item 25, section 13A. If the student is registered in an alternative schooling arrangement under state or territory law, then the specified entities that may apply for the assignment of a schools identifier are the relevant state or territory and an entity prescribed by the regulations (see subsection 13A(2)).

7 Schedule 1, item 4 and item 25, paragraph 13A(3)(b). See explanatory memorandum, p. 12.

8 Schedule 1, item 25, section 13B.

9 Schedule 1, item 25, section 13C.

10 Schedule 1, item 25, section 13D.

identifier is the schools identifier of the individual; and the individual has not already been assigned a student identifier.[11] The Registrar's decision to either refuse to assign a schools identifier; refuse to validate a schools identifier; or revoke a schools identifier would be reviewable by the Administrative Appeals Tribunal.[12]

2.7 The bill would allow an individual's schools identifier and school identity management information (both of which would be classified as 'protected information' under the bill and would include personal information) to be verified, collected and used by, and shared or disclosed to, the Registrar as well as various entities for various purposes.[13] With respect to the Registrar, the bill would authorise the Registrar to use or disclose protected information of an individual for the purposes of research that relates (directly or indirectly) to school education, or that requires the use of protected information or information about school education; and that meets the requirements specified by the Education Ministerial Council.[14] Using or disclosing personal information for this purpose would be taken, for the purposes of the *Privacy Act 1988* (Privacy Act), to be authorised, meaning that provisions in the Privacy Act relating to the prohibition on use or disclosure of personal information for a secondary purpose would not apply.[15] Further, the current requirement that the Registrar take reasonable steps to protect a record of student identifiers from misuse, interference and loss, and from unauthorised access, modification or disclosure, would be extended to apply to records of schools identifiers and school identity management information.[16]

2.8 The bill would enable specified entities, such as the approved school authority, state or territory public bodies, and the Secretary and Australian Public Service (APS)

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11 Schedule 1, item 25, section 13D.

12 Schedule 1, item 25, section 13F. It is noted that on 14 October 2024, the Administrative Appeals Tribunal will be replaced by the Administrative Review Tribunal. See Administrative Appeals Tribunal, *Transition to the Administrative Review Tribunal* (accessed 28 August 2024).

13 Schedule 1, item 4 defines 'protected information' as a student identifier, schools identifier or school identity management information. Items 39–49 extend the application of Division 5 of the *Student Identifiers Act 2014*, which relates to the collection, use and disclosure of student identifiers, to 'protected information'.

14 Schedule 1, item 46. The Education Ministerial Council comprises Commonwealth and state and territory education ministers. The Council generally meets four times a year to collaborate and make decisions about early childhood education and care, school education, higher education and international education. See Department of Education, *What is the Education Ministers Meeting?* (27 April 2024).

15 Schedule 1, item 55, which amends section 25 of the *Student Identifiers Act 2014*, which relates to the circumstances in which use or disclosure of personal information is authorised for the purposes of the *Privacy Act 1988*. Personal information means information or an opinion about an identified individual, or an individual who is reasonably identifiable, whether the information or opinion is true or not, and is recorded in material form or not. See *Student Identifiers Act 2014*, section 4 and *Privacy Act 1998*, section 6.

16 Schedule 1, items 35–38.

employees in the Education Department, to request the Registrar to verify that an identifier is the schools identifier of an individual or to give the entity the schools identifier of an individual.[17] A more limited number of entities, including the approved school authority and state or territory public bodies, would be able to request the Registrar to give them an individual's school identity management information or to verify any such information held by the entity.[18] If such an application is made, the Registrar may verify or give the individual's school identity management information to the entity (or provide reasons for their refusal to do so).[19] Entities that are prescribed by the regulations would also be authorised to collect, use or disclose protected information of an individual if it is for a purpose, or in circumstances, relating to school education and prescribed by the regulations.[20] Entities may also collect, use or disclose protected information with the express or implied consent of the individual to whom the information relates.[21]

2.9 Further, the bill would extend the application of provisions in the Student Identifiers Act that protect records of student identifiers and prohibit the unauthorised collection, use or disclosure of student identifiers—contravention of either provision constituting an interference with an individual's privacy for the purposes of the Privacy Act—to include schools identifiers and school identity management information.[22] Entities that keep a record of identifier information (including schools identifiers and school identity management information) would be required to take reasonable steps to protect that record from misuse, interference and loss; and from unauthorised access, modification or disclosure.[23] Entities must also not collect, use or disclose protected information if it is not authorised under the Act.[24] Contravention of these provisions may result in an investigation by the Privacy Commissioner or Information Commissioner.[25]

2.10 However, these provisions (relating to protecting records and prohibiting unauthorised disclosure—contravention of which would be an interference with privacy),[26] to the extent that they apply to schools identifiers and school identity management information, would not apply to a state or territory public body unless a declaration is made by the Commonwealth education minister by way of an exempt legislative instrument, at the request of the responsible state or territory education

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17 Schedule 1, items 28 and 29.

18 Schedule 1, item 32, section 15A.

19 Schedule 1, item 32, section 15B.

20 Schedule 1, item 47.

21 Schedule 1, items 48 and 49.

22 Schedule 1, items 34–38, 40, 41 and 50

23 Schedule 1, items 34–38.

24 Schedule 1, items 40 and 41.

25 Schedule 1, items 50 and 51.

26 *Student Identifiers Act 2014*, sections 16, 17 and 23.

minister.[27] State and territory public bodies (primarily schools) would therefore not be subject to the protected information regulatory regime unless the responsible state or territory education minister requests this, and the Commonwealth education minister makes a declaration to that effect. Non-government schools and entities, however, would be subject to the protected information regulatory scheme.[28]

## Summary of initial assessment

### *Preliminary international human rights legal advice*

*Rights of the child and rights to privacy and education*

2.11 By authorising the verification, collection, use and disclosure of schools identifiers and school identity management information, the measures would engage and limit the right to privacy. As the measures would apply to primary and secondary school children, the rights of the child would also be engaged and limited. 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, as well as the right to control the dissemination of information about one's private life.[29] The United Nations (UN) High Commissioner for Human Rights has noted that an individual's ability to keep track of what personal information is collected about them and control the many ways in which that information can be used and shared becomes more difficult with larger datasets and the fusing of personal information from various sources.[30] The UN High Commissioner for Human Rights has also noted that the sharing of information and data with third parties as well as the long-term storage of personal data often amounts to further privacy intrusions and other adverse human rights impacts, many of which may not have been envisaged at the time of data collection.[31]

2.12 Children are guaranteed the right to privacy under international human rights law.[32] The UN Committee on the Rights of the Child has emphasised that '[p]rivacy is vital to children's agency, dignity and safety and for the exercise of their rights'.[33] The

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27 Schedule 1, item 78. The declaration would be exempt and not subject to sunsetting. In its consideration of this bill, the Senate Standing Committee for the Scrutiny of Bills raised concerns about exemption from disallowance and sunsetting. See *Digest 10 of 2024*, pp. 10–12.

28 Explanatory memorandum, [119].

29 International Covenant on Civil and Political Rights, article 17. See UN High Commissioner for Human Rights, *The right to privacy in the digital age*, A/HRC/39/29 (2018) [7].

30 UN High Commissioner for Human Rights, *The right to privacy in the digital age*, A/HRC/48/31 (2021) [13].

31 UN High Commissioner for Human Rights, *The right to privacy in the digital age*, A/HRC/48/31 (2021) [14].

32 Convention on the Rights of the Child, article 16.

33 UN Committee on the Rights of the Child, *General comment No. 25 (2021) on children's rights in relation to the digital environment*, CRC/C/GC/25 (2021) [67].

UN Committee on the Rights of the Child has observed that digital practices, such as automated data processing, mandatory identity verification and information filtering, are becoming routine and cautioned that such practices 'may lead to arbitrary or unlawful interference with children's right to privacy; they may have adverse consequences on children, which can continue to affect them at later stages of their lives'.[34]

2.13 Additionally, Australia is required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.[35]

2.14 Further, if the measures had the effect of restricting access to primary or secondary education for students without a schools identifier, the right to education may be engaged and limited. The Parliamentary Joint Committee on Human Rights has previously raised concerns that requiring a USI in order to be eligible for Commonwealth financial assistance for higher education may constitute a retrogressive measure with respect to the obligation to progressively introduce free education, as the practical effect of this measure may be to restrict access to education for students without a USI and unable to pay tuition up front.[36] The committee concluded that this retrogressive measure may not constitute a proportionate limitation on the right to education.[37] The right to education provides that education should be accessible to all, in particular by making primary education compulsory and free to all and by progressively introducing free secondary education in its different forms, including technical and vocational secondary education.[38] States have a duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of the right to education.[39]

2.15 The above rights may be subject to permissible limitations (noting that retrogressive measures are a type of limitation) where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

*Legitimate objective*

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34 UN Committee on the Rights of the Child, *General comment No. 25 (2021) on children's rights in relation to the digital environment*, CRC/C/GC/25 (2021) [68].

35 Convention on the Rights of the Child, article 3(1).

36 Parliamentary Joint Committee on Human Rights, *Education Legislation Amendment (2020 Measures No. 1) Act 2020*, *Report 8 of 2020* (1 July 2020) pp. 28–31 and *Report 10 of 2020* (26 August 2020) pp. 11–19.

37 Parliamentary Joint Committee on Human Rights, *Education Legislation Amendment (2020 Measures No. 1) Act 2020*, *Report 10 of 2020* (26 August 2020) p. 19.

38 International Covenant on Economic, Social and Cultural Rights, article 13 and Convention on the Rights of the Child, article 28.

39 See, UN Committee on Economic, Social and Cultural Rights, *General Comment 13: the Right to education* (1999).

2.16 It is not clear that the stated objectives would constitute legitimate objectives for the purposes of human rights law. A legitimate objective must be one that is necessary and addresses a public or social concern that is pressing and substantial enough to warrant limiting rights. Improving the transfer and sharing of students' personal information, and supporting the administration of school education, appear to be primarily directed towards administrative convenience, which in and of itself is unlikely to be sufficient to constitute a legitimate objective for the purposes of international human rights law. Further, as to necessity, the explanatory materials have not demonstrated why existing laws and practices are insufficient to achieve the stated objectives. The Interstate Student Data Transfer Note and Protocol—a joint initiative between the Commonwealth, state and territory education departments and independent and Catholic education sectors—allows the transfer of student information between schools when a child moves from one state or territory to another.[40] The type of information that may be shared between schools includes the child's personal details (such as name and date of birth), information about the school and an outline of the child's attendance, progress in learning areas, subjects studied, support and health care needs.[41] However, in contrast to the measures in this bill, the consent or permission of the parent or guardian and, if appropriate, the child must be obtained in order for information to be shared between schools.[42]

*Rational connection*

2.17 Under international human rights law, it must also be demonstrated that any limitation on a right has a rational connection to the objective sought to be achieved. In this regard, the key question is whether the relevant measures are likely to be effective in achieving the stated objectives. While the breadth of information that could be associated with a schools identifier raises concerns with respect to proportionality (as detailed below), the measures may nonetheless be rationally connected to the stated objectives. However, depending on the scope of personal information captured by 'school identity management information' and associated with schools identifiers, questions may arise as to whether the full scope of information would be necessary to effectively achieve the stated objectives.

*Proportionality*

2.18 In assessing whether the potential limitations on rights are proportionate to the objectives being sought, it is necessary to consider a number of factors, including whether the proposed limitations are sufficiently circumscribed; whether the

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40 Department of Education, *Transferring Student Data Interstate* (13 June 2024).

41 Department of Education, *Interstate Student Data Transfer Note Parent/Guardian Fact Sheet* (accessed 2 September 2024).

42 Department of Education, *Interstate Student Data Transfer Note Parent/Guardian Fact Sheet* and *Interstate Student Data Transfer Note Parent/Guardian Frequently Asked Questions* (accessed 2 September 2024).

measures are accompanied by sufficient safeguards; and whether there are any less rights restrictive alternatives that could achieve the same stated objectives.

2.19 The breadth of personal information that would be collected and the circumstances in which the information would be used and shared are relevant in considering whether the measures are sufficiently circumscribed. Indeed, the UN Human Rights Committee has stated that legislation must specify in detail the precise circumstances in which interferences with the right to privacy may be permitted.[43] As set out above, the type of personal information that may be captured by school identity management information and associated with schools identifiers is unclear, as it will generally be set out in future regulations. However, given the vast array of personal information collected and held by schools currently, such as a student's personal details (name, date of birth, address and contact details); enrolment and attendance records; health, psychological and counselling records; and behavioural information, the potential breadth of information that may be used and shared could be extensive.

2.20 The stated purposes for which information may be collected, used and shared are vague and neither the bill nor the explanatory materials provide guidance in this regard, noting that with respect to entities, most of the detail is to be set out in future regulations. It is unclear what the potential research areas are for which protected information may be shared, and whether information would be de-identified when shared for these purposes. It is also unclear what is meant by the term 'school education' and when a research purpose will be sufficiently related to 'school education' so as to authorise the use or disclosure of protected information. With respect to information used and disclosed by the Registrar, it is unclear what requirements are likely to be specified by the Education Ministerial Council.

2.21 As to whom information may be shared with, the legislation specifies the entities that may request a schools identifier or school identity management information from the Registrar.[44] While specifying the entities in the legislation assists with proportionality, given the large number of entities listed, a significant number of people would, in practice, be authorised to receive and use protected information

2.22 The vast array of personal information that may potentially be captured by the measures as well as the broad purposes for which, and the lack of specificity regarding to whom, such information may be used and disclosed, raises concerns that the measures may not be sufficiently circumscribed. By not defining the purposes for which a student's personal information may be used and disclosed with sufficient clarity, there appears to be a risk that such information may be used for secondary purposes—some of which may not have been contemplated when the legislation was drafted.

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43 *NK v Netherlands*, UN Human Rights Committee Communication No.2326/2013 (2018) [9.5].

44 Schedule 1, items 28, 29 and 32.

2.23 The measures appear to be accompanied by some legislative safeguards with respect to the right to privacy. However, some would not apply to state and territory public bodies unless a declaration is made by way of an exempt legislative instrument by the education minister.[45] The *Privacy Act 1988* would apply, however compliance with the Privacy Act is not a complete answer to concerns about interference with the right to privacy for the purposes of international human rights law. With respect to state and territory privacy legislation, without a comprehensive review of this broader legislative framework, it is not possible to conclude whether the safeguards contained in this other legislation are sufficient to protect the right to privacy for the purposes of international human rights law. The value of the other non-legislative safeguards will depend on how they operate in practice. In general, discretionary safeguards alone may not be sufficient for the purpose of a permissible limitation under international human rights law.[46] This is because discretionary safeguards are less stringent than the protection of statutory processes as there is no requirement to follow them. It is not clear that the safeguards identified would be sufficient to ensure that any limitation the right to privacy is proportionate. Further, neither the Registrar nor entities are required to obtain the consent of the child or their parent or guardian in order to collect, use and disclose their personal information. Indeed, the child and their parent or guardian would not need to be informed about an application for a schools identifier; they would only be notified after a schools identifier had been assigned. The bill does not contain any mechanism by which a child or their parent or guardian could object to, or express their views about, the collection, use or disclosure of their personal information and data, and does not provide for any exemptions to the assignment of a schools identifier. The lack of flexibility to treat different cases differently raises concerns with respect to proportionality. Further, the ability to apply for an exemption may operate as a safeguard with respect to the right to education (noting that the statement of compatibility did not address whether the measures may limit this right and so provided no information as to safeguards that would protect this right).

***Committee's initial view***

2.24 The committee noted that the bill seeks to extend the Unique Student Identifier scheme to all Australian primary and secondary school students by enabling the assignment of a schools identifier to each student. By authorising the verification, collection, use and disclosure of schools identifiers and school identity management information (both of which would be classified as 'protected information' under the bill and would include personal information), the measures would engage and limit the right to privacy. As the measures would apply to primary and secondary school children, the rights of the child would also be engaged and limited. If the measures

45 Schedule 1, item 78.

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

had the effect of restricting access to primary or secondary education for students without a schools identifier, the right to education may also be engaged and limited.

2.25 The committee noted that the stated objectives, including to improve the transfer of student information between entities and support the administration of education, appear to largely be directed towards administrative convenience, raising questions as to whether these would constitute legitimate objectives for the purposes of international human rights law. Having regard to the vast array of personal information that may potentially be captured by the measures, as well as the broad purposes for which, and the lack of specificity regarding to whom, such information may be used and disclosed, it is not clear that the measures would be sufficiently circumscribed. The committee also noted that while there are some safeguards accompanying the measures, it is not clear that these would be sufficient, noting that key safeguards recognised as being effective under international human rights law are missing, such as obtaining the consent of the child or their parent or guardian for the collection, use and disclosure of their personal information. The committee therefore considered that further information was required to assess the compatibility of these measures with the right to privacy, the rights of the child and the right to education, and as such sought the minister's advice.

2.26 The committee therefore sought the advice of the minister.

2.27 The full initial analysis is set out in *Report 8 of 2024*.

### Minister's response[47]

2.28 The minister advised:

> **(a) how likely is it that a student would not have a schools identifier assigned to them; and if that were the case, what are the consequences of not having a schools identifier in terms of accessing primary and secondary education**
>
> It is not possible to estimate the 'likelihood' that a student would not have a schools Unique Student Identifier (USI) assigned to them. The Better and Fairer Schools (Information Management) Bill 2024 (the Bill) does not create an obligation on education systems to request assignment of schools identifiers for students, and it is not the intent of Education Ministers to make assignment of a schools identifier a condition of access to school education.
>
> It is anticipated that schools identifiers will be implemented in a phased manner across all jurisdictions and systems, informed by local contexts. Schedule B of the Bill identifies the final milestone for the USI National Enabling Initiative to be that 'All school students have a USI by end 2027'.

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47 The minister's response to the committee's inquiries was received on 26 September 2024. This is an extract of the response. The response is available in full on the committee's webpage.

Following passage of the Bill, the Australian Government will continue working with states and territories to agree implementation arrangements for USIs, inclusive of any proposed 'opt-in/out' arrangements.

### (b) what is the pressing and substantial public or social concern that the measures seek to address

The need for a USI has been supported by a number of significant reviews including the Review to Achieve Educational Excellence in Australian Schools (2018), the Productivity Commission Inquiry into the Education Evidence Base (2016), the Education Council's science, technology, engineering and mathematics (STEM) Partnerships Forum (2018) and the Review to Inform a Better and Fairer Education System (2023). All of these reviews recommended the implementation of a national USI for the schools sector.

These reports made the case that a USI is needed to:

- drive consistency in the collection of data that enables student growth to be measured, improving the design of teaching interventions
- maximise learning growth, supporting individual student learning needs through ready access to student records
- underpin innovation and continuous improvement in Australia's education systems
- improve our understanding of student pathways into school and beyond
- track individual student performance, enhancing the national evidence base and improving system level insights on teaching interventions
- organise and better connect the national evidence base, improving capacity for evidence based interventions.

Adopting a common protocol for when students move their enrolment between systems was a key element of the response of governments to recommendations of the 2017 Royal Commission into Institutional Responses to Child Sexual Abuse.

### (c) what are the existing arrangements for the sharing of a students' personal information, including school records, between schools or educational institutions (for example, in the event that a student transfers to another school)

The Interstate Student Data Transfer Note (ISDTN) and Protocol supports the exchange of student information when an individual moves between schools. The ISDTN is a joint initiative between the Australian Government, state and territory education departments, and the independent and Catholic education sectors. The ISDTN and Protocol is a paper based system that provides a set of common documents for schools to use when a student transfers interstate. The Student Data Transfer Protocol (SDTP) is a national project currently led by

South Australia to establish a more efficient online exchange of student information than the current ISDTN.

The SDTP project includes the development of a protocol and electronic mechanisms for identifying and exchanging records for students moving their enrolment between education systems, in accordance with all relevant legislation concerning children's welfare and education records. The SDTP was a key element in the response of governments to recommendations of the 2017 Royal Commission into Institutional Responses to Child Sexual Abuse.

**(d) why current laws and practices, particularly the Interstate Student Data Transfer Note and Protocol, are insufficient to achieve the stated objectives**

Schools identifiers will not replace the ISDTN or SDTP. Education Ministers have agreed that schools identifiers will be included as a data element in the SDTP once it is operational, to further support the robust and timely transfer of student information. As noted above, multiple reviews over many years have recommended the implementation of a national USI for the schools sector, with a range of identified objectives and benefits (please refer response to question 'b' for further details).

**(e) why the bill does not require the consent of the student and/or their parent or guardian in order to collect, use and share the student's personal information**

The policy intent of the national Schools USI is for all school students to have an enduring unique national identifier that they can take with them throughout their education journey, from school to vocational education and training and higher education.

Under amendments to the *Student Identifiers Act 2014 (Cth)*, school education authorities will be provided with authority to request generation of a schools identifier on behalf of a student, consistent with the operating model agreed by Education Ministers.

Under the Act (as amended by the Bill), education authorities will not be required to seek an individual's consent to schools identifier generation but will be required to provide notice to the individual that a schools identifier has been requested and generated on their behalf pursuant to school education, and the purpose for which the schools identifier will be used.

Implementation of schools identifiers will also be subject to local legislation and regulation. States and territories will undertake local privacy analysis and consider any required local legislative action. Following passage of the Bill, the Australian Government will continue working with states and territories to agree implementation arrangements for USIs, inclusive of any proposed 'opt in/out' arrangements.

**(f) what type of information is likely to be captured by 'school identity management information' and why is it necessary to define this term in regulations rather than the bill itself**

School identity management information will consist of the minimum data set agreed by Education Ministers to support a base level of data integrity and data matching requirements for the creation of a schools identifier and will only include data elements already collected and used by education authorities for school enrolment purposes. The school identity management information will be defined in the regulations and not the Bill to provide Education Ministers with flexibility for future decision making.

**(g) what information would sit behind, or be associated with, a schools identifier. For example, would a student's full school record be associated with their schools identifier, including potentially highly sensitive personal information, such as a student's health, counselling, psychological and behavioural records**

School identity management information will consist of the minimum data set agreed by Education Ministers to support a base level of data integrity and data matching requirements it does not include a student's full school record or sensitive personal information such as a student's health, counselling, psychological and behavioural records.

**(h) how long would a student's personal information be retained by the Registrar, and who is able to access this information**

Currently, USI information is retained by the Office of Student Identifiers Registrar (OSIR) and is governed by the *Archives Act 1983*. Education Ministers will consider and agree detailed arrangements for schools identifiers data retention, accessibility and destruction as part of the Schools USI Data Governance Framework.

These arrangements will take account of relevant legislation and data management standards, including Australian Government cyber security standards (such as those set out in the Australian Cyber Security Centre's Information Security Manual) and the Systems Interoperability Framework standard.

In line with Recommendation 21 of the Privacy Impact Assessment, the OSIR will develop appropriate policies to destroy or dispose personal information associated with a Schools USI that is no longer required for a relevant purpose. The OSIR is working with the National Archives of Australia to develop the OSIR Data Retention Policy.

**(i) in circumstances where the Registrar discloses student identifiers to entities, would this involve sharing the number of the identifier only or would it involve sharing associated information (such as a**

**student's name, age, gender identity, language, test results, health and behavioural information etc)**

Student identifiers, schools identifiers and school identity management information is protected information under the Bill. Access to this information is restricted as provided by Divisions 5 and 6 of Part 2 of the Act (as amended by the Bill). Education Ministers are establishing a Schools USI Data Governance Framework that will specify the requirements that must be met for protected information to be released by the Registrar. The framework will be an Intergovernmental Agreement and will operate as an important safeguard requiring the agreement of all Education Ministers. The framework will be established and agreed by Education Ministers before schools identifiers are assigned to any students.

**(j) what are examples of potential research areas for which protected information may be shared**

As noted above, multiple reviews over many years have recommended the implementation of a national USI for the schools sector, with a range of identified benefits and potential research areas (please refer response to question 'b' for further details).

**(k) what is meant by the term 'school education' in the context of sharing information for purposes relating to this**

The Bill identifies that the Registrar is authorised to use or disclose protected information of an individual if the use or disclosure is for the purposes of research that relates to school education and meets the requirements specified by the Education Ministerial Council.

The Education Ministerial Council consists of the Commonwealth, state and territory ministers responsible for school education (currently the Education Ministers Meeting (EMM)); the Bill reflects this remit. Matters that relate to primary or secondary school education would reasonably fall within the scope of the responsibilities of the Education Ministers.

Any use of USIs, school identity management information and student identifiers for school education research purposes will require the agreement of Education Ministers.

**(l) whether guidance will be provided as to when a research purpose will be sufficiently related to 'school education' so as to authorise the use or disclosure of protected information**

Please refer to responses to questions 'i' and 'k'.

**(m) why is it necessary that protected information be shared for research that indirectly relates to school education**

For the purposes of the Bill, 'protected information' refers to USIs, schools identifiers and school identity management information. Multiple reviews have highlighted that one of the key benefits of a national USI system is the

ability to generate connected longitudinal data insights across the education and training continuum.

Depending on the intent and scope of research, the connection to school education may be considered 'direct' or 'indirect', for example, an examination of education and career pathways such as the STEM workforce pipeline.

**(n) what requirements are likely to be specified by the Education Ministerial Council for the purposes of sharing protected information for research**

Education Ministers are establishing a Schools USI Data Governance Framework that will specify the requirements that must be met for protected information to be released by the Registrar for research purposes. The framework will operate as an important safeguard requiring the agreement of all Education Ministers. The framework will be established and agreed by Education Ministers before schools identifiers are assigned to any students.

**(o) when sharing information for research purposes, would the information be required to be de-identified and if not, why not**

The Schools USI Data Governance Framework will specify the requirements that must be met for protected information to be released by the Registrar for research purposes.

**(p) whether students and their parents or guardians would be informed of the various ways in which their personal information is being, or may be, used and disclosed**

Under the Act (as amended by the Bill), education authorities will be required to provide notice to an individual that a schools identifier has been requested and generated on their behalf pursuant to school education, and the purposes for which the schools identifier will be used. Education Ministers have agreed that implementation of schools identifiers throughout Australia will be supported by comprehensive communications activities with a focus on parents and carers.

**(q) to whom the Registrar and entities may disclose protected information for purposes relating to research or school education (with respect to proposed subsection 18(5) and 18C)**

The Bill requires that the use or disclosure of protected information for research purposes relating to school education must meet the requirements specified by the Education Ministerial Council before such information can be used or disclosed. This ensures that appropriate limits are placed around the Registrar's power under subsection 18(5) and 18D.

**(r) what entities and what purposes or circumstances are likely to be prescribed by the regulations with respect to proposed section 18C, which would authorise entities prescribed by the regulations**

**to use or disclose protected information for a purpose or in circumstances prescribed by the regulations**

Please note that there are no proposed amendments to s18C of the Act and this section does not apply to schools identifiers. Item 47 of the Bill introduces the new section 18D.

This section provides that an entity prescribed by the regulations is authorised to collect, use or disclose protected information of an individual if the collection, use or disclosure is for a purpose, or in circumstances:

(a) relating to school education

(b) prescribed by the regulations.

The Schools USI scheme is a joint initiative between the Commonwealth, states and territories. Together the Commonwealth, state and territory ministers responsible for school education (Education Ministers) are responsible for negotiating and agreeing on use cases for schools identifiers.

In December 2022, the Education Ministers agreed to a single use case for the Schools USI scheme: to support the transfer of student information when individuals move between schools under the SDTP. The regulations will make provision for this agreed use under s 18D of the Act.

It is necessary and appropriate for other future uses of the Schools USI scheme to be prescribed in the regulations under s 18D in reflection of the nature of the USI scheme as a joint initiative.

Regulations under the Act for schools identifiers may only be made with agreement from the Education Ministerial Council. By prescribing future uses under the regulations, this ensures input from and scrutiny by the Education Ministers.

Furthermore, it is not possible to pre-empt the future uses that Education Ministers will decide for the Schools USI scheme, nor would it be appropriate for the Commonwealth to bind the states and territories to future uses to which they have not agreed.

Therefore, it is necessary that future uses be prescribed by the regulations for state and territory agreement and oversight.

**(s) what remedies would be available to students and their parents or guardians in circumstances where their right to privacy has been violated (for example if personal information is used or disclosed unlawfully or without authorisation), and would they be notified of such a violation**

Schools identifiers, student identifiers and individuals' school identity management information are classified as protected information under this Bill. This means that strict legislative restrictions apply to the collection, use, and disclosure of this information.

The Bill specifies the limited circumstances where the collection, use and disclosure of this information is authorised.

Any other collections, uses and disclosures of this information will be unauthorised and will be taken to be an interference with an individual's privacy under the *Privacy Act 1988 (Cth)*. As such they can be the subject of a complaint to, and investigation, by the Australian Information Commissioner.

State and territory privacy legislation will also apply to the handling of student identifiers, schools identifiers and individuals' school identity management information by state or territory public bodies.

Relevant state and territory public bodies already collect and handle significant volumes of personal information about school students in their administration and provision of education. As such each jurisdiction already has in place privacy protections that apply to the handling of personal information.

Each state and territory, except South Australia and Western Australia, has its own privacy legislation which applies to the handling of personal information.

Although South Australia and Western Australia do not have specific privacy legislation, they do have privacy principles.

In addition, Western Australia currently has a privacy Bill before its parliament.

Each of the states and territories have a regulator/commissioner who is able to handle complaints about breaches of privacy in their jurisdiction.

**(t) when would the data governance framework likely be established and what, if any, safeguards would it contain with respect to the right to privacy and the rights of the child (beyond those set out above)**

Education Ministers will consider and agree the Schools USI Data Governance

Framework in early 2025.

No schools identifiers will be assigned to students until the Data Governance Framework is established.

One of the matters to be included in the Data Governance Framework is a commitment for all states and territories to handle student identifiers, schools identifiers and school identity management information in a manner consistent with the Australian Privacy Principles.

**(u) whether there is any mechanism by which a child or their parent or guardian could object to, or express their views about, the assignment of a schools identifier or the collection, use or disclosure of their personal information and data; and if not, why not**

The Australian Government is working with all jurisdictions and non-government education authorities in considering local arrangements for

implementation, including any required 'opt-out' arrangements and implications for the national system.

Options may include the ability for parents and carers on behalf of their child to 'opt-out' of receiving an identifier, or the potential for parents and carers to 'opt-in' be able to or 'opt-out' of specific uses of schools identifiers as Ministers consider and agree future uses.

**(v) whether, as the bill is currently drafted, a student or their parent or guardian could choose not to have a schools identifier or choose to opt-out of the scheme at a later stage, and if not, why not**

While the Bill will provide authority for education authorities to request assignment of a schools identifier without an individual's express consent, the Bill does not create an obligation on education systems to request assignment of schools identifiers for students.

Following passage of the Bill, the Australian Government will continue working with states and territories to agree implementation arrangements for schools identifiers, inclusive of any proposed 'opt in/out' arrangements.

**(w) will schools identifiers become compulsory for all primary and secondary school students, noting that while proposed section 13A provides that entities *may* apply to the Registrar for schools identifiers to be assigned to school students, the statement of compatibility states that the bill will see a USI issued to every Australian school student**

The Bill does not create a requirement for education systems (or individuals) to request assignment of schools identifiers.

As part of the National School Reform Agreement, Education Ministers agreed to implement unique student identifiers for all school students as a national policy initiative.

Education Ministers agreed this national initiative in acknowledgment of the benefits that extending the national system of unique student identifiers can provide to individuals and education systems.

The Australian Government is working with all jurisdictions and non-government education authorities in considering local arrangements for implementation, including any required 'opt out' arrangements and implications for the national system.

**(x) if a schools identifier will be compulsory for all students in the near future, are exemptions available for those who do not wish to have a schools identifier**

Please refer to question response.

**(y) why is it necessary that state and territory public bodies only be subject to the protected information regulatory regime (sections 16, 17 and 23 of the Act) if the education minister makes a declaration to that effect**

The new section 55A has the effect that the *Privacy Act 1988 (Cth)* (Privacy Act) will not regulate the administration of schools identifier information by state and territory public bodies unless there is agreement by the relevant Education Minister.

This new section acknowledges the constitutional limitations of the Commonwealth while allowing for the future application of the Privacy Act to state and territory public bodies.

**(z) what safeguards accompany the measures to ensure that, in all actions concerning children, the best interests of the child are a primary consideration**

Education Ministers are responsible for ensuring that in all actions and decisions concerning children, the best interests of the child are a primary consideration.

As a safeguard, any use of schools identifiers, school identity management information and student identifiers for school education research purposes will require the agreement of all Education Ministers.

**(aa) whether less rights restrictive alternatives were considered and if so, what these are and why they are insufficient to achieve the stated objectives**

Extension of USIs to the school education sector has been recommended by a number of significant reviews over many years including – in part- response of governments to recommendations of the 2017 Royal Commission into Institutional Responses to Child Sexual Abuse.

The Bill establishes the concept of a 'schools identifier' distinct from a 'student identifier' in acknowledgment of the different operating model and data set agreed by Education Ministers in extending USIs to the school education sector. Education authorities rather than individuals will make a request to the Student Identifiers Registrar to assign a schools identifier and education authorities will maintain the school identity management information linked to the schools identifier.

## Concluding comments

### *International human rights legal advice*

2.29 As to how likely it is that a student would not have a schools identifier assigned to them (and if so, what would be the consequences of not having a schools identifier in terms of accessing primary and secondary education) the minister advised that the bill does not oblige education systems to request assignment of schools identifiers for

students, and it is not the intent to make assignment of a schools identifier a condition of access to school education. The minister stated that it is not possible to estimate the 'likelihood' that a student would not have a schools USI assigned to them. The minister stated that it is anticipated that schools identifiers will be implemented in a phased manner, noting that it is intended that all school students will have a USI by the end of 2027. The minister stated that the Australian Government will work with states and territories to agree implementation arrangements for USIs, inclusive of any proposed 'opt-in/out' arrangements. Based on this additional information, it would appear that the bill will not have the effect of limiting the right to education in practice.

*Legitimate objective*

2.30 Further information was sought to as to whether the bill is directed towards a legitimate objective, and an issue of pressing and substantial concern.

2.31 The minister stated that the need for a USI has been supported by a number of significant reviews including the Review to Inform a Better and Fairer Education System (2023). The minister stated that these reviews recommended the implementation of a national USI for the schools sector in order to 'drive consistency in the collection of data that enables student growth to be measured, improving the design of teaching interventions' and to 'maximise learning growth, supporting individual student learning needs through ready access to student records'. The minister also stated that adopting 'a common protocol for when students move their enrolment between systems' was a key element of the response of governments to recommendations of the 2017 Royal Commission into Institutional Responses to Child Sexual Abuse. As to the current processes, the minister advised that the Interstate Student Data Transfer Note (ISDTN) and Protocol supports the exchange of student information when a student moves between schools. The minister stated that this is 'a paper based system' providing a set of common documents for schools to use when a student transfers interstate. However, the minister noted that a national project to establish a more efficient exchange of student information online (the Student Data Transfer Protocol (SDTP)) is currently underway, and includes 'the development of a protocol and electronic mechanisms for identifying and exchanging records for students moving their enrolment between education systems, in accordance with all relevant legislation concerning children's welfare and education records'. The minister stated that the SDTP was also a key element in the response of governments to recommendations of the 2017 Royal Commission into Institutional Responses to Child Sexual Abuse. The minister stated that schools identifiers will not replace the ISDTN or SDTP. He stated that Education Ministers have agreed that schools identifiers 'will be included as a data element in the SDTP once it is operational'. The SDTP permits the sharing (with consent) of information including a child's personal details (such as name and date of birth), information about the school and an outline of the child's attendance, progress in learning areas, subjects studied, support and health care

needs.[48] It is not clear whether and how information associated with a USI would differ from that already set out under the SDTP.

2.32 It remains unclear that the objectives identified by the minister would constitute legitimate objectives for the purposes of human rights law. As noted in the preliminary international human rights legal advice, a legitimate objective must be one that is necessary and addresses a public or social concern that is pressing and substantial enough to warrant limiting rights. Improving the transfer and sharing of students' personal information, and supporting the administration of school education, appears to be primarily directed towards administrative convenience, which in and of itself is unlikely to be sufficient to constitute a legitimate objective for the purposes of international human rights law. Further, it remains unclear whether and how existing laws and practices are insufficient to achieve the stated objectives, in particular the existing consent-based SDTP scheme.

*Rational connection*

2.33 The preliminary international human rights legal advice noted that, in order to assess whether the measures in the bill are likely to achieve their stated objectives, it is necessary to identify what information would be captured by 'school identity management information'. The minister stated that the term 'school identity management information' would be defined in regulations (to provide Education Ministers with flexibility for future decision making.) The minister stated that school identity management information will consist of 'the minimum data set agreed by Education Ministers to support a base level of data integrity and data matching requirements for the creation of a schools identifier', and will only include data elements already collected and used by education authorities for school enrolment purposes. The minister stated that it would not include a student's full school record or sensitive personal information such as a student's health, counselling, psychological and behavioural records. However, the minister did not particularise the data elements it would include and nothing in the bill would prevent the definition of 'school identity management information' from including such details as a matter of law. Nonetheless, while the breadth of information that could be associated with a schools identifier raises concerns with respect to proportionality (as detailed below), the information provided by the minister suggests that the measure may nonetheless be rationally connected to the stated objective.

*Proportionality*

2.34 Further information was sought in relation to whether the proposed limitations on the right to privacy are sufficiently circumscribed; whether the measures are accompanied by sufficient safeguards; and whether there are any less rights restrictive alternatives that could achieve the same stated objectives.

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48 Department of Education, *Interstate Student Data Transfer Note Parent/Guardian Fact Sheet* (accessed 2 September 2024).

2.35 As set out above, the potential breadth of personal information that would be collected and the circumstances in which the information would be used and shared is not clear on the face of the bill. The type of personal information that may be captured by school identity management information and associated with schools identifiers will generally be set out in future regulations, and so is also unclear. While the minister stated that school identity management information will consist of a minimum data set and will not include sensitive personal information such as a student's health records, as a matter of law, nothing in the bill would prevent a very broad range of information being defined by delegated legislation. The minister stated that the implementation of schools identifiers will be subject to 'local legislation and regulation', stating that states and territories will undertake 'local privacy analysis' and consider any required 'local legislative action'. The minister also stated that once the bill has passed, the government will work with states and territories to agree implementation arrangements for USIs, inclusive of any proposed 'opt in/out' arrangements.

2.36 As to how long a student's personal information may be retained by the Registrar, and who is able to access this information, the minister stated that USI information is governed by the *Archives Act 1983*.[49] The minister stated that education ministers will consider and agree detailed arrangements for schools identifiers data retention, accessibility and destruction as part of the Schools USI Data Governance Framework. The minister stated that these arrangements 'will take account of relevant legislation and data management standards, including Australian Government cyber security standards (such as those set out in the Australian Cyber Security Centre's Information Security Manual) and the Systems Interoperability Framework standard'. The minister stated that the Registrar will develop 'appropriate policies to destroy or dispose personal information associated with a Schools USI that is no longer required for a relevant purpose'. The minister also stated that the registrar is working with the National Archives of Australia to develop a relevant Data Retention Policy. These non-legislative measures have the capacity to assist with the proportionality of the bill, however, equally, it cannot be concluded that they would sufficiently circumscribe the retention of personal information pursuant to this scheme. Further, being non-legislative, such measures will not be subject to legislative scrutiny, and their safeguard value will generally depend on how they operate in practice.

2.37 The minister stated that information including a student's name, age, gender identity, language, test results, health and behavioural information is protected information under the bill, and that access would be restricted as provided by Divisions 5 and 6 of Part 2 of the Act. As to whether the disclosure of student identifiers to entities would involve sharing the number of the identifier only or this further personal

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49 The *Archives Act 1983* governs access to Commonwealth archival records, and provides for open access to most archival records after a period of 20 years, subject to certain exemptions (including where records contain personal information).

information, the minister stated that education ministers will establish a 'Schools USI Data Governance Framework' that will specify the requirements that must be met for protected information to be released by the Registrar. The minister stated that this framework will be considered and agreed in early 2025. He stated that the framework will be an Intergovernmental Agreement, which will be established and agreed by Education Ministers before schools identifiers are assigned to any students. The minister stated that one of the matters to be included in the framework is 'a commitment for all states and territories to handle student identifiers, schools identifiers and school identity management information in a manner consistent with the Australian Privacy Principles'. Again, such a framework has the capacity to serve as an important safeguard with respect to the right to privacy. However, intergovernmental agreements are not themselves legally binding,[50] which may limit their safeguard value.

2.38 As to why the bill does not require the consent of the student and/or their parent or guardian in order to collect, use and share the student's personal information, the minister stated that education authorities will be required to provide notice to the individual that a schools identifier 'has been requested and generated on their behalf pursuant to school education', and the purpose for which the schools identifier will be used. However, it remains unclear why the consent of the student and/or their parent or guardian is not required (particularly noting that consent is a requirement in order to issue an SDPT when a student changes school).

2.39 Further information was also sought regarding the purposes for which information may be shared. As to what is meant by the term 'school education' in the context of sharing information for purposes relating to this, the minister stated that the bill identifies that the Registrar is authorised to use or disclose protected information of an individual if the use or disclosure is for the purposes of research that relates to school education and meets the requirements specified by the Education Ministerial Council. The minister stated that matters that relate to primary or secondary school education 'would reasonably fall within the scope of the responsibilities of the Education Ministers'. This would appear, therefore, to encompass a potentially broad range of responsibilities, and so authorise the use and disclosure of personal information about an individual in a broad range of circumstances.

2.40 As to the sharing of information for research purposes, and potential research areas, the minister stated that multiple reviews over many years have recommended the implementation of a national USI for the schools sector, with 'a range of identified benefits and potential research areas'. As to whether guidance will be provided as to when a research purpose will be sufficiently related to 'school education' so as to authorise the use or disclosure of protected information, the minister noted that

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50 See further, Cheryl Saunders, Intergovernmental agreements and the executive power, *Public Law Review* (2005), vol. 16, page 297.

Education Ministers are establishing a Schools USI Data Governance Framework, and that any use of USIs, school identity management information and student identifiers for school education research purposes would require the agreement of Education Ministers. This process would appear to ensure that there is oversight of the framework by which information may be shared, and may have the capacity to create requirements that protect the privacy of personal information where it may be shared for research purposes. However, the fact that the process would require the agreement of multiple ministers does not itself ensure that the resulting scheme would provide appropriate privacy protections, and there is nothing in the bill that would require such measures to have such safeguard value with respect to the right to privacy. For example, information was sought as to whether information shared for research purposes would be required to be de-identified. The minister stated that the governance framework would specify requirements for disclosure, but did not state what such requirements would provide with respect to de-identification. As to whether students and parents/guardians would be informed of the ways in which their personal information is being (or may be) used and disclosed, the minister stated that where an education authority has requested a USI in relation to a student, they would be required to notify the individual about the purposes for which the schools identifier will be used. The minister further stated that Education Ministers have agreed that implementation of schools identifiers throughout Australia 'will be supported by comprehensive communications activities with a focus on parents and carers'. However, it is not clear that such communication or notification requirements would require an individual to be notified of the *specific* research purposes for which their personal information has been (or may be) used, or whether it may merely notify them that their personal information may be used for unspecified research purposes.

2.41 As to why is it necessary that protected information be shared for research that indirectly relates to school education, the minister stated that multiple reviews have highlighted that one of the key benefits of a national USI system is the ability to generate connected longitudinal data insights across the education and training continuum, and that depending on the intent and scope of research, the connection to school education may be considered 'direct' or 'indirect' (for example, an examination of education and career pathways such as the STEM workforce pipeline). Regarding to whom the Registrar and entities may disclose protected information for purposes relating to research or school education, the minister stated that such use or disclosure must meet 'the requirements specified by the Education Ministerial Council', which ensures that appropriate limits are placed around the Registrar's power. However, as with the other non-legislative measures considered above, the mere fact that the Education Ministerial Council must specify requirements for disclosure does not itself ensure that any limit on the right to privacy is proportionate, and there is nothing in the bill that would appear to impose such an overarching requirement.

2.42 Further information was also sought as to what entities are likely to be authorised by delegated legislation to use or disclose protected information, and for what purposes or in what circumstances. The minister did not identify what entities are likely to be authorised. In relation to purposes, the minister stated that in December 2022, Education Ministers agreed to a single use case for the Schools USI scheme: to support the transfer of student information when individuals move between schools under the SDTP. However, subsection 18D(a) provides that an entity may collect, use or disclose personal information in circumstances 'relating to education', which appears to potentially encompass a wide range of circumstances. It is not clear why the narrower single use case that has been agreed may not instead be provided for in section 18D. The minister stated that the regulations will make provision for this agreed use, and that it is 'necessary and appropriate for other future uses of the Schools USI scheme to be prescribed in the regulations' in reflection of the nature of the USI scheme as a joint initiative, and noted that regulations 'may only be made with agreement from the Education Ministerial Council',[51] which ensures input from and scrutiny by the education ministers. However, the mere fact that the Education Ministerial Council must agree to use cases does not itself ensure that any such resulting limit on the right to privacy would be proportionate, and there is nothing in the bill that would appear to require this.

2.43 As to the presence of safeguards, advice was sought regarding what remedies would be available to students and their parents or guardians where their right to privacy has been violated (for example if personal information is used or disclosed unlawfully or without authorisation), and whether they would be notified of such a violation. The minister stated any collections, uses and disclosures of relevant information beyond the scope of the bill would be unauthorised and constitute an interference with an individual's privacy under the *Privacy Act 1988*. The minister stated that in such circumstances an individual could make a complaint to the Australian Information Commissioner. The minister also stated that state and territory privacy legislation would also apply to the handling of student identifiers, schools identifiers and individuals' school identity management information by state or territory public bodies. The minister stated that each jurisdiction already has privacy protections, and that each state and territory, except South Australia and Western Australia (which only have privacy principles), has its own privacy legislation which applies to the handling of personal information. The minister also noted that each of the states and territories have a regulator/commissioner who can handle complaints about breaches of privacy in their jurisdiction. These legislative frameworks may assist with the proportionality of the scheme, noting however that no detailed information as to the extent of their safeguard value is provided. Further, it remains unclear whether a student and their parent/guardian would be required to be notified of a violation of their privacy in relation to the USI scheme.

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[51] Schedule 1, item 79, proposed subsection 57(2) and (2A).

2.44 Information was also sought as to what safeguards would accompany the measures to ensure that, in all actions concerning children, the best interests of the child are a primary consideration. The minister stated that Education Ministers are responsible for ensuring that in all actions and decisions concerning children, the best interests of the child are a primary consideration. This has the capacity to serve as an important safeguard, however this does not appear to be a statutory or other legal requirement, which raises questions as to its value in practice. The minister noted that any use of schools identifiers, school identity management information and student identifiers for school education research purposes will require the agreement of all education ministers. Again, this may serve as a safeguard, however as noted above, it is not clear that an overarching requirement that the best interests of the child be a primary consideration would be required to inform such agreement. Consequently, questions remain as to whether the legislative framework would ensure that in all actions concerning children, the best interests of the child are a primary consideration as a matter of practice.

2.45 Further information was also sought as to the flexibility of the proposed scheme, and in particular: whether the assignment of a USI would be compulsory or whether an individual could opt-out of the scheme (either initially or at a later time); and whether there is a mechanism by which a child or their parent or guardian could object to, or express their views about, the assignment of a schools identifier or the collection, use or disclosure of their personal information and data. The minister stated that the government is working with all jurisdictions and non-government education authorities in considering local arrangements for implementation, including any required 'opt-out' arrangements and implications for the national system. The minister stated that options may include the ability for parents and carers on behalf of their child to 'opt-out' of receiving an identifier, or the potential for parents and carers to be able to 'opt-in' or 'opt-out' of specific uses of schools identifiers as ministers consider and agree future uses. The minister reiterated that the bill does not require education authorities to request the assignment of a USI, but noted the final milestone for the USI National Enabling Initiative to be that 'All school students have a USI by end 2027'. The process the minister describes has the capacity to result in additional safeguards with respect to the right to privacy. However, any safeguard value would ultimately depend on what arrangements are made, and how they operate in practice. Further, the bill would not require the establishment of such opt-out mechanisms.

2.46 Further information was also sought as to why state and territory public bodies would only be subject to the protected information regulatory regime if the education minister makes a declaration to that effect.[52] The minister stated that this acknowledges the constitutional limitations of the Commonwealth while allowing for the future application of the Privacy Act to state and territory public bodies. It assists

[52] Schedule 1, item 78, proposed section 55A.

to understand that this additional step reflects a constitutional requirement. However, it is unclear why proposed section 55A does not require that the minister must make such a declaration if a state or territory has agreed to the application of the regime. Further, it is noted that as a matter of law, if no declaration were made, state and territory public bodies (the vast majority of schools) would not be subject to the provisions in the Act requiring the protection of personal information.

2.47 As to whether less rights restrictive alternatives were considered and if so, what these are and why they are insufficient to achieve the stated objectives, the minister stated that the extension of USIs to the school education sector has been recommended by a number of significant reviews over many years. The minister stated that the bill establishes the concept of a 'schools identifier' distinct from a 'student identifier' in acknowledgment of the different operating model and data set agreed by Education Ministers in extending USIs to the school education sector. The minister stated that education authorities rather than individuals will make a request to the Student Identifiers Registrar to assign a schools identifier and education authorities will maintain the school identity management information linked to the schools identifier. It remains unclear that the existing, less rights restrictive, consent-based approach to the sharing of information would be ineffective to achieve the stated objectives of the measure.

*Concluding remarks*

2.48 It is not clear that the bill is directed towards a legitimate objective that is necessary and seeks to address a public or social concern that is pressing or substantial enough to warrant limiting rights (particularly the right to privacy and the rights of the child). Further, the bill seeks to establish a legislative scheme in which the majority of detail would be provided for by delegated legislation (and by associated non-legislative measures). The bill itself does not sufficiently circumscribe potential limits on the right to privacy and the rights of the child, nor does it contain sufficient safeguards to ensure that a resulting scheme would permissibly limit the right to privacy. As such, there is a risk that the bill constitutes an impermissible limit on the right to privacy and the rights of the child.

***Committee view***

2.49 The committee thanks the minister for this response.

2.50 The committee notes that the bill seeks to extend the Unique Student Identifier scheme to all Australian primary and secondary school students by enabling the assignment of a schools identifier to each student. By authorising the verification, collection, use and disclosure of schools identifiers and school identity management information (both of which would be classified as 'protected information' under the bill and would include personal information), the measures would engage and limit the right to privacy. As the measures would apply to primary and secondary school children, the rights of the child would also be engaged and limited.

2.51 The committee notes the minister's advice that it is not intended that the measures would restrict access to primary or secondary education for students without a schools identifier. The committee considers that the bill may not, therefore, engage and limit the right to education.

2.52 With respect to the right to privacy and the rights of the child, the committee notes that the bill seeks to improve the transfer of student information between entities and support the administration of education. The committee considers that these are important objectives, however the committee notes that under international human rights law, it must also be demonstrated that this objective seeks to address a matter of concern which is pressing and substantial enough to warrant limiting human rights. In this regard, the committee considers that the bill is largely directed towards administrative convenience, and it remains unclear that existing consent-based arrangements for sharing information when a child changes school are inadequate.

2.53 As to proportionality, the committee considers that the bill seeks to establish a legislative scheme in which the majority of detail would be provided for by delegated legislation (and by associated non-legislative measures). The committee considers that the bill itself does not sufficiently circumscribe potential limits on the right to privacy and rights of the child, nor does it contain sufficient safeguards to ensure that a resulting scheme would permissibly limit the right to privacy. As such, the committee considers that there is a risk that the bill constitutes an impermissible limit on the right to privacy and the rights of the child, and considers that the privacy implications (in particular) of a resulting scheme may only be apparent in practice. The committee considers that the bill could be amended to alleviate some of these concerns without frustrating the bill's overall intention.

**Suggested action**

2.54 The committee considers the proportionality of these measures may be assisted were the bill amended to:

(a) clarify that the assignment of a schools identifier is not a condition of access to school education;

(b) require that in all decisions relating to the administration of these measures which relate to children, the best interests of the child shall be a primary consideration;

(c) require that, in setting requirements for the disclosure of information, the Educational Ministerial Council must have regard to the best interests of the child, and the right to privacy;

(d) provide that the definition of 'school identity management information' in delegated legislation is to provide for a minimum data set, and may not include a student's full school record or sensitive

personal information (such as a student's health, counselling, psychological and behavioural records);

(e) provide that sensitive personal information (such as a student's health, counselling, psychological and behavioural records) may never be shared without a student or parent or guardian's consent;

(f) amend section 18D(a) to provide that protected information about an individual may only be collected, used or disclosed by a prescribed entity to support the transfer of student information when individuals move between schools under the Student Data Transfer Protocol; and

(g) establish a requirement that if a person's privacy is breached pursuant to the scheme, they must be notified of the breach and advised of available remedies.

2.55 The committee recommends that consideration be given to amending proposed section 55A to require that the minister must make a declaration if a state or territory has agreed to the application of the regime.

2.56 The committee recommends that consideration be given to requiring an independent review of the operation of this proposed USI scheme after it has commenced operation.

2.57 The committee recommends that the statement of compatibility be updated to reflect the information provided by the minister.

2.58 The committee draws its human rights concerns to the attention of the minister and the Parliament.

# Family Law Amendment Bill 2024[53]

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| **Purpose** | This bill seeks to amend the *Family Law Act 1975* and make consequential amendments to the *Evidence Act 1995*, *Federal Circuit and Family Court of Australia Act 2021*, *Federal Proceedings (Costs) Act 1981*, *Child Support (Registration and Collection) Act 1988* and *Child Support (Assessment) Act 1989*<br><br>Schedule 1 seeks to amend the property framework in the *Family Law Act 1975* to codify aspects of the common law and ensure the economic effects of family violence are considered in property and spousal maintenance proceedings<br><br>Schedule 2 seeks to provide a regulatory framework for Children's Contact Services<br><br>Schedule 3 seeks to improve case management in family law proceedings by, amongst other matters: permitting the family law courts to determine if an exemption to the mandatory family dispute resolution requirements applies; safeguarding against the misuse of sensitive information in family law proceedings; and amending Commonwealth Information Order powers and expanding the category of persons about which violence information must be provided to the family law courts in child related proceedings<br><br>Schedule 4 seeks to insert definitions of 'litigation guardian' and 'manager of the affairs of a party', remake costs provisions, and require superannuation trustees to review actuarial formulas used to value superannuation interests to ensure courts have access to accurate and reasonable valuations<br><br>Schedule 5 provides for review of the operation of the bill and tabling of a report of the review in the Parliament |
| **Portfolio** | Attorney-General |
| **Introduced** | House of Representatives, 22 August 2024 |
| **Rights** | Rights of the child; protection of the family; privacy; effective remedy |

53 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Family Law Amendment Bill 2024, *Report 9 of 2024*; [2024] AUPJCHR 71.

2.59 The committee requested a response from the minister in relation to the bill in *Report 8 of 2024*.[54]

## Use and disclosure of safety-related information by Children's Contact Services

2.60 Schedule 2 to the bill seeks to amend Part II of the *Family Law Act 1975* (Family Law Act) to provide for the accreditation and regulation of existing services referred to as 'Children's Contact Services' (CCS). These are services that facilitate contact between a child and a member of the child's family with whom the child is not living, and where members of the family may not be able to safely manage such contact, and are provided on a professional, commercial or charitable basis.[55] The bill would provide that accreditation rules may be made in relation to individuals as CCS practitioners, and to persons (whether or not individuals) and other entities as CCS businesses.[56]

2.61 The bill would regulate the confidentiality of certain safety-related information held by a service. Specifically, it would provide that a person who is or has been an 'entrusted person' must not use or disclose safety information obtained by the person in their capacity as an entrusted person, unless the use or disclosure is required or authorised by section 10KE.[57] An 'entrusted person' is a CCS practitioner or CCS business,[58] a director or other officer of a CCS business, or a person employed or engaged to perform work (whether paid or unpaid) for or on behalf of a CCS business.[59] 'Safety information' is information that relates to the risks of harm to a child or a member of a child's family, or to the identification and management of such risks, if CCS have been, are being or will be, provided to the child, and the risks are those that may arise in connection with the use, facilitation or provision of the service.[60]

2.62 Subsections 10KE(4)–(9) provide for permitted uses or disclosure of safety information by an entrusted person. These include that an entrusted person:

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54 Parliamentary Joint Committee on Human Rights, *Report 8 of 2024* (11 September 2024), pp. 28– 36.

55 Schedule 2, item 15, subsection 10KB(1). CCS do not include services provided as a result of intervention by a child welfare officer of a state or territory; supervision of contact between a child and a family member who is in a correctional institution or services prescribed by delegated legislation. See, subsection 10KB(3).

56 Schedule 2, item 4, paragraph 10A(1)(b).

57 Schedule 2, item 15, subsection 10KE(1).

58 Schedule 2, item 15, section 10KC defines a 'CCS practitioner' to mean an individual accredited as a CCS practitioner under the Accreditation Rules. Section 10KD defines a 'CCS business' to mean a person or other entity that is accredited as a CCS business under the Accreditation Rules.

59 Schedule 2, item 15, subsection 10KE(2).

60 Schedule 2, item 15, subsection 10KE(3).

- must disclose safety information if they reasonably believe it is necessary for the purpose of complying with a law of the Commonwealth, state or territory;
- may use safety information for the purposes of performing the person's functions as an entrusted person;
- may disclose safety information to one or more other entrusted persons if they are engaged by a particular CCS business and it is reasonable to disclose the safety information to enable the CCS business to appropriately provide children's contact services in respect of the child;
- may use or disclose safety information that is a communication (including an admission) made by an individual to an entrusted person, if consent is given by the person if 18 or over, or where the person is 15, 16 or 17 with the consent of the person if they have the capacity to consent, or where under 15 with the consent of each person who has parental responsibility for the child or a court;
- may use or disclose safety information where they reasonably believe that the use or disclosure is necessary to protect a child from the risk of serious harm or preventing or lessening a serious and imminent threat to the life or health of a person, or reporting the commission of an offence involving violence or a threat of violence to a person;
- may use or disclose safety information where they reasonably believe it is necessary for preventing or lessening a serious and imminent threat to the property of a person, or reporting the commission of an offence involving intentional property damage or the threat of property damage;
- may use or disclose safety information where they reasonably believe it is necessary to assist an independent children's lawyer to represent the child's interests; and
- may disclose safety information in order to provide information other than personal information for research relevant to families.

## Summary of initial assessment

### *Preliminary international human rights legal advice*

*Rights of the child and right to protection of the family*

2.63 Insofar as the measure provides for regulations to be made for the accreditation of CCS to support the safety and quality of services offered for facilitating contact between a child and members of their family, this measure would promote the rights of the child and the right to protection of the family.

2.64 However, by providing for the use and disclosure of safety information in certain circumstances, this measure also 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.[61] 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.

2.65 The statement of compatibility briefly identifies that providing for the use and disclosure of personal information by CCS engages the right to privacy.[62] It appears that supporting the operation of a workable and effective CCS, and thereby supporting children to see members of their family in a safe manner, would constitute a legitimate objective for the purposes of international human rights law. Permitting the use and disclosure of safety information would, in some circumstances, appear to be rationally connected to (that is, capable of achieving) that objective.

2.66 However, it is unclear why such a broad range of individuals should be entrusted persons and therefore able to access, use and disclose safety information. It is unclear whether entrusted persons would be required to be provided with appropriate training to be able to make decisions regarding when to use or disclose the information. The statement of compatibility does not explain to whom safety information may be disclosed and what they may do with that information, why each of the exceptions listed are necessary and whether they are appropriately targeted. It is not clear what safeguards would apply to many of the listed exceptions for the use and disclosure of safety information. In addition, no information is provided as to what, if any, other existing legal or regulatory frameworks regulated the use and disclosure of information that would be 'safety information' under this bill prior to its introduction, and whether any such frameworks would continue to apply to CCS. It is also unclear whether and how CCS are subject to oversight and review with respect to the use and disclosure of safety information.

***Committee's initial view***

2.67 The committee noted that the accreditation of Children's Contact Services (CCS) is an important measure to improve the safety and quality of services facilitating contact between children and their families and that the regulation of the use and disclosure of safety information is an important aspect of this measure.

2.68 The committee considered that the measure promotes the rights of the child and the right to protection of the family, but that the use and disclosure of safety information necessarily engages and limits the right to privacy.

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

62 The assessment of Schedule 2 in relation to the right to protection of the family does include a brief discussion of the privacy implications of regulating the use and disclosure of safety information. See pp. 28–29.

2.69 The committee considered that further information was required to assess the compatibility of the measure with the right to privacy and therefore sought the advice of the Attorney-General.

2.70 The full initial analysis is set out in *Report 8 of 2024*.

## Minister's response[63]

2.71 The minister advised:

> Use and disclosure of safety-related information by CCS- Right to privacy
>
> **1. Why is it appropriate for the definition of entrusted persons to be so broad and whether such persons will be appropriately trained**
>
> The definition of an entrusted person is necessarily broad as to allow for information to be shared with persons reasonably associated with a CCS (such as the staff with whom the information was originally shared, other staff working with the family who may need to know that particular information is sensitive and how it could affect the safety of the client family, or a business owner who might not otherwise be considered 'staff but who play a role in the decision making in relation to the service).
>
> The accreditation rules will impose minimum operating standards on CCS in order to be accredited. As family violence is a significant risk associated with the service, under the proposed accreditation framework, staff will be expected to have appropriate skills and knowledge to safely provide services and organisations are expected to have appropriate policies guiding the provision of the services.
>
> There will not be a single approach to training staff or developing policies to achieve this objective. There will be some variation in approach taken across different businesses.
>
> **2. Why is the definition of entrusted persons not confined to a class of persons whose role involves access to and assessment of this information**
>
> As all businesses may be different, there may not be a single class of person (for example as defined by a job or role title) who may come into contact with this information. Arbitrarily restricting the ability to protect or appropriately use this information may inadvertently result in the information not being able to be protected or used as required. For example, if a particular business did not have a staff member with a clearly identified role to manage safety information, it may not use that information to protect the safety of a client for fear of breaching the provisions supporting the sharing of that information. Inversely, the execution of a safety plan during changeover or supervised visitation is

[63] The minister's response to the committee's inquiries was received on 24 September 2024. This is an extract of the response. The response is available in full on the committee's webpage.

often contingent upon all members of staff having sufficient knowledge. For example, if one parent is to enter through one entrance and the other parent is to enter through another, it is imperative that all staff members who may interact with each parent know exactly what limitations have been placed on them.

**3. Why the Bill does not require that an entrusted person who is permitted to use and disclose safety information in certain circumstances must receive training relating to identifying those circumstances in practice**

As noted in response to question 1, the proposed accreditation framework would allow for the making of accreditation rules that would impose minimum operating standards on CCS in order to be accredited. As family violence is a significant risk associated with the service, under the proposed accreditation framework, staff will be expected to have appropriate skills and knowledge to safely provide services and organisations will be expected to have appropriate policies guiding the provision of the services.

There will not be a single approach to training staff to achieve this objective but there are many short and long-term training programs available in all jurisdictions that will allow service providers to sufficiently upskill their staff for these purposes.

**4. To whom an entrusted person can disclose safety information, and what that individual or body can then do with that information**

Safety information is proposed to be protected because knowledge of that information by another party (in the context of CCS, an ex-partner or their family) could result in harm. As noted in the explanatory materials, this could include information which, on the surface, may seem innocuous, such as the bus route that a person takes to attend a CCS session. Where the parent the child lives with is fearful for their safety, travelling in the community can be a significant risk. Where they are travelling with a child, knowledge of that travel route could increase risks of child abduction.

The intention is to protect this information, but if there are situations where this information should be shared in order to support the safety of the person, then the legislation would be deficient if it were not to allow this.

For example, if the visiting parent made a statement which implied that they were aware of the bus route used by the residential parent leaving a contact session (following on from the previous example) and that they would see the child shortly, and the CCS worker had a concern that this could affect the safety of their client, they may wish to report this to the police. In seeking to improve the safety of the child and the parent they reside with, information about the bus route (otherwise protected safety information) could be shared with the police to allow the police to make a risk assessment about whether they should take any action to engage in the situation.

The ability to share information would also assist the courts, should they feel that it is relevant to making final orders in relation to post-separation parenting matters.

Different states and territories may introduce different laws that require persons to disclose information in different situations. This is in addition to mandatory reporting obligations where there are reasonable grounds to suspect that a child has been or is at risk of being abused, has been or is at risk of being ill-treated, or exposed to or subjected to behaviour which psychologically harms the child.

The provision intends that information only be released for narrow lawful purposes. Any organisations or individuals in receipt of safety-related information (most notably police and the courts) are required to adhere to the privacy standards that they already employ for other sensitive information that they deal with.

**5. Why each of the exceptions permitting the use and disclosure of safety information in subsections 10KE(4)-(9) are necessary**

The exceptions are considered necessary for the following reasons:

10KE(4) – To prevent conflicts between Commonwealth and state/territory laws, or confusion about which law takes precedence when the *Family Law Act 1975* (Cth) (Family Law Act) restricts information sharing while another Act permits it. The aim is also to avoid penalising individuals for failing to comply with laws they would otherwise be required to follow.

10KE(5) – To allow the recipient of the information to consider it when planning for the safe provision of services. This may involve documenting the information or adjusting their approach based on the details provided.

10KE(6) – To allow the sharing of information with other staff to ensure all individuals involved in providing services to the family are aware of potential risks and can support the safe delivery of services. This may include sharing information with personnel not directly interacting with the family (such as centre management), but who are still responsible for ensuring service safety.

10KE(7) – To provide clients access to records of disclosures for use in other processes or to allow the use of disclosed information for their benefit ( e.g. advocating for the client in other situations) when consent is given. This supports the principle that individuals are entitled to access information about themselves and, as adults, can make informed decisions regarding its use. It also acknowledges that children aged 15 and older may have the maturity and understanding to make decisions independently, and denying those under 18 the same rights could unfairly restrict their entitlements.

Assessing maturity and capacity to give consent will be subjective, but staff in these sensitive roles are expected to rely on their skills, knowledge, organisational policies, and input from other staff to make informed decisions.

10KE(8) – To enable staff to share information that suggests a credible risk of harm with appropriate bodies to help prevent or reduce that risk. This may involve providing relevant details to an Independent Children's Lawyer (ICL), where appointed, to assist the court in making informed decisions regarding parenting orders.

10KE(9) – To facilitate the monitoring and evaluation of the accreditation regime's effectiveness through the use of de-identified data. This includes examining how environmental risks affect the operation of CCS and how that information is utilised to improve service delivery.

**6. What safeguards exist, if any, to protect safety information disclosed or used pursuant to these exceptions**

Not unlike other similar provisions in the Family Law Act which require the disclosure of information, there are no explicitly imposed obligations on those entities regarding how they store or use the information once it is disclosed to them under such an order. For example, section 67ZBE of the Family Law Act allows the court to order the disclosure of information to certain entities, such as police, child welfare authorities, or other relevant bodies, in situations where the court believes the information may assist in protecting the welfare of a child.

These provisions do not impose obligations on the recipient because the storage and use of the information by these entities would typically be governed by other legislation or regulations that apply to their specific roles. For example, police and child protection agencies may be subject to strict privacy, data protection, and record-keeping laws at the state, territory, or Commonwealth level, such as privacy legislation, child protection legislation, or law enforcement guidelines.

**7. Whether entrusted persons will have any obligations in the accreditation rules to consider the privacy and security of the safety information they have access to, for example, who has access to safety information disclosed, whether it will be stored and how long it will be stored for**

The proposed accreditation rules will include requirements for operating policies that govern the management of the centre, including secure information handling and storage. These rules are expected to establish minimum retention periods for records. Feedback from the sector indicates that existing regulatory frameworks already oblige CCS operators to retain records for significant periods of time. It is also recognised that the same piece of information may be subject to multiple retention requirements for different reasons. In such cases, the longest retention period would likely apply to ensure that individuals are not disadvantaged when seeking access to information in the future.

It is important to note that it would not be necessary to specifically prescribe safety and storage requirements for information that has always been part

of the operational framework, but is now classified under the Family Law Act. Such information has long been subject to existing privacy, storage, and security laws, and service providers are already familiar with these obligations.

The new classification under the Family Law Act does not introduce fundamentally different information but rather formalises its treatment, meaning additional prescriptive measures are not needed beyond what is already required by other legal regimes.

**8. What, if any, other existing legal or regulatory frameworks regulated the use and Disclosure of information that would be 'safety information' under this bill prior to its introduction and whether any such frameworks would continue to apply to CCS**

There are a range of existing legal and regulatory frameworks that govern the use and disclosure of sensitive information in contexts similar to the proposed measures in this bill. The *Privacy Act 1988* regulates the handling of personal information by Australian Government agencies and some private sector organisations. The Act outlines principles on how personal information, including sensitive information about a party's safety, should be collected, used, and disclosed.

If CCS providers handle personal or sensitive information of this nature, they are obliged to comply with the Australian Privacy Principles under the Act.

The *Family Law Act 1975* also includes specific provisions around the protection of individuals in family law proceedings, including provisions that focus on family violence and safety risks.

In some cases, family law court and other relevant bodies will collect, use and disclose information for the purpose of ensuring the safety of children and other vulnerable family members.

The *Children and Young Persons (Care and Protection) Act 1998* (NSW) or equivalent provisions in other states and territories, regulate the disclosure of information to ensure the safety of children, often requiring certain individuals to report concerns about a child's safety or well-being. Professionals working in a CCS setting may be mandated to disclose information if there are reasonable grounds to believe the child is at risk. These provisions, and those similar (such as Family Violence information sharing schemes and Confidentiality in Family Dispute Resolution) will continue to apply to CCS, ensuring that any safety information is reported in accordance with local laws.

In short, these provisions will allow for determinations to be made about the nature of information and the prohibition on its disclosure, but will not contradict or compromise other statutory provisions that require disclosure in certain circumstances. The existing frameworks, such as the Privacy Act, Family Law Act, and child protection laws, would continue to apply to CCS unless expressly overridden by regulations. The new bill adds specific

provisions regarding the use and disclosure of "safety information," but it's unlikely to replace these broader protections. Rather, the new bill will likely complement these frameworks by providing additional guidance or obligations specific to the new context (such as enhancing the focus on risk assessments or improving communication between service providers).

**9. Whether and how CCS are subject to oversight and review with respect to the use and disclosure of safety information**

If an organisation is suspected of misusing safety information, the proposed accreditation rules would require it to have a complaints mechanism in place. This would allow the complainant to raise concerns directly with the organisation. If the complainant remains dissatisfied with the outcome, they could escalate the complaint to the regulatory body. The proposed rules also include administrative penalties for substantiated wrongdoing, which could lead to loss of accreditation and, in turn, a reduction in earning capacity.

While deeply undesirable that any breach of the controls over the sharing of safety information should result in harm to a person, state and territory laws exist in relation to crimes against a person or property, and are beginning to recognise and penalise coercive control. These regimes (for example in relation to assault) are likely to be a more effective punishment than penalties under these particular accreditation rules, which could penalise the person inappropriately sharing the safety information.

If a party believes that the actions of the Commonwealth or its officers are especially improper or unlawful, they have several legal avenues available for enforcement. This is typical in situations where 'bad faith' is claimed.

These options include pursuing a common law tort for misfeasance in public office, negligence, or potentially a breach of statutory duty; lodging a complaint with the Australian Human Rights Commission (AHRC) if the conduct violates human rights; or seeking redress through the Compensation for Detriment Caused by Defective Administration (CDDA) scheme.

## Concluding comments

### *International human rights legal advice*

2.72 The Attorney-General advised that the definition of 'entrusted person' is necessarily broad to allow for information to be shared with persons reasonably associated with CCS. The Attorney-General stated that there may not be a single class of persons who may come into contact with safety information, and arbitrarily restricting the ability to protect or appropriately use this information may inadvertently result in the information not being able to be protected or used as required. For example, he stated that if a particular business did not have a staff member with a clearly identified role to manage safety information, it may not use that information to protect the safety of a client for fear of breaching the provisions

supporting the sharing of that information. Inversely, the Attorney-General stated, the execution of a safety plan during changeover or supervised visitation is often contingent upon all members of staff having sufficient knowledge. For example, if one parent were to enter through one entrance and the other parent were to enter through another, it would be imperative that all staff members who may interact with each parent know exactly what limitations have been placed on them.

2.73 Regarding whether entrusted persons would be appropriately trained in identifying circumstances to use and disclose safety information in practice, the Attorney-General stated that the bill would allow for the making of accreditation rules that would impose minimum operating standards on CCS in order to be accredited. He stated that staff will be expected to have appropriate skills and knowledge to safely provide services and organisations are expected to have appropriate policies guiding the provision of the services. The Attorney-General advised that there will not be a single approach to training staff but there are many short and long-term training programs available in all jurisdictions that will allow service providers to sufficiently upskill their staff for these purposes.

2.74 A broad definition of entrusted persons which allows for safety information to be shared more easily may be an important and necessary requirement in practice. However, the bill itself would not *require* that all entrusted persons must be appropriately trained in using and disclosing safety information. While the bill would allow for the making of accreditation rules, which the Attorney-General has stated would impose minimum operating standards, that requirement is not apparent on the face of the bill. It is also unclear what kind of training would be required to be provided to entrusted persons other than staff members (for example contractors or volunteers). Much would depend on the accreditation rules set out in delegated legislation and therefore there may be a risk that this measure is not sufficiently circumscribed.

2.75 Further information was also sought as to whom an entrusted person can disclose safety information to, and any secondary use and disclosure of that information. The Attorney-General advised that the intention is to protect safety information while providing for 'narrow lawful purposes' where this information can be shared in order to support the safety of a person. The Attorney-General provided examples of sharing information to the police or to assist the courts. For example, he stated that if a visiting parent implied that they knew the bus route used by the residential parent leaving a contact session and that they would see the child shortly, and the CCS worker had a concern that this could affect the safety of their client, they may wish to report this to the police. The Attorney-General also stated that there may be circumstances where information is disclosed to courts where relevant to making final orders in post-separating parenting matters.

2.76 The Attorney-General also provided information in relation to each of the proposed exceptions permitting the use and disclosure of information.[64] For example, he stated that the ability for an entrusted person to disclose safety information to other entrusted persons[65] would enable different staff in the same organisation to communicate with one another if necessary, including to ensure that all persons delivering services are aware of any potential safety risks. This example provides a useful illustration of circumstances in which it may be reasonable for safety information to be shared within an organisation. However, in relation to the proposed ability for an entrusted person to disclose safety information *to any person* in a range of specific circumstances (such as to address an immediate threat to the safety of a person),[66] the Attorney-General stated that this will enable staff to disclose information to appropriate bodies such as an Independent Children's Lawyer. However, it would appear that this provision would permit the disclosure of safety information to any person in practice, not merely to appropriate bodies.

2.77 As to what safeguards and privacy protections would apply to safety information which has been used or disclosed pursuant to these measures, the Attorney-General stated that organisations or individuals in receipt of safety-related information are required to adhere to the privacy standards that they already employ for other sensitive information that they deal with. The Attorney-General stated that there are no explicitly imposed obligations regarding how entities may use or store safety information disclosed to them, as that would typically be governed by other legislation or regulations that apply. In this regard, the Attorney-General stated that police and child protection agencies (and other entities) may be subject to a range of privacy requirements under the *Privacy Act 1988*, the *Family Law Act 1975* and the Children and Young Persons (Care and Protection) Acts (at state and territory levels), which regulate the disclosure of information and would continue to apply to CCS unless expressly overridden by regulations. The Attorney-General stated that the specific provisions regarding 'safety information' will likely complement these frameworks by providing additional guidance or obligations specific to the new context.

2.78 These other legal frameworks may have important safeguard value. However, it is not clear whether these frameworks would apply to all the individuals and entities to whom safety information may be disclosed pursuant to this measure, and if not, what would govern the protection of safety information provided to individuals who are not subject to these frameworks (for example, a contractor engaged by a CCS business to perform work). In this regard, safety information may be disclosed to *any* person in specified circumstances, and it is not clear what frameworks (if any) would protect the privacy of safety information in this potentially broad range of

64 Schedule 2, item 15, proposed section 10KE.

65 Schedule 2, proposed subsection 10KE(6).

66 Schedule 2, item 15, proposed subsection 10KE(8).

circumstances.[67] As such, some questions remain as to whether there are sufficient privacy safeguards in place regarding secondary use and disclosure of safety information, where that information is shared to individuals not already subject to existing privacy frameworks.

2.79 As to whether entrusted persons will have any obligations in the accreditation rules to consider the privacy and security of safety information they have access to, the Attorney-General advised that the proposed accreditation rules will include requirements for operating policies that govern the management of the centre, including secure information handling and storage. The Attorney-General further stated that such information has long been subject to existing privacy, storage and security laws. Requirements in the accreditation rules regarding the privacy and security of safety information could provide useful safeguards, however much would depend on the content of these rules as set out in delegated legislation as to whether safety information is adequately protected in practice.

2.80 Further information was also sought as to whether and how CCS would be subject to oversight and review with respect to the use and disclosure of safety information. The Attorney-General advised that the proposed accreditation rules would require a complaints mechanism for an individual to make a complaint about an organisation misusing safety information, and the proposed rules also include administrative penalties for substantiated wrongdoing. The Attorney-General further stated that state and territory laws also exist in relation to crimes against a person or property, and where a party believes the actions of the Commonwealth or an officer are improper or unlawful, there are several legal avenues for enforcement. While avenues for complaints and redress are welcome, it is not clear that there would be a routine mechanism for oversight and review over how a CCS is using and disclosing safety information. It would appear that review would rely on an individual affected initiating a complaint or legal action.

2.81 In light of the information provided by the Attorney-General, it would appear that there may be circumstances where safety information may be used or disclosed in a manner which is accompanied by sufficient privacy and other safeguards. However, several key elements of the scheme relevant to an assessment of its proportionality would be set out in delegated legislation (in particular, any training requirements for entrusted persons, and additional privacy safeguards). Further, as the bill would not require routine oversight or review of CCS management of safety information, this raises the question of whether these information sharing powers would be appropriately monitored. Given the breadth of safety information that could be shared by a range of persons to potentially any person, there may be a risk that information is disclosed in circumstances where the privacy and other safeguards outlined by the Attorney-General would not apply, and it is not possible to assess the safeguard value of measures that may be included in future delegated legislation.

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67 Schedule 2, item 15, subsection 10KE(8).

Consequently, there may be a risk that personal information may be disclosed pursuant to this measure in a manner which would not constitute a proportionate limit on the right to privacy.

***Committee view***

2.82 The committee thanks the Attorney-General for this response.

2.83 The committee considers that there may be circumstances where safety information may be used or disclosed in a manner which is accompanied by sufficient privacy and other safeguards. However, the committee notes that several key elements of the scheme relevant to an assessment of its proportionality would be set out in delegated legislation (in particular, any training requirements for entrusted persons, and additional privacy safeguards). Further, the committee notes that the bill would not appear to require routine oversight or review of CCS management of safety information, which raises the question of whether these information sharing powers would be appropriately monitored. The committee considers that given the breadth of safety information that could be shared by a range of persons to potentially any person, there may be a risk that information is disclosed in circumstances where the privacy and other safeguards outlined by the Attorney-General would not apply, and it is not possible to assess the safeguard value of measures that may be included in future delegated legislation. Consequently, the committee considers that there may be a risk that personal information may be disclosed pursuant to this measure in a manner which would not constitute a proportionate limit on the right to privacy.

2.84 The committee considers that much will depend on the content of the accreditation rules and how they are implemented in practice. The committee notes that it will assess the compatibility of any accreditation rules made pursuant to this legislation.

**Suggested action**

2.85 The committee considers the proportionality of this measure may be assisted were the bill amended to:

(k) provide that any accreditation rules must include requirements relating to training or qualification requirements for entrusted persons, Children's Contact Service contractors, and volunteers;

(l) amend subsection 10KE(8) to provide that an entrusted person may disclose information to prescribed 'appropriate bodies' (as opposed to any person); and

(m) establish a mechanism for routine oversight and review of the sharing of safety information by Children's Contact Services.

2.86 The committee recommends that the statement of compatibility be updated to reflect the information provided by the Attorney-General.

2.87 The committee draws these human rights concerns to the attention of the Attorney-General and the Parliament.

## Immunity from criminal and civil proceedings

2.88 Section 10A of the Family Law Act provides that regulations may prescribe accreditation rules relating to the accreditation of persons as family counsellors, family dispute resolution practitioners, and to perform other roles prescribed by the regulations.

2.89 The bill would provide that accreditation rules may relate to individuals as CCS practitioners, and persons and other entities as CCS businesses.[68] It also seeks to insert section 10AA into the Family Law Act to provide that no action, suit or proceeding lies against the Commonwealth, or an officer of the Commonwealth, in relation to any act done, or omitted to be done, in good faith in the performance or exercise, or the purported performance or exercise, of a function, power or authority conferred by the accreditation rules.

## Summary of initial assessment

### *Preliminary international human rights legal advice*

*Right to an effective remedy*

2.90 By excluding the Commonwealth from civil and criminal liability for actions done or not done in good faith in accordance with the accreditation rules, this measure engages the right to an effective remedy. This is because if such an act done or omitted by the Commonwealth or an officer of the Commonwealth resulted in a violation of a person's human rights (such as the right to privacy), they would be unable to seek a remedy for that violation from the Commonwealth.

2.91 The right to an effective remedy requires the availability of a remedy which is effective with respect to any violation of rights and freedoms recognised under the International Covenant on Civil and Political Rights (such as the right to privacy).[69] It includes the right to have such a remedy determined by competent judicial, administrative or legislative authorities or by any other competent authority provided for by the legal system of the state. While limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), States

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68 Schedule 2, item 4, paragraph 10A(1)(b).

69 International Covenant on Civil and Political Rights (ICCPR), article 2(3). See, *Kazantzis v Cyprus,* UN Human Rights Committee Communication No. 972/01 (2003) and *Faure v Australia,* UN Human Rights Committee Communication No. 1036/01 (2005), States parties must not only provide remedies for violations of the ICCPR, but must also provide forums in which a person can pursue arguable if unsuccessful claims of violations of the ICCPR. Per *C v Australia*, UN Human Rights Committee Communication No. 900/99 (2002), remedies sufficient for the purposes of article 5(2)(b) of the ICCPR must have a binding obligatory effect.

parties must comply with the fundamental obligation to provide a remedy that is effective.[70]

2.92 While the explanatory memorandum states that it is considered reasonable and appropriate to indemnify officers of the Commonwealth against actions for negligence arising from a good faith policy decision as to a person or entity's compliance with the accreditation rules, made in the performance of their duties and based on information provided by that person or entity,[71] the statement of compatibility does not identify that this engages the right to an effective remedy. As such, no information is provided as to whether and how this proposed measure is consistent with the right.

***Committee's initial view***

2.93 The committee noted that providing that no action, suit or proceeding can be made against the Commonwealth, or an officer of the Commonwealth, for actions done or not done in good faith in accordance with the accreditation rules engages the right to an effective remedy.

2.94 The committee considered that further information was required to assess the compatibility of this measure with this right and as such sought the advice of the Attorney-General.

2.95 The full initial analysis is set out in *Report 8 of 2024*.

## Minister's response[72]

2.96 The minister advised:

> **10. Whether and how the measure is consistent with the right to an effective remedy**
>
> Amendments regulating the use and disclosure of safety information in CCS settings are consistent with the right to an effective remedy, even with included immunity provisions, under certain conditions. The right to an effective remedy, as recognised in human rights law (e.g., Article 2 of the International Covenant on Civil and Political Rights), ensures that individuals whose rights are violated can seek redress through accessible and effective legal mechanisms.
>
> The immunity provisions in the legislation are narrowly tailored to apply only in specific circumstances, such as when CCS providers or government officers act in good faith and in the lawful execution of their duties. If immunity is only granted for actions taken in good faith, it protects officials from frivolous lawsuits while maintaining accountability for misconduct.

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70 See UN Human Rights Committee, *General Comment 29: States of Emergency (Article 4)* (2001) [14].

71 Explanatory memorandum, pp. 101–102.

72 The minister's response to the committee's inquiries was received on 24 September 2024. This is an extract of the response. The response is available in full on the committee's webpage.

The legislation makes clear that immunity does not extend to cases where there is malfeasance, negligence, or bad faith actions, which ensures that individuals still have access to legal remedies if their rights are violated due to improper conduct by CCS providers or government officials.

It is also important to note that these immunity provisions do not prevent individuals from seeking judicial review of government decisions related to the handling of safety information.

If a party believes that their rights were violated due to the improper use or disclosure of safety information, they will still be able to challenge the legality of those decisions in court.

**11. What remedies are available to persons where performance by the Commonwealth, in good faith in accordance with the Accreditation Rules results in a violation of their human rights.**

Even if the Commonwealth acts in good faith in their actions (or non-actions), individuals retain access to various legal and administrative remedies if such actions result in a violation of their human rights. From judicial review to complaints with human rights bodies, compensation schemes, and common law claims, these avenues ensure that individuals can still seek redress and hold the government accountable, even when there is no malicious intent.

Under judicial review, the court may quash the decision, send it back to the decision-maker to be reconsidered, or provide declaratory or injunctive relief. This ensures that actions in good faith are still subject to scrutiny if they have unintended harmful consequences. For common law remedies, a successful claim can result in damages or an injunction to prevent ongoing harm.

These claims would need to prove that the Commonwealth's actions, though in good faith, were unreasonable or breached the party's human rights. Complaints about the administrative actions of Commonwealth agencies may be made to the Commonwealth Ombudsman under the *Ombudsman Act 1976*. The Ombudsman can recommend changes, issue reports, or help mediate a resolution between the individual and the government body. While the Ombudsman's findings are not legally binding, they often lead to corrective actions.

## Concluding comments

### *International human rights legal advice*

2.97 The Attorney-General stated that the measure is consistent with the right to an effective remedy as the immunity provisions are narrowly tailored to apply only in specific circumstances where CCS providers or government officers act in good faith and in the lawful execution of their duties. The Attorney-General advised that individuals retain access to various legal and administrative remedies, including judicial review, complaints to human rights bodies, compensation schemes,

complaints to the Commonwealth Ombudsman, and common law claims. The availability of these alternative mechanisms does assist in an assessment of whether a person would still have access to an effective remedy where the performance of functions was done in good faith, but still resulted in a violation of their rights. However, whether these mechanisms would be sufficient for the purposes of the right to an effective remedy may depend on the circumstances in each case.

2.98 Further, with respect to specific remedies identified by the Attorney-General, it is noted that the tort of misfeasance in public office requires that a public officer has demonstrated 'bad faith or the dishonest abuse of power',[73] meaning that it would apply in circumstances which would be beyond the scope of the proposed immunity in any case. Further, judicial review in Australia represents a limited form of review in that it allows a court to consider only whether the decision was lawful (that is, within the power of the relevant decision maker). The court cannot undertake a full review of the facts (that is, the merits), as well as the law and policy aspects of the original decision to determine whether the decision is the correct or preferable decision. This raises the question as to whether judicial review would be an effective remedy in relation to a breach of human rights in practice.

***Committee view***

2.99 The committee thanks the Attorney-General for this response.

2.100 The committee considers that the availability of alternative mechanisms identified by the Attorney-General assists in an assessment of whether a person would still have access to an effective remedy where the performance of functions was done in good faith but resulted in a violation of their rights. The committee considers that whether these mechanisms would be sufficient for the purposes of the right to an effective remedy may depend on the circumstances in each case.

2.101 The committee considers that the statement of compatibility should have identified the availability of these alternative remedies in relation to proposed broad-reaching immunity from liability in section 10AA.

**Suggested action**

2.102 The committee recommends that the statement of compatibility be updated to reflect the information provided by the Attorney-General as to alternative remedies which would be available despite the proposed immunity in section 10AA.

2.103 The committee draws these human rights concerns to the attention of the Attorney-General and the Parliament.

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[73] For further information see, Australian Government Solicitor, *Legal Briefing No. 115 'Misfeasance in public office'* (2020). In particular, this states that 'the tort is not concerned with negligence but, rather, with a dishonest exercise of power involving actual 'bad faith''.

# Legislative instruments

## Online Safety (Relevant Electronic Services—Class 1A and Class 1B Material) Industry Standard 2024[74]

## Online Safety (Designated Internet Services—Class 1A and Class 1B Material) Industry Standard 2024

| | |
|---|---|
| **FRL No.** | F2024L00711; F2024L00710 |
| **Purpose** | These instruments establish industry standards for relevant electronic services and designated internet services that require these services to establish and implement systems, processes and technologies to effectively manage risks that Australians will solicit, generate, distribute, access or be exposed to class 1A material or class 1B material through the service |
| **Portfolio** | Department of Infrastructure, Transport, Regional Development, Communications and the Arts |
| **Authorising legislation** | *Online Safety Act 2021* |
| **Disallowance** | 15 sitting days after tabling (tabled in the House of Representatives and the Senate on 24 June 2024. Notice of motion to disallow must be given by 22 August 2024 in the House of Representatives or the Senate)[75] |
| **Rights** | Effective remedy; freedom of expression; privacy |

2.104 The committee requested a response from the Minister for Communications in relation to the instruments in *Report 7 of 2024*.[76]

### Regulation of certain online materials

2.105 These legislative instruments establish industry standards for 'relevant electronic services' and 'designated internet services' with respect to certain materials

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74 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Online Safety (Relevant Electronic Services—Class 1A and Class 1B Material) Industry Standard 2024, *Report 9 of 2024*; [2024] AUPJCHR 72.

75 In the event of any change to the Senate or House's sitting days, the last day for the notice would change accordingly. The Parliamentary Joint Committee on Human Rights placed a motion in the Senate to disallow these two legislative instruments on 22 August 2024, to extend the period during which the instruments are subject to parliamentary disallowance by a further 15 sitting days (currently, 21 November 2024).

76 Parliamentary Joint Committee on Human Rights, *Report 7 of 2024* (21 August 2023), pp. 17–43.

– non-compliance with which attracts a civil penalty of 500 penalty units.[77] A 'relevant electronic service' is defined as an electronic service that enables end-users to communicate with other end-users by way of email, instant messaging, SMS (short message services), MMS (multi-media message services) or chat services (including dating services), as well as an electronic service that enables end-users to play online games with other end-users.[78] A 'designated internet service' is defined as a service that allows end-users to access material using an internet carriage service or a service that delivers material by means of an internet carriage service to persons having equipment appropriate for receiving that material, but does not include: a social media service; a relevant electronic service (as defined above); or an on-demand program service.[79] A designated internet service includes, for example, websites, apps and online storage services that allow end-users to upload, store and manage files, including photos and other media.[80] However, relevant electronic services and designated internet services do not include an 'exempt service', that is, a service where none of the material on the service is accessible or delivered to one or more end-users in Australia.[81]

2.106 The object of the industry standards is to improve online safety for Australians in respect of 'class 1A' and 'class 1B' materials, including by ensuring that service providers establish and implement systems, processes and technologies to manage effectively risks that Australians will solicit, generate, distribute, get access to or be exposed to class 1A or class 1B materials through the services.[82] Class 1A material is defined as child sexual exploitation material; pro-terror material; or 'extreme crime and violence material'.[83] Class 1B material is defined as 'crime and violence material' (but not extreme crime and violence material) or 'drug-related material'.[84] Pro-terror, extreme crime and violence, crime and violence and drug-related materials are all

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77 These instruments are made under section 145 of the *Online Safety Act 2021*, which allows the Commissioner to determine a standard that applies to a particular section of an online industry. See also section 146. 500 penalty units currently equates to a penalty of $165,000.

78 *Online Safety Act 2021*, subsection 13A(1). Other relevant electronic services may also be specified in legislative rules.

79 *Online Safety Act 2021*, subsection 14. A 'relevant electronic service' is defined in section 13A of the *Online Safety Act 2021*.

80 Explanatory statement, p. 17.

81 *Online Safety Act 2021*, subsections 13A(2) and 14(3).

82 Online Safety (Relevant Electronic Services—Class 1A and Class 1B Material) Industry Standard 2024, section 4 and Online Safety (Designated Internet Services—Class 1A and Class 1B Material) Industry Standard 2024, section 4.

83 Online Safety (Relevant Electronic Services—Class 1A and Class 1B Material) Industry Standard 2024, section 6 and Online Safety (Designated Internet Services—Class 1A and Class 1B Material) Industry Standard 2024, section 6.

84 Online Safety (Relevant Electronic Services—Class 1A and Class 1B Material) Industry Standard 2024, section 6 and Online Safety (Designated Internet Services—Class 1A and Class 1B Material) Industry Standard 2024, section 6.

defined by reference to 'class 1 material'.[85] Class 1 materials are materials which are or would likely be classified as RC (Refused Classification) under the *Classification (Publications, Films and Computer Games) Act 1995*.[86]

2.107 'Pro-terror material' means class 1 material that:

- directly or indirectly counsels, promotes, encourages or urges the doing of a terrorist act or provides instruction in the doing of a terrorist act; or
- directly praises the doing of a terrorist act in circumstances where there is a substantial risk that the praise might have the effect of leading a person (regardless of the person's age or any mental impairment that the person might suffer) to engage in a terrorist act; or
- is 'known pro-terror material', meaning that it has been verified as pro-terror material (such as material produced by terrorist entities that are on the United Nations (UN) Security Council Consolidated List).[87]

2.108 However, pro-terror material does not include material that is accessible using a relevant electronic or designated internet service if its availability on the service can reasonably be taken to be part of public discussion, public debate, entertainment or satire.[88]

2.109 The definitions of 'extreme crime and violence material', 'crime and violence material' and 'drug-related material' in the legislative instruments differ slightly

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85 Online Safety (Relevant Electronic Services—Class 1A and Class 1B Material) Industry Standard 2024, section 6 and Online Safety (Designated Internet Services—Class 1A and Class 1B Material) Industry Standard 2024, section 6.

86 Class 1 material is defined in section 106 of the *Online Safety Act 2021* as various types of materials, such as films and computer games, that are or would likely be classified as RC (Refused Classification) under the *Classification (Publications, Films and Computer Games) Act 1995*. A film, publication or computer game will be classified as 'RC' where it: describes, depicts, expresses or otherwise deals with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that it offends against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that it should not be classified; or describes or depicts in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not); or promotes, incites or instructs in matters of crime or violence. National Classification Code (May 2005), sections 2–4. With respect to films see also Guidelines for the Classification of Films 2012, which provide that a film will be classified RC where it contains bestiality; or gratuitous exploitative or offensive depictions of activity accompanied by fetishes or practices which are considered abhorrent.

87 Online Safety (Relevant Electronic Services—Class 1A and Class 1B Material) Industry Standard 2024, section 6 and Online Safety (Designated Internet Services—Class 1A and Class 1B Material) Industry Standard 2024, section 6.

88 Online Safety (Relevant Electronic Services—Class 1A and Class 1B Material) Industry Standard 2024, section 6 and Online Safety (Designated Internet Services—Class 1A and Class 1B Material) Industry Standard 2024, section 6.

depending on the type of material or publication in question, for instance, if the material relates to a computer game, publication or neither type of material.[89]

2.110 Drug-related material means class 1 material that, without justification:

- depicts, expresses or otherwise deals with matters of drug misuse or addiction in such a way that the material offends against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that the material should be classified RC; or
- is or includes detailed instruction in the unlawful use of drugs; or
- depicts the unlawful use of drugs in connection with incentives or rewards, or interactive, detailed and realistic unlawful use of drugs (in relation to computer game materials); or
- is or includes material promoting the unlawful use of drugs (in relation to material that is neither a computer game nor publication).[90]

2.111 Crime and violence material includes material that, without justification:

- promotes, incites or instructs in matters of crime or violence, or is or includes detailed instruction in, or promotion of, matters of crime or violence; or
- is or includes depictions of bestiality or similar practices; or
- depicts, expresses or otherwise deals with matters of crime, cruelty or violence in such a way that it offends against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that it should be classified RC; or
- is or includes depictions of violence that have a very high degree of impact and are excessively frequent, prolonged, detailed or repetitive (in relation to computer game materials); or
- is or includes gratuitous, exploitative or offensive descriptions or depictions of violence that have a very high degree of impact and are excessively frequent, emphasised/prolonged or detailed (in relation to publication materials and materials that are neither a computer game nor publication); or
- is or includes gratuitous, exploitative or offensive descriptions or depictions of cruelty or real violence that have a very high degree of impact and are

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89 Section 6 of each legislative instrument provides that each category of material has a separate definition for material in relation to a 'computer game', 'publication' and 'material that is not a computer game or publication'.

90 Online Safety (Relevant Electronic Services—Class 1A and Class 1B Material) Industry Standard 2024, section 6 and Online Safety (Designated Internet Services—Class 1A and Class 1B Material) Industry Standard 2024, section 6.

very detailed (in relation to publication materials and materials that are neither a computer game nor publication);

- is or includes depictions of cruelty or realistic violence that have a very high degree of impact and are very detailed (in relation to computer game materials); or
- is or includes depictions of actual sexual violence (in relation to computer game materials); or
- is or includes depictions of implied sexual violence related to incentives or rewards (in relation to computer game materials); or
- is or includes gratuitous, exploitative or offensive descriptions or depictions of sexual violence (in relation to publication materials and materials that are neither a computer game nor publication).[91]

2.112 Extreme crime and violence material is material that is crime and violence material as defined above where, without justification, the impact of the material is extreme for various reasons, such as because the material is more detailed, realistic or highly interactive.[92]

2.113 Part 3 of the standards impose obligations on service providers in relation to risk assessments and risk profiles. Providers are required to carry out a risk assessment as to the risk that classes 1A and 1B materials will be generated or accessed by, or distributed by or to, end-users in Australia and will be stored on the service.[93] The standards set out the methodology, risk factors and indicators to be used for such risk assessments and risk profile determinations.[94] Certain providers are exempt from the risk assessment requirements, such as a gaming service with limited communications functionality or an 'end-user managed hosting service', which is a service primarily

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91 Online Safety (Relevant Electronic Services—Class 1A and Class 1B Material) Industry Standard 2024, section 6 and Online Safety (Designated Internet Services—Class 1A and Class 1B Material) Industry Standard 2024, section 6.

92 Online Safety (Relevant Electronic Services—Class 1A and Class 1B Material) Industry Standard 2024, section 6 and Online Safety (Designated Internet Services—Class 1A and Class 1B Material) Industry Standard 2024, section 6.

93 Online Safety (Relevant Electronic Services—Class 1A and Class 1B Material) Industry Standard 2024, section 7 and Online Safety (Designated Internet Services—Class 1A and Class 1B Material) Industry Standard 2024, section 7.

94 Online Safety (Relevant Electronic Services—Class 1A and Class 1B Material) Industry Standard 2024, section 8 and Online Safety (Designated Internet Services—Class 1A and Class 1B Material) Industry Standard 2024, section 8.

designed or adapted to enable end-users to store or manage material such as an online file or photo storage service.[95]

2.114 Part 4 of the standards impose various requirements on service providers in relation to online safety compliance measures. The standards include an index that sets out the requirements that apply to each type of service, noting that not all requirements apply to all types of services. [96] In general, the higher the risk that a service could be used to solicit, access or distribute classes 1A and 1B materials (based on the risk assessment and consequent risk profile), the more online safety compliance measures apply. Depending on the type of service, providers may be required to:

- include in the terms of use for the service various provisions, such as requiring the account holder of the service to ensure the service is not used to solicit, access, distribute or store classes 1A or 1B material. Non-compliance with such provisions by an account holder could result in the provider suspending the provision of the service or removing or deleting the relevant material;[97]
- have systems and processes for responding to breaches of the terms of use and taking appropriate action to respond to classes 1A or 1B materials, such as by removing material from the service if the provider becomes aware of it;[98]
- notify law enforcement or an appropriate non-governmental organisation of class 1A material;[99]
- ensure the service has certain safety features and settings;[100]

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95 Online Safety (Relevant Electronic Services—Class 1A and Class 1B Material) Industry Standard 2024, subsection 7(6) and Online Safety (Designated Internet Services—Class 1A and Class 1B Material) Industry Standard 2024, subsection 7(6).

96 Online Safety (Relevant Electronic Services—Class 1A and Class 1B Material) Industry Standard 2024, section 12 and Online Safety (Designated Internet Services—Class 1A and Class 1B Material) Industry Standard 2024, section 12.

97 Online Safety (Relevant Electronic Services—Class 1A and Class 1B Material) Industry Standard 2024, section 13 and Online Safety (Designated Internet Services—Class 1A and Class 1B Material) Industry Standard 2024, section 13.

98 Online Safety (Relevant Electronic Services—Class 1A and Class 1B Material) Industry Standard 2024, sections 14, 15, 23 and 24 and Online Safety (Designated Internet Services—Class 1A and Class 1B Material) Industry Standard 2024, sections 14–17.

99 Online Safety (Relevant Electronic Services—Class 1A and Class 1B Material) Industry Standard 2024, section 16 and Online Safety (Designated Internet Services—Class 1A and Class 1B Material) Industry Standard 2024, section 18.

100 Online Safety (Relevant Electronic Services—Class 1A and Class 1B Material) Industry Standard 2024, section 18 and Online Safety (Designated Internet Services—Class 1A and Class 1B Material) Industry Standard 2024, section 24.

- implement appropriate systems, processes and technologies to detect, identify and remove certain class 1A material that is stored on the service or being distributed using the service. However, a provider is not required to use systems or technologies to do this if it is 'not technically feasible or reasonably practicable'; or it would require the provider to implement or build a systemic weakness or vulnerability into the service, or implement or build a new decryption capability into the service, or render methods of encryption used in the service less effective. If the provider does not implement any systems or technologies for these reasons, they must still take 'appropriate alternative action';[101]
- implement systems, processes and technologies (if appropriate) to effectively deter and disrupt end-users from using the service to create, offer, solicit, access, distribute, or otherwise make available or store certain class 1A material. For example, providers may use hashing technologies, machine learning and artificial intelligence systems that scan for relevant material and detect key words, behavioural signals and patterns;[102]
- respond promptly and take appropriate and timely action to complaints made to the provider, and refer unresolved complaints to the e-safety Commissioner;[103] and
- provide information and compliance reports to the Commissioner.[104]

## Summary of initial assessment

### *Preliminary international human rights legal advice*

*Multiple rights*

2.115 By requiring providers to implement measures to reduce the risk that their services will be used to solicit, generate, access, distribute and store harmful material,

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101 Online Safety (Relevant Electronic Services—Class 1A and Class 1B Material) Industry Standard 2024, sections 19 and 20 and Online Safety (Designated Internet Services—Class 1A and Class 1B Material) Industry Standard 2024, sections 20 and 21. Regarding 'appropriate alternative action', section 11 of both standards sets out the matters to be taken into account when determining whether an action is appropriate, including the extent to which the action would achieve the object of the standards; the nature of the material in question; and whether the action would be proportionate to the level of risk to online safety the material poses.

102 Online Safety (Relevant Electronic Services—Class 1A and Class 1B Material) Industry Standard 2024, section 21 and Online Safety (Designated Internet Services—Class 1A and Class 1B Material) Industry Standard 2024, section 22.

103 Online Safety (Relevant Electronic Services—Class 1A and Class 1B Material) Industry Standard 2024, sections 29 and 31 and Online Safety (Designated Internet Services—Class 1A and Class 1B Material) Industry Standard 2024, sections 28 and 30.

104 Online Safety (Relevant Electronic Services—Class 1A and Class 1B Material) Industry Standard 2024, sections 32–37 and Online Safety (Designated Internet Services—Class 1A and Class 1B Material) Industry Standard 2024, sections 31–36.

including material depicting child sexual exploitation and sexual violence, the standards are likely to promote numerous human rights, including the right of women to be free from sexual exploitation, the rights of the child and the right to be protected against arbitrary and unlawful interferences with an individual's privacy and attacks on reputation.[105]

*Rights to freedom of expression and privacy*

2.116 However, by requiring providers to regulate certain online material – including by restricting access to, disrupting the dissemination of and removing the material – the measures engage and limit the right to freedom of expression. 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.[106]

2.117 The right to freedom of expression carries with it special duties and responsibilities and accordingly may be subject to limitations that are necessary to protect the rights or reputations of others,[107] national security, public order, or public health or morals.[108] Such limitations must be prescribed by law, be rationally connected to the objective of the relevant measures and be proportionate.[109] Noting the important status of this right under international human rights law, restrictions on the right to freedom of expression must be construed strictly and any restrictions must be justified in strict conformity with the limitation clause in article 19(3), including restrictions justified on the basis of article 20.[110]

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105 Convention on the Elimination of All Forms of Discrimination Against Women, article 16; Convention on the Rights of the Child, article 34; International Covenant on Civil and Political Rights, article 17.

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

107 Restrictions on this ground must be constructed with care. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [28].

108 The concept of 'morals' derives from myriad social, philosophical and religious traditions. This means that limitations for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [32].

109 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [21]–[36].

110 UN Human Rights Committee, *General comment No. 34: Article 19: Freedoms of opinion and expression*, CCPR/C/GC/34 (2011) [2]–[3], [21]–[22], [52].

Article 20 of the International Covenant on Civil and Political Rights states that any propaganda for war and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. These prohibitions are compatible with article 19. See UN Human Rights Committee, *General Comment No 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20)* (1983).

2.118 By requiring providers to detect and identify certain material and disrupt attempts by end-users to use the service to create, offer, solicit, access, distribute, or otherwise make available, or store certain material, the measures also engage and limit the right to privacy.[111] Additionally, a number of measures require providers to take certain actions, such as report matters to law enforcement or terminate the provision of a service if they become aware that an end-user is breaching the terms of use or using the service to solicit, access, distribute or store certain material. Depending on how the provider becomes aware of such matters, these measures may also limit 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.[112]

2.119 The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected to (that is, effective to achieve) and proportionate to achieving that objective.

***Committee's initial view***

2.120 The committee noted that requiring relevant electronic service and designated internet service providers to implement measures to reduce the risk that their services will be used to solicit, generate, access, distribute and store harmful material, including material depicting child sexual exploitation and sexual violence, and pro-terror material, likely promotes numerous human rights. However, the committee also noted that the measures necessarily limit the rights to freedom of expression and privacy by regulating certain online material, including restricting access to, disrupting the dissemination of and removing the material. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

2.121 In relation to child sexual exploitation material, material depicting sexual violence and pro-terror material that reaches the threshold of incitement to national, racial or religious hatred, the committee considered that to the extent that regulating these types of material limits the rights to freedom of expression and privacy, such limitations are likely permissible under international human rights law. However, considering the scope of materials captured by the measures is much broader, the committee noted the necessity of undertaking an analysis of whether the regulation of these other types of material, such as crime and violence or drug-related material that offends against the standards of morality, decency and propriety, is reasonable, necessary and proportionate. In this regard, the committee considered that the

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111 Further, if the exercise of powers under these measures did constitute an impermissible limit on a person's right to privacy or right to freedom of expression, it is not clear whether that person would have access to an effective remedy.

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

measures pursue legitimate objectives but that questions arose as to whether the measures are rationally connected and proportionate to these objectives.

2.122 The committee considered further information was required to assess these matters, and as such sought the minister's advice. The committee placed a protective motion to disallow the legislative instruments, to extend the period of disallowance by a further 15 sitting days, to ensure that the instruments remained subject to parliamentary control when the committee provided its concluding advice to the Parliament.[113]

2.123 The minister subsequently referred the committee's request to the eSafety Commissioner (whose response is set out below).

2.124 The full initial analysis is set out in *Report 7 of 2024*.

## eSafety Commissioner's response[114]

2.125 The eSafety Commissioner advised:

> **1. Reasonable, necessary and proportionate**
>
> The Standards address online material of the highest harm, including child sexual abuse material and pro-terror material. I am glad that the Committee recognises the severity of these harms, and the impact that they have on the human rights of Australians.
>
> However, as the Committee is aware, the Standards also cover other harmful material. The requirements in the Standards are risk-based and proportionate to the risk a service presents in respect of class 1A material (including child sexual abuse material, pro-terror material, and extreme crime and violence) as well as 1B material (including crime and violence, and drug-related material). Services that have a higher risk profile have more requirements they must meet. The Standards are also outcomes focussed and provide flexibility in how providers of RES and DIS can meet the applicable requirements under the Standards.
>
> As set out below in response to the Committee's questions, eSafety also recognises that Class 1A and 1B poses different risks to different users. eSafety has limited the measures for Class 1B material accordingly. Proactive detection requirements are limited to Class 1A material, with providers only required to have and enforce terms of use in relation to Class 1B material and respond to breaches. This reflects our understanding that scalable measures for Class 1B material may be more challenging, thereby posing more risks to privacy and free expression if subject to broad measures under the Standards. Please refer to **Attachment A** - which

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113 *Journals of the Senate*, No. 127, 22 August 2024, p. 3837.

114 The eSafety Commissioner's response to the committee's inquiries was received on 30 August 2024. This is an extract of the response. The response is available in full on the committee's website.

provides an outline of comparative obligations in the Standards for Class 1A and Class 1B material.

The assessment and identification of Class 1B material is also more context dependent. The Standards recognise this, carving out Class 1B material which have justifications from being in scope of the Standards. In addition, the National Classification Scheme highlights context as an essential principle when assessing how material should be classified. As the Committee is aware, the Classification (Publications, Films and Computer Games) Act 1995 also provides that the literary, artistic, or educational merit of material and general character of material (including whether it is of a medical, legal, or scientific character) must be considered in classification. Structural elements of the classification system such as context must be considered under the Standards, ensuring that requirements are reasonable and proportionate.

The proactive detection requirements for Class 1A material are also limited to material which has been verified as child sexual abuse material or pro-terror material ('known') material. This recognises that technology currently can detect this material at extremely high accuracy rates (with the most common technology used – digital fingerprinting technology, referred to as 'hash matching' - operating at accuracies of 1 in 50 billion). These tools do not use artificial intelligence, nor read communications, but instead provide a binary response regarding whether material matches against known, and previously vetted, child sexual abuse material or pro-terror material. The focus on known material also reflects current practice by many – if not yet all – providers of 'Tier 1' RES and DIS providers in Australia (as well as services regulated under registered industry codes, including social media services). eSafety's previous use of transparency powers under the Act has demonstrated how widely these technologies are already used. For example, eSafety's transparency reports have shown how hash matching tools to detect known child sexual abuse material are used to varying degrees by Apple's iCloud email, Facebook, Instagram, Threads, WhatsApp, Google (YouTube, Gmail, Drive Chat, Photos, and Blogger), X, Discord, Twitch, TikTok, Microsoft (OneDrive, Hotmail, Teams, Skype, and Xbox) and Snapchat.[115] This practice has been standard across most of industry since 2009, when the first hash-matching tool, developed by Microsoft and Dartmouth University, was applied to child sexual abuse material, and subsequently pro-terror material.[116] For child sexual abuse material, most services rely on the database of verified hashes provided by the National Center for Missing and Exploited Children in the United States, where

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115 eSafety Commissioner, 'Responses to transparency notices', URL: https://www.esafety.gov.au/industry/basic-online-safety-expectations/responses-to-transparency-notices.

116 Microsoft Corporation, 'PhotoDNA', URL: https://www.microsoft.com/en-us/photodna https://www.microsoft.com/en-us/photodna.

hashes are triple vetted by analysts and senior managers before being added to the database.[117] A recent audit of 538,922 images and videos in the NCMEC hash list identified that 99.99% met the US federal definition of 'child pornography'.[118]

I note the Committee's comment that 'to detect known pro-terror material, providers may still need to scan vast amounts of private communications' and that 'the broad definition of known pro-terror material, this is likely to result in a significant interference with privacy'.

The definition of 'known pro-terror material' in the Standards is narrow and reflects existing the practice of most of industry. Note 1 in the definition of 'known pro-terror material' in the Standards limits pro-terror material that proactive detection is required for (unless exceptions apply) to material that can 'be detected via hashes, text signals, searches of key words terms, URLs or behavioural signals or patterns that signal or are associated with online materials produced by terrorist entities that are on the **United Nations Security Council Consolidated List**. [emphasis added]'. Note 2 also states that this material may, for example, 'be verified because of a decision of the Classification Board. Material may also be verified by using tools provided by independent organisations that are recognised as having expertise in counter-terrorism.' Examples given in the Standards of these organisations include Tech Against Terrorism, a United Nations supported NGO, and the Global Internet Forum to Counter Terrorism, an industry supported NGO. These notes reflect the existing practices of many 'Tier 1' RES and DIS services who primarily use the United Nations Security Council Consolidated List to decide what material to proactively detect on their services.

I do not believe that the Standards requirements to use 'hashes, text signals, searches of key words terms, URLs or behavioural signals or patterns' to detect known pro-terror material are characterised accurately as requiring the scanning of 'vast amount of private communications'. As set out above, hash matching does not read communications, but provides a binary match against verified material, and is only one of the examples provided. Some of these measures have no relationship to private communications at all – e.g. keyword searches. Further, the Standards make no reference to *where* these interventions must take place on a service, such as in 'private communications'; instead taking a risk and proportionality-based approach, depending on what is appropriate on a given service. Protections set out in more detail below have also been put in place for circumstances where

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117 Michelle DeLaune, President and CEO, National Center for Missing and Exploited Children, testimony to the United States Senate Committee on the Judiciary, 2023, https://www.missingkids.org/content/dam/missingkids/pdfs/Senate%20Judiciary%20Hearing%20-%20NCMEC%20Written%20Testimony%20(2-14-23)%20(final).pdf.

118 National Center for Missing and Exploited Children, 'Concentrix' Audit of NCMEC's Hash List', 2024, URL: https://www.missingkids.org/content/dam/missingkids/pdfs/Concentrix-NCMEC-document.pdf.

measures are not technically feasible or would weaken end-to-end encryption.

**2. Promotion and protection of human rights**

As highlighted in the Explanatory Statements to the Standards, the Standards promote and protect a range of human rights. This includes the right to freedom of expression through the Standards' requirements for providers to address, minimise and prevent harms associated with access and exposure to the most harmful forms of online material. This is because the presence of such material can make end-users feel unsafe and unwilling to engage in expression. For example, adult survivors of child sexual exploitation and abuse have spoken about the silencing effect of their victimisation, and the anxiety, and re-traumatisation, they experience because of the images of their abuse being available online.

The requirements under the Standard also promote the privacy rights of victim-survivors of child sexual exploitation and abuse by reducing the proliferation of material depicting crimes perpetrated against them. This is critical given the traumatic impacts of child sexual exploitation and abuse and how victim survivors can be re-traumatised from the continued circulation of images or videos of themselves. Access to a range of Class 1 material also harms others who encounter it online, and the wider community, including by having a normalising, radicalising, and/or inciting effect on other users, further increasing risk to others' human rights in the future from additional offending.

As well as promoting the human rights of victims and the wider community, the Standards' protections for human rights were strengthened further following consultation, including with industry and civil society (including human rights groups). In November 2023 the eSafety Commissioner invited submissions from the online industry, advocacy groups, other stakeholders, and the public on the two draft industry standards. This engagement followed industry associations' engagement over more than 12 months with these stakeholders in the development of the draft RES and DIS codes.

eSafety's consultation was an important part of the process to better understand the impact of proposed obligations on industry as well as the concerns of advocacy groups. The key changes made to the draft Standards are set out the Impact Analysis[119], but include changes to improve protections against potential infringement of a range of rights:

- Specifying that when detecting and removing known pro-terror and child sexual abuse material there is no requirement to build a systemic weakness or vulnerability into end-to-end encryption; or

[119] Office of Impact Assessment, Online Safety Industry Standards Impact Assessment, https://oia.pmc.gov.au/published-impact-analyses-and-reports/online-safety-industry-standards-esafety-0.

build a new decryption capability in relation to an encrypted service; or render methods of encryption less effective;

- In addition to a service provider being not required to detect and remove known child sexual abuse and pro-terror material where it would not be technically feasible for the provider to do so, they are also not required to if it is not reasonably practicable. This change is based on feedback that technical feasibility alone was inadequate to encompass broader impediments that a service provider might encounter in deploying a technology.
- Limiting detection and removal requirements in relation to pro-terror material 'at rest' (i.e., in inert spaces such as file/photo storage or emails in draft form), to account for difficulties in detecting pro-terror material stored in inert environments.
- Clarifying how 'appropriate' is to be interpreted to ensure that matters like proportionality and potential harms are considered in how a provider complies with obligations.

These protections and others are set out in more detail in response to the Committee's questions.

**3. Responses to the Committee's questions**

**(a) what evidence demonstrates that the full range of materials which would fall within classes 1A and 1B (excluding child sexual exploitation material, material depicting sexual violence and pro-terror material that constitutes incitement to national, racial or religious hatred), would be harmful to adult end-users who consent to view such materials;**

As noted above, the Standards adopt outcomes and risk-based approaches, recognising that the risk of harm from different forms of Class 1 material exists. The requirements contained in the Standard are proportionate to the risk a service presents in respect of class 1A and class 1B material, and this minimises the potential for illegitimate restriction of personal expression.

Online harms can occur through the production, distribution, and consumption of harmful material. Just as these harms apply in respect of child sexual abuse and pro-terror material, they can also apply to crime and violence and drug-related material comprising class 1B material, including for adults. For example:

- The advertising of illicit drugs on messaging platforms can facilitate the accessibility of these substances to buyers.[120]
- Encountering violent content online, particularly in large volumes, risks normalising violence.[121]
- Studies have shown that violent media content may be one risk factor for aggression.[122]
- Research has shown a link between violent video game exposure and aggressive behaviour.[123]
- A study of journalists working with user generated content found that daily exposure to violent images was linked to anxiety, depression, post-traumatic stress disorder and alcohol consumption.[124]

eSafety also held a youth crime roundtable on 28 June 2024 with researchers and law enforcement across the country. The roundtable emphasised the link between criminal offending by young people, and the distribution of material online to social media services that incites and promotes crime.[125]

Further evidence of the harms from Class 1 material is also included in the Explanatory Statements for the Standards, as well as the Impact Analysis for

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120 Tayeb et al (2023). *Use of social media and messaging platforms to purchase illicit drugs, among a sample of people who regularly use ecstasy and/or other illicit stimulants.* National Drug and Alcohol Research Centre, NSW Sydney. https://www.unsw.edu.au/content/dam/images/medicine-health/ndarc/2022-08-ndarc-reports/2024-03%20Social%20media%20bulletin%20March%202024.pdf.

121 Ofcom (2024). *Understanding Pathways to Violent Content Among Children.* This research found that young children particularly young people aged 16-17, believed they were becoming desensitised to violent content. While this research was undertaken with children, it points to harms that some cohorts of adults may struggle with across the lifespan. https://www.ofcom.org.uk/siteassets/resources/documents/research-and-data/online-research/keeping-children-safe-online/experiences-of-children/understanding-pathways-to-online-violent-content-among-children.pdf?v=368021.

122 Bender et al (2018). 'The effects of violent media content on aggression', *Current Opinion in Psychology, 19,* 104-108 https://doi.org/10.1016/j.copsyc.2017.04.003.

123 American Psychological Association (2020). 'APA Resolution on Violent Video Games'.

124 Feinstein et al (2014). 'Witnessing images of extreme violence: a psychological study of journalists in the newsroom'. *Journal of the Royal Society of Medicine Open, 5(8),* pp. 1-7. DOI: 10.1177/2054270414533323.

125 eSafety Commissioner, 'Addressing youth crime on social media platforms', https://www.esafety.gov.au/newsroom/media-releases/addressing-youth-crime-on-social-media-platforms.

the Standards[126], which was assessed by the Office of Impact Analysis and given an 'exemplary' rating.

Importantly, while eSafety considers the evidence outlined above demonstrates the extensive harms that arise for Class 1B material, including for adults and the wider community, we do recognise that the harms arising from class 1B material can be less severe. This is reflected throughout the Standards, which attach less onerous obligations to class 1B material.

eSafety notes that insofar as the Committee is considering whether Class 1B material should attach any requirements under the Standards, we do not consider that this was an option available to eSafety. Parliament decided that any industry codes and standards should cover class 1 material when it passed the Act. It also decided that the definitions of Class 1 (and 2) material should be drawn from the National Classification Code. Parliament took the view that if material has been, or would likely be, classified as Refused Classification, the material has the characteristics that warrant its restriction under existing Australian legislation.

eSafety also notes that there is currently a review of the National Classification Scheme, as the well as the Online Safety Act underway. Industry Codes and Standards will evolve depending on the outcome of those processes. However, the Committee will appreciate that in the meantime we are operating in the context of the existing scheme and legislation.

**(b) whether service providers are capable of effectively implementing the measures such that the measures would be, in practice, rationally connected to the stated objectives**

The Standards contain a broad range of measures which in combination provide appropriate community safeguards in respect of class 1 material, as provided for by the Act. These measures, whether considered individually or together, are capable of being (and in some cases are already being) implemented and are rationally connected to the stated objectives.

Given the breadth of services captured by the RES and DIS industry sections, requirements are formulated to ensure that all service providers which may be in scope can implement the requirements. To this end, requirements are service agnostic, meaning they are capable of being deployed by any service provider, include obligations to have policies against using the service for class 1A material or class 1B material, and to having user reporting tools.

To the extent that a service provider may be limited in its ability to meet certain requirements, there are qualifiers and limitations built into provisions. The inclusion of 'appropriate' for key requirements relating to

126 Office of Impact Assessment, Online Safety Industry Standards Impact Assessment, https://oia.pmc.gov.au/published-impact-analyses-and-reports/online-safety-industry-standards-esafety-0.

detecting and removing and disrupting and deterring, child sexual abuse material and pro-terror material are particularly important where they are required to balance the rights to privacy and freedom of expression.

The Standards state that 'appropriate' can include a consideration of proportionality to online safety risk of end-users in Australia, considering scale and reach of the service. This was introduced after submissions to the standards consultation suggested that some obligations were not feasible for particular service providers. Importantly, the matters to be considered appropriate are not exhaustive, and so service providers can consider other factors when determining a suitable way for them to comply in practise.

The limitations in relation to 'technical feasibility' and 'reasonable practicability' provide an added layer of flexibility for services which may be limited in their capabilities, and to facilitate compliance in a way which is appropriate for that service.

eSafety can only register Standards which provide 'appropriate community safeguards'[127]. Each requirement in the standard contributes a distinct benefit towards the Act's objectives for codes and/or standards. While this may mean that in some circumstances some service providers are required to undertake measures which currently they are not doing as is necessary to achieve the Act's objective of lifting online safety standards, the Standards do not contain measures which compel a provider to take steps they are not capable of doing.

**(c) whether there will be guidance provided to service providers to assist in interpreting and applying key terms used in the standards. For example, in the context of crime and violence material, the meaning of 'promotes', 'incites', 'instructs' or 'violence' and 'offends against the standards of morality, decency and propriety generally accepted by reasonable adults'**

The definitions of categories used within the Standards are a means of separating out types of refused classification, and therefore class 1, content to ensure that obligations can be gradated by the level of harm caused by such content. The terms used within the definitions are all taken from the classifications system, in particular the Classification (Publications, Films and Computer Games) Act 1995, National Classification Code, Guidelines for the Classification of Films 2012, Guidelines for the Classification of Publication 2005, and Guidelines for the Classification of Computer Games 2023. It is not appropriate for the eSafety Commissioner to make specific guidance on these terms as they are administered by a different Commonwealth entity.

However, eSafety acknowledges that varying terminology may be used across different jurisdictions and contexts. The Standards provide that no particular phrases or words are required in the terms of use. For example, a

127 Section 145(1)(a)(ii).

provider may capture pro-terror material in a service's terms of use with different but similar terminology, such as terrorist and violent extremist content. eSafety considers that this approach holds online service providers accountable for their own terms of use, and the enforcement of them. eSafety will ensure that this position is clear in regulatory guidance.

**(d) why the exception to the requirement to identify, detect and remove known pro-terror material (on the basis that it is not technically feasible or reasonably practicable) does not apply to the obligation to disrupt and deter pro-terror material**

The 'technically feasible' and 'reasonably practicable' exception does not apply to the disrupt and deter provisions because the provision only requires the service provider to implement systems and processes, and only where it is appropriate to do so, technologies. The technical feasibility and reasonably practicable exceptions were introduced to account for the broader impediments that a service provider might encounter in deploying a technology. Within this provision the use of 'appropriate' is included, which within its definition can include a consideration of proportionality considering the risks to end-users in Australia, versus the scale and reach of the service.

As indicated in the Explanatory Statements, the disrupt and deter provisions for Class 1A material are intended to complement the detect and remove provisions to ensure that service providers who are limited in their ability to detect and remove, take meaningful steps to effectively disrupt and deter known and new child sexual exploitation material and pro-terror material on their services. The disrupt and deter provisions cover a broader range of material, both new and known, whereas detect and remove provisions apply only in relation to *known* child sexual abuse material and pro terror material.

Further information in relation to the disrupt and deter provisions are included in eSafety's response to question (f) below.

**(e) why the exception to the requirement for providers to remove classes 1A and 1B materials if they become aware of such materials (on the basis that it is not technically feasible or reasonably practicable) only applies to relevant electronic services (and not designated internet services)**

The 'technically feasible' and 'reasonably practicable' exceptions were included for RES for obligations requiring the removal of 1A and 1B material in response to feedback from service providers. They identified that some RES may have limited, or no ability, to exercise control over the materials sent over their services. For example, users of carrier networks (i.e. Telstra, Optus, Vodaphone) will often transmit material to customers of other networks. In these circumstances it may not always be possible to remove material even where the provider (i.e. the carrier network) is aware of it. As previously indicated, the Standards do not contain measures which compel

a provider to take steps they are not capable of doing, and the inclusion of these exceptions aims to make this clear.

Due to the broad range and complexity of services that are captured under the DIS Standard, the requirements for service providers to take appropriate action, rather than a requirement to remove the material, was decided upon. As this constitutes a more flexible and less onerous requirement suitable to the broad variety of services which may be captured under DIS, the 'technically feasible' and 'reasonably practicable' exception was not drafted into these provisions.

**(f) how a provider would comply with their obligation to disrupt pro-terror material without first identifying it**

Section 22(2) in DIS and section 21(2) in RES require specific services disrupt and deter end-users from using the service for accessing pro-terror material and child sexual exploitation material. These requirements are not contingent on being able to first identify confirmed pro-terror material. There are a range of strategies which services can and do employ to minimise the risk that their service is used to provide users with access to pro-terror material.

As stated in the Explanatory Statements, some examples of systems, processes and technologies which may be implemented include the blocking of certain keywords and/or search terms that may be associated with child sexual exploitation material or pro-terror material; and displaying warning messages to users; and using technical indicators to prevent the recidivism of users who have previously been banned or suspended for breaches of a provider's terms of use for child sexual exploitation or pro-terror material. These interventions do not require material to be identified and confirmed to be effective. For example, preventing users previously banned for pro-terror breaches of terms of use from using the service 'disrupts' the dissemination of pro-terror material by preventing those actors from continuing to operate on the service, but does not require the ongoing identification of any specific material.

These are important risk mitigation steps which many RES and DIS service providers are already taking. An omission of the requirement to disrupt and deter pro-terror material would involve a derogation of best practise which many in industry have already established.

eSafety's regulatory guidance, which we will publish before the Standards are currently due to come into force on 22 December 2024, will provide industry participants and services providers with further examples of systems, processes and technologies which could be considered to meet this obligation. However, eSafety received feedback during consultation that specific technical interventions should not be prescribed, so these will continue to be indicative.

**(g) what are some examples of appropriate alternative actions that providers may take if they do not implement systems or technologies because it is not technically feasible or reasonably practicable**

As noted in the Explanatory Statements, 'appropriate alternative action' may comprise a suite of additional steps, which when considered holistically in the context of the specific service, provide risk mitigations and appropriate safeguards in lieu of a system or technology. It is expected that service providers should assess the appropriate alternative actions that can be applied as part of a broader set of risk mitigations to protect the rights and best interests of children and end-users in Australia in general.

eSafety's regulatory guidance will provide further information to industry to support their consideration of appropriate alternative actions, however eSafety cannot be prescriptive, as what is appropriate to do will depend on the service in question. However, some examples could include setting children's accounts to high privacy settings by default, providing warning messages, and providing educational or supportive information. Some of these measures may also be steps that a provider takes to disrupt and deter end-users from using the service for known and new pro-terror material and child sexual exploitation material.[128]

**(h) if end-to-end encrypted service providers have existing decryption capability (and so would not need to implement or build new decryption capability), whether they would be required to scan encrypted communications to identify and remove known pro-terror material, even if doing so would render the encryption less effective**

The relevant provisions of the RES and DIS Standards are clear that in deploying systems or technology to detect known pro-terror material, or known child sexual abuse material, that an end-to-end encrypted service is not required to build a new decryption capability or render methods of encryption used in the service less effective.

As such, if a system or technology made the encryption of an end-to-end encrypted service less effective, the Standard would not require it. This applies whether a 'decryption capability' already existed or not.

**(i) what specific safeguards in the Privacy Act 1988, Telecommunications Act 1997 and Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 apply to the standards and how those safeguards would ensure that the limitation on the right to privacy is proportionate in practice**

RES and DIS services are required to comply with all relevant legislation when implementing the Standards, including the Privacy Act 1988,

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128 Section 22 in DIS, section 21 in RES.

Telecommunications Act 1997 and Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018.

Specifically, the Privacy Act 1988 applies to all collection of personal information by regulated entities. The RES Standard requires that entities collect identifying information on sign-up for some services. However, services will still be required to comply with Australian Privacy Principle 2 which requires regulated entities to give the individuals the option of using a pseudonym. All the requirements in the Privacy Act and the Australian Privacy Principles will apply, including the requirements regarding using or disclosing personal information.

Section 7 of the Telecommunications (Interception and Access) Act 1979 prohibits a person intercepting a communication passing over telecommunications system. This provision will prohibit carriage service providers from listening to or recording a communication over their telecommunications system. It should be noted that nothing in the Standards require carriage services to listen to or record communications.

Section 276 of the Telecommunications Act 1997 states that a carrier or carriage service provider must not disclose or use the contents or substance of a communication that has been carried by a carrier or carriage service provider. It should be noted that this provision does not apply when a person is undertaking actions required by the Standards, but also, that nothing in the Standards requires a carrier or carriage service provider to disclose or use the contents or substance of a communication. If a carrier or carriage service provider operates beyond the scope of the Standards and discloses or uses the contents or substance of a communication, then section 276 will apply.

It should be noted that the eSafety Commissioner is not authorised to request industry assistance under Part 15 of the Telecommunications Act 1997 (as amended by the Telecommunications and Other Legislations Amendment (Assistance and Access) Act 2018). As such, compliance with, or investigation of compliance with, the Standards will not allow for the use of the powers provided under Part 15.

**(j) how a provider would become aware of a breach of the terms of use or the use of their service to access, distribute etc. classes 1A or 1B materials. For example, could a provider proactively scan private communications to monitor compliance with its terms of use**

The ways in which a provider would become aware of a breach in terms of service for class 1A or 1B material are dependent on the service, but typically a service would be made aware through reports from end-users of the service. Sections 14(3)(a) and 23(3)(a) of the RES Standard, and sections 14(3)(a) and 16(3)(i) of the DIS Standard recognise this by requiring services to review reports by end-users of the service in Australia that class 1A and 1B materials are accessible using the service.

There is nothing in the Standards that prohibits or requires proactive scanning to identify breaches of terms of use. As is the current situation, some services may voluntarily decide to use technology to detect breaches of terms of use on different parts of their services, including private messaging.[129]

The provisions relating to breaches of terms of use (class 1A and 1B material) only require that service providers implement systems and processes to respond to a breach in terms of service for Class 1A and 1B material when they become aware of the breach. Services must remove the material as soon as practicable (if technically feasible or reasonably practicable to do so) and take appropriate alternative action to prevent further access, distribution, and ongoing breaches. As stated in the Standards, appropriate action for these provisions may include a service exercising any of its contractual rights under its terms of use.

**(k) what other safeguards, if any, accompany the measures to ensure the limitations on the rights to freedom of expression and privacy are proportionate, such as access to review for decisions to remove material**

This response has set out above how the Standards promote and protect freedom of expression and privacy rights, and the limitations that are in place to ensure that measures taken to implement the Standards are proportionate. This includes the risk-based and outcome-focussed framework, as well as limiting proactive detection requirements to known child sexual abuse material and pro-terror material, and clear exemptions for measures that might weaken encryption.

The Standards address the risks of class 1A and 1B material, this material is already classified as refused classification. Material classified as refused classification contains content that is outside *generally accepted community standards.* As noted above, the National Classification Scheme emphasises the importance of context as an essential principle when assessing how material should be classified. When classifying material, the literary, artistic, or educational merit of the material and the character of the material, including if it is of a medical, legal or scientific character must be considered. These and other structural elements within the classification system which must be considered under the Standards protect against undue limitations on freedom of expression.

There are no requirements in the Standards for service providers to remove any material that is not already, or would not be, *refused classification*. Service providers have the ability and discretion to implement review processes where class 1A and 1B material has been removed (through

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129 eSafety Commissioner, *Responses to Transparency Notices*, https://www.esafety.gov.au/industry/basic-online-safety-expectations/responses-to-transparency-notices

breach of terms of use provisions) and where an end-user may raise a complaint (see below).

**(l) if an end-user's rights to freedom of expression or privacy were violated, for example where a provider restricted legitimate forms of expression, what remedy would be available to the end-user.**

It is standard practice for online services to have complaints and appeals processes, which can enable end-users to raise examples where a provider may have made an incorrect content moderation decision. While these are matters for individual providers, eSafety will include in its regulatory guidance, that service providers are encouraged to make available a mechanism for users to appeal interventions made on their material.

**4. Conclusion**

eSafety appreciates the Committee's questions, and comprehensive analysis of the Standards. eSafety will ensure that the Committee's feedback is considered in the planned regulatory guidance to industry. eSafety will ensure that that this guidance highlights the following matters:

1. Examples of systems, processes and, if appropriate, technologies which could be considered to 'disrupt and deter' child sexual exploitation material and pro-terror material, including those in this correspondence.
2. Further information to support industry in their consideration of 'appropriate alternative actions' where it is not technically feasible or reasonably practicable to deploy a system or a technology.
3. That, if a system or technology made the encryption of an end-to-end encrypted service less effective, the Standard would not require it, and that this applies whether a 'decryption capability' already existed or not. eSafety will also make this clear in a supplementary Explanatory Statement.
4. That, where they don't already exist, providers are encouraged to have complaints and appeals processes, which can enable end-users to raise examples where a provider may have made an incorrect content moderation decision.

eSafety trusts that these commitments, and this broader response, will reassure the Committee that the Standards not only protect human rights, but are essential measures in furthering the human rights of victim-survivors as well as the safety and wellbeing of the broader community. After two and a half years to get to this point on the most harmful forms of content, it is important to note that any substantive changes to the Standards at this stage would require further public consultation, thereby delaying the commencement of the Standards beyond the current date of 22 December 2024.

eSafety considers the registered Standards provide appropriate community safeguards, as required by section 145(1)(a)(ii) of the Act, provide for reasonable and proportionate measures to minimise harms posed by Class 1 material as defined by the Act; and, in doing so, protect and extend the human rights of Australians.

## Concluding comments

### *International human rights legal advice*

2.126 The preliminary analysis noted that regulating child sexual exploitation material, material depicting sexual violence and pro-terror material that reaches the threshold of incitement to national, racial or religious hatred likely permissibly limits the rights to freedom of expression and privacy. However, questions arose as to whether regulating the other types of material to which the measures apply, such as crime and violence or drug-related material, is reasonable, necessary and proportionate. In particular, the preliminary analysis noted that the stated objectives of respecting and protecting the rights of others; promoting and improving transparency and accountability of online services; and improving the online safety of Australians, constitute legitimate objectives for the purposes of international human rights law. However, questions arose as to whether the measures are rationally connected to (that is, capable of achieving), and a proportionate means of achieving, these objectives.

*Rational connection*

2.127 As to whether and how the measures are rationally connected to the objective of preventing harm, the eSafety Commissioner (the Commissioner) advised that the production, distribution and consumption of crime and violence and drug-related materials (comprising class 1B material) can cause harm to adults. For example, the Commissioner referred to research that demonstrated that advertising illicit drugs can facilitate the accessibility of these substances to buyers; encountering violent content online risks normalising violence and may be linked to aggressive behaviour; and daily exposure to violent images may be linked to anxiety, depression, post-traumatic stress disorder and alcohol consumption. The Commissioner also noted that a youth crime roundtable (hosted by the Commission) revealed a link between criminal offending by young people and the online distribution of material that incites and promotes crime. The Commissioner acknowledged, however, that the harms arising from class 1B material can be less severe, as reflected in the fact that the standards attach less onerous obligations to class 1B material (compared to class 1A material). The Commissioner further noted the relevance of the broader legislative framework, stating that it was not an option to *not* attach any requirements under the standards to class 1B material because the Online Safety Act requires that industry codes and standards cover class 1 material, the definition of which is drawn from the National Classification Code. The Commissioner noted that there is currently a review of the

National Classification Scheme and the Online Safety Act, and that the standards will evolve depending on the outcome of these reviews.

2.128 The research referred to by the Commissioner indicates that viewing certain class 1 material may lead to harm, such as poor mental health, criminal or anti-social behaviour and substance misuse, in both adults and children. However, noting the breadth of materials that fall under the class 1 classification and the sometimes vague descriptions of such materials (as detailed below), it is not clear that the *full* range of materials regulated by the measures would be harmful to adult end-users who consent to view such materials (accepting that such materials would likely cause more harm to children). The mere fact that material depicts matters that may fall outside of generally accepted community standards does not itself demonstrate that the viewing of such content by a consenting adult will cause harm to them. Indeed, the Commissioner recognised that the harms arising from class 1B material can be less severe and noted that there was no option to *not* attach requirements under the standards to such material as the Online Safety Act requires industry standards to apply to class 1 material generally.[130] It is therefore not clear that regulating all materials that fall under classes 1A and 1B would necessarily be rationally connected to the objective of preventing harm and improving online safety.

2.129 Further, the preliminary analysis raised questions as to whether providers are capable of effectively implementing the measures such that the measures would be, in practice, rationally connected to the stated objectives. The Commissioner stated that the measures are capable of being, and in some cases are already being, implemented. The Commissioner stated that to the extent that a service provider is unable to meet certain requirements, the standards include qualifiers and limitations that account for this, such as the inclusion of the word 'appropriate' (which was introduced after submissions to the standards consultation suggested that some requirements were not feasible for particular providers). The Commissioner also stated that the exceptions to the requirements on the bases of technical feasibility and reasonable practicability add a layer of flexibility (these exceptions are discussed further below in the context of proportionality). Additionally, the Commissioner advised that in preparing the planned regulatory guidance to industry, they will ensure that the guidance includes further information to support industry in their consideration of 'appropriate alternative actions' where it is not technically feasible or reasonably practicable to implement a system or technology. The Commissioner emphasised that the standards do not require providers to implement measures which they are not capable of implementing.

2.130 It appears that providers may be capable of effectively implementing the measures, particularly if they are provided with clear guidance as to how the measures

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130 The Parliamentary Joint Committee on Human Rights raised similar queries with respect to the regulation of class 1 material by the Online Safety Act 2021 when it was first introduced as a bill. See *Report 5 of 2021* (29 April 2021) pp. 45–83.

are to be interpreted and applied in practice. However, much will depend on the quality of this guidance, the nature of the measure, the type of material in question, and the individual service provider. As noted in the preliminary analysis, if providers interpreted the scope of materials captured by the measures too broadly such that they took action with respect to materials that fell outside the categories of classes 1A and 1B materials, the causal nexus between the materials being regulated and the potential harm caused by viewing such material becomes more tenuous.[131]

*Proportionality*

2.131 The breadth of the measures, including the type of material that is to be regulated by providers, is relevant in considering whether the limitations are sufficiently circumscribed. As noted in the preliminary analysis, the type of material regulated by the measures is class 1 material, meaning that it is or would likely be classified as 'Refused Classification' (RC), which is material that cannot be sold, hired, advertised, or legally imported into Australia.[132] However, even if the material is unlawful under Australian law, it may still be protected under international human rights law. This is particularly so where the definition of the material is drafted in vague and/or broad terms such that the scope of expression restricted by Australian law may be overly broad.

2.132 For example, the definition of 'pro-terror material' (and the related term 'known pro-terror material') in the standards[133] reflects the definition of 'advocates'

131 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/38/35 (2018) [17].

132 Online Safety (Relevant Electronic Services—Class 1A and Class 1B Material) Industry Standard 2024, statement of compatibility, p. 5 and Online Safety (Designated Internet Services—Class 1A and Class 1B Material) Industry Standard 2024, statement of compatibility, p. 6.

133 Online Safety (Relevant Electronic Services—Class 1A and Class 1B Material) Industry Standard 2024, section 6 and Online Safety (Designated Internet Services—Class 1A and Class 1B Material) Industry Standard 2024, section 6.

in the context of the offence of advocating terrorism in the Criminal Code.[134] The Parliamentary Joint Committee on Human Rights has previously raised concerns regarding the breadth of the offence of advocating terrorism, both when it was first introduced in 2014 and when it was amended in 2023.[135] In particular, concerns were raised that the offence is overly broad in its application and may result in the criminalisation of speech and expression that does not genuinely advocate the commission of a terrorist act or terrorism offence. In the absence of clear legislative guidance with respect to key terms in the offence, such as 'instruction', 'praises' and 'advocates', and in light of the very broad definition of 'terrorist act' itself, there were concerns that the offence was not sufficiently circumscribed and the scope of expression restricted was overly broad.[136] In the absence of sufficient safeguards, the committee considered that the offence did not appear to be compatible with the right to freedom of expression. Given that the definition of pro-terror material directly draws on the offence of advocating terrorism, these concerns remain relevant to these measures.

2.133 Regarding 'known pro-terror material', the Commissioner stated that the definition in the standards is narrow and reflects the existing practice of most of industry. They stated that the notes that accompany the definition of 'known pro-

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134 Under section 80.2C of the Criminal Code, a person commits an offence if they advocate the doing of a terrorist act or the commission of a terrorism offence, and they engage in that conduct reckless as to whether another person will engage in a terrorist act or commit a terrorism offence. A person advocates the doing of a terrorist act or the commission of a terrorism offence if they (a) counsel, promote, encourage or urge the doing of a terrorist act or the commission of a terrorism offence; (b) provide instruction on the doing of a terrorist act or the commission of a terrorist offence; or (c) praise the doing of a terrorist act or the commission of a terrorism offence in circumstances where there is a substantial risk that such praise might lead other persons to commit terrorist acts or offences. A 'terrorist act' is defined in subsections 100.1(1) and (2) of the Criminal Code as an action or threat of action that: is intended to advocate a political, religious or ideological cause and coerce or influence by intimidation a foreign government or a section of the public; and is a certain type of action, including actions that cause serious physical harm to a person or serious damage to property; cause a person's death or endanger their life; create a serious risk to the health or safety of the public; or seriously interfere with, seriously disrupt, or destroy an electronic system (including a telecommunication, financial or transport system).

135 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament*, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (28 October 2014) pp. 50–52; *Report 9 of 2023*, Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023 (6 September 2023) pp. 61–121.

136 The UN Human Rights Committee has stated '[s]uch offences as "encouragement of terrorism" and "extremist activity" as well as offences of "praising", "glorifying", or "justifying" terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression. Excessive restrictions on access to information must also be avoided'. See *General Comment No. 34, Article 19: Freedoms of opinion and expression* (2011) [46].

terror material' limit the scope of material that proactive detection is required for. Note 1 states that:

> Known pro-terror material may include material that can be detected via hashes, text signals, searches of key words terms, URLs or behavioural signals or patterns that signal or are associated with online materials produced by terrorist entities that are on the United Nations Security Council Consolidated List.

2.134 Note 2 states:

> Material may, for example, be verified as a result of a decision of the Classification Board. Material may also be verified by using tools provided by independent organisations that are recognised as having expertise in counter-terrorism. Examples of these organisations include Tech Against Terrorism and the Global Internet Forum to Counter Terrorism.

2.135 The Commissioner stated that the notes reflect the existing practice of many Tier 1 relevant electronic services and designated internet services who primarily use the UN Security Council Consolidated List to decide what material to proactively detect on their services.

2.136 If, in practice, service providers limit their efforts to proactively detecting material produced by terrorist entities listed on the UN Security Council Consolidated List, this may assist with circumscribing the measures with respect to this type of material, as material produced by listed terrorist entities is more likely to reach the threshold of incitement to national, racial or religious hatred and thus restricting such material would be a permissible limit on the right to freedom of expression. However, while it is relevant to consider how legislation will likely be applied in practice, ultimately an assessment as to the compatibility of legislation with international human rights law must be based on the text of the legislation itself. In this regard, legislative notes are intended to serve as 'signposts' in legislation, explaining links between provisions or giving examples illustrating how the provisions are to be interpreted and applied.[137] They should not include substantive content.[138] Further, examples in legislation are non-exhaustive and may extend the operation of a provision, but may not constrain it.[139] Consequently, the notes accompanying the definition of 'known pro-terror material' do not, as a matter of statutory interpretation, have the legal effect of narrowing or limiting the scope of material for which proactive detection is required. They merely give examples of the type of

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137 See Office of Parliamentary Counsel, *OPC Drafting Manual*, edition 3.2 (July 2019) p. 32; Act Parliamentary Counsel's Office, *ACT Legislation: Reading Legislation,* version 2022-1 (September 2022) p. 9; Department of the Senate, *Guides to Senate Procedure, No. 15 – Reading a bill* (December 2019) p. 3.

138 In this regard, the *Acts Interpretation Act 1901* states that, while all material in an Act is art of an Act (section 13), only sections have effect as a substantive enactment (section 12).

139 *Acts Interpretation Act 1901*, section 15AD.

material that *may* be captured by the definition and how such material may be detected and verified. Further, as 'known pro-terror material' is defined as material that has been verified as pro-terror material, the concerns outlined above with respect to the breadth of the definition of 'pro-terror material' are applicable to 'known pro-terror material'. Relevantly, the definition of 'pro-terror material' is not limited to material produced by terrorist entities listed on the UN Security Council Consolidated List. The definition is drafted by reference to what the material *does*, such as indirectly promotes the doing of a terrorist act, rather than by reference to *who* made the material.

2.137 Likewise, the other types of material captured by the measures, including crime and violence, and drug-related materials, are similarly defined in vague and broad terms and neither the standards nor the explanatory materials provide clarity as to the meaning of key terms used in the definitions. For example, crime and violence material includes material that, without justification, promotes, incites or instructs in matters of crime or violence. However, the meaning of each term, such as 'promotes' or 'incites', is unclear on the face of the legislation. Crime and violence material also includes material that depicts, expresses or otherwise deals with matters of crime or violence in such a way that it offends against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that it should be classified as RC. Again, the meaning of key terms is unclear as is the threshold that must be met in order for material to offend against standards of morality, decency and propriety, noting that these concepts are inherently subjective. Relevantly, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has raised concerns about vague content regulation rules, noting that excessively vague terms, such as 'promotes terrorist acts or incites violence' and 'distasteful or offensive content' are 'subjective and unstable bases for content moderation'.[140]

2.138 The Commissioner advised that the terms used in the definitions are all taken from the classifications system[141] and that it is not appropriate for them to make specific guidance on these terms as they are administered by a different Commonwealth entity. The classifications system, however, provides limited guidance as to the meaning of key terms. For instance, the National Classification Code, which sets out the criteria for classifying material, does not include definitions of key terms or concepts. Other classification guidelines include some definitions but these are often drafted in broad terms. For example, the Guidelines for the Classification of Publications 2005 defines 'violence' as 'acts of violence' and 'the obvious threat of

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140 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/38/35 (2018) [26].

141 Including the Classification (Publications, Films and Computer Games) Act 1995, National Classification Code, Guidelines for the Classification of Films 2012, Guidelines for the Classification of Publication 2005, and Guidelines for the Classification of Computer Games 2023.

violence or its result'. Further, it is not clear that the standards applicable to films, computer games and publications are necessarily generally applicable to material that may appear online.

2.139 A further complexity is that the standards contain three different definitions of crime and violence material and drug-related material depending on the form of material in question. While providers are expected to apply the most relevant definition, without legislative or other guidance as to the meaning of key terms used in the definitions, it may be difficult in practice for providers to apply the appropriate definition to the material they are dealing with and do so consistently.[142] The use of vague terms, multiple definitions and the lack of clear guidance may result in substantial variation in the way the standards are interpreted and applied in practice by providers.

2.140 The Commissioner acknowledged that varying terminology may be used across different jurisdictions and contexts, and that the standards do not provide particular phrases or words that are required to be used in the terms of use. For example, providers may use different but similar terminology in their terms of use to capture pro-terror material, such as terrorist and violent extremist content. The Commissioner stated that this approach holds service providers accountable for their own terms of use and the enforcement of them. However, for such an approach to be effective in practice, providers would still need to understand the meaning of key terms so that they can ensure the terminology they use in the terms of use appropriately captures all material that is required to be regulated by the standards. Without sufficient clarity as to the meaning of key terms there appears to be a risk that providers may excessively restrict material so as to avoid liability.[143] The broader the scope of material that may be restricted, the greater the interference with the right to freedom of expression would be.

2.141 The breadth of the obligations imposed on providers and how providers will comply with these obligations in practice are also relevant considerations in assessing proportionality, particularly the extent to which the measures would interfere with the right to privacy.

2.142 In relation to known pro-terror material, providers are required to implement appropriate systems, processes and technologies to detect, identify and remove this material, unless it is not technically feasible or reasonably practicable to do so; or it would require the provider to implement or build a systemic weakness or vulnerability into the service, or implement or build a new decryption capability into the service, or

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142 See Online Safety (Relevant Electronic Services—Class 1A and Class 1B Material) Industry Standard 2024, statement of compatibility, p. 143 and Online Safety (Designated Internet Services—Class 1A and Class 1B Material) Industry Standard 2024, statement of compatibility, p. 144.

143 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/38/35 (2018) [17].

render methods of encryption used in the service less effective.[144] If a provider does not implement any systems or technologies because it is not technically feasible or reasonably practicable, they must still take 'appropriate alternative action'.[145] The Commissioner provided some examples of alternative actions, including setting children's accounts to high privacy settings by default, providing warning messages, and providing educational and supportive information.

2.143 As to how providers will proactively identify and detect known pro-terror material, the Commissioner stated that technologies such as digital fingerprinting technology (referred to as 'hash matching') can detect this material at extremely high accuracy rates. The Commissioner advised that these technologies do not use artificial intelligence, nor read communications, but instead provide a binary response regarding whether material matches against known and previously vetted pro-terror material. The Commissioner stated that providers would not need to scan vast amounts of private communications in order to identify and detect known pro-terror material. However, the statements of compatibility states that providers are not proactively required to 'scan texts, emails, or messages for content *other than material which has been verified as…pro-terror material*' (emphasis added), suggesting that providers may in fact scan communications in order to identify and detect verified pro-terror material.[146] Further, the Commissioner stated that the standards make no reference to where interventions must take place on a service, such as in private communications, instead taking a risk and proportionality-based approach depending on what is appropriate on a given service. While the standards may not explicitly require private communications to be scanned by providers, it appears that this could occur in practice, which would constitute a significant interference with privacy.

2.144 The exceptions to the obligation to detect and remove known pro-terror material (on the basis that it is not technically feasible or reasonably practicable, or would require the provider to implement or build a systemic weakness or new decryption capability, or render encryption less effective) may operate as safeguards. However, the potential safeguard value of the 'technically feasible' or 'reasonably practicable' exceptions appear likely to decrease over time as technology evolves and circumstances change. The notes accompanying the detect and remove provisions in

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144 Online Safety (Relevant Electronic Services—Class 1A and Class 1B Material) Industry Standard 2024, section 20 and Online Safety (Designated Internet Services—Class 1A and Class 1B Material) Industry Standard 2024, section 21.

145 The matters that are to be taken into account when determining whether an action is appropriate are set out in section 11 of both standards. These matters include the extent to which the action would achieve the object of the standards; the nature of the material in question; and whether the action would be proportionate to the level of risk to online safety the material poses.

146 Online Safety (Relevant Electronic Services—Class 1A and Class 1B Material) Industry Standard 2024, statement of compatibility, p. 6 and Online Safety (Designated Internet Services—Class 1A and Class 1B Material) Industry Standard 2024, statement of compatibility, p. 7.

the standards state that providers may use hashing technologies and machine learning to detect and identify known pro-terror material.[147] However, those notes do not limit the operation of the substantive provisions. Further, noting the continuing advancements in technology and machine learning, it appears likely that, at some stage, providers will have access to mechanisms making it technically feasible to scan all communications and material to identify and remove known pro-terror material. The potential interference with privacy may therefore increase over time as advances in technology allow for greater interference.

2.145 With respect to the exception applying to end-to-end encrypted services, the Commissioner clarified that if a system or technology made the encryption of an end-to-end encrypted services less effective, the standards would not require providers to implement it. This applies regardless of whether the provider already had existing decryption capability. This exception assists with proportionality. The UN High Commissioner for Human Rights has highlighted the importance of encryption and anonymity as a safeguard with respect to the right to privacy, stating:

> Encryption and anonymity provide individuals and groups with a zone of privacy online where they can hold opinions and exercise freedom of expression without arbitrary and unlawful interference or attacks. Encryption and anonymity tools are widely used around the world, including by human rights defenders, civil society, journalists, whistle-blowers and political dissidents facing persecution and harassment. Weakening them jeopardizes the privacy of all users and exposes them to unlawful interferences not only by States, but also by non-State actors, including criminal networks. Such a widespread and indiscriminate impact is not compatible with the principle of proportionality.[148]

2.146 In relation to pro-terror material more broadly (which includes material that has not necessarily been verified as such), providers are required to implement systems, processes and technologies (if appropriate) to effectively deter and disrupt end-users from using the service to create, offer, solicit, access, distribute, or otherwise make available, or store such material.[149] However, unlike the obligation to identify, detect and remove known pro-terror material, there are no exceptions to the obligation to disrupt and deter pro-terror material on the basis that it is not technically feasible or reasonably practicable. As to why these exceptions are not included, the Commissioner advised that the use of the word 'appropriate' within the provision

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147 Online Safety (Relevant Electronic Services—Class 1A and Class 1B Material) Industry Standard 2024, subsection 20(2) and Online Safety (Designated Internet Services—Class 1A and Class 1B Material) Industry Standard 2024, subsection 21(3).

148 UN High Commissioner for Human Rights, *The right to privacy in the digital age*, A/HRC/39/29 (2018) [20].

149 Online Safety (Relevant Electronic Services—Class 1A and Class 1B Material) Industry Standard 2024, section 21 and Online Safety (Designated Internet Services—Class 1A and Class 1B Material) Industry Standard 2024, section 22.

means that only where it is appropriate to implement technologies are providers required to do so. The Commissioner emphasised that the disrupt and deter provisions are intended to complement the detect and remove provisions to ensure that providers who are limited in their ability to detect and remove still take meaningful steps to effectively disrupt and deter. Such steps may include blocking certain keywords and/or search terms that may be associated with pro-terror material; displaying warning messages to users; and preventing users previously banned for pro-terror breaches of terms of use from using the service. The Commissioner stated that these kinds of steps do not require material to first be identified and confirmed as pro-terror material. They noted that regulatory guidance that is to be provided to industry participants and service providers will include further examples of systems, processes and technologies that could be considered to meet the obligation to disrupt and deter. Based on this further information, it appears that providers could fulfil their obligation to deter and disrupt pro-terror material without first identifying it, which may lessen the potential interference with the right to privacy, although it will depend on the manner in which providers interpret and implement these obligations in practice.

2.147 In addition to the above obligations with respect to known pro-terror and pro-terror material, providers also have obligations to implement systems and processes to take appropriate action in relation to a breach of the terms of use and respond to classes 1A and 1B materials, including by removing the material and ensuring the material can no longer be accessed or distributed via the service.[150] These obligations apply when the provider becomes aware that there is, or has been, a breach of the terms of use or that the service is being used or has been used to solicit, access, distribute or store classes 1A and 1B materials. Relevant electronic service providers do not need to remove the material if it is not technically feasible or reasonably practicable for the provider to do so.[151] The explanatory statement states that this recognises that some providers, for example telephony relevant electronic services, may have limited or no ability to exercise control over materials.[152] As to why the exception to the requirement to remove material on the basis of technical feasibility or reasonable practicability does not also apply to designated internet service providers, the Commissioner advised that due to the broad range and complexity of designated internet services, it was determined that a requirement for service providers to take appropriate action should be imposed, rather than a requirement to remove the material. The Commissioner stated that the obligation to take appropriate

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150 Online Safety (Relevant Electronic Services—Class 1A and Class 1B Material) Industry Standard 2024, sections 14, 15, 23 and 24 and Online Safety (Designated Internet Services—Class 1A and Class 1B Material) Industry Standard 2024, sections 14–17.

151 Online Safety (Relevant Electronic Services—Class 1A and Class 1B Material) Industry Standard 2024, sections 15 and 24.

152 Online Safety (Relevant Electronic Services—Class 1A and Class 1B Material) Industry Standard 2024, explanatory statement, p. 149 and Online Safety (Designated Internet Services—Class 1A and Class 1B Material) Industry Standard 2024.

action is a more flexible and less onerous requirement suitable to the broad variety of services which may be captured by the designated internet services standard.

2.148 The extent to which these obligations will interfere with privacy depends on how providers become aware of the breach of the terms of use or the material in question. The Commissioner stated that how a provider will become aware of a breach will depend on the service, but typically the provider is made aware through reports from end-users of the service.[153] The Commissioner stated that the standards do not prohibit or require proactive scanning to identify breaches of terms of use, but that some services may voluntarily decide to use technology to detect breaches on different parts of their services, including private messaging. Thus, while not required by the standards, it appears that providers may implement more intrusive methods to become aware of breaches of terms of use, such as scanning or reading private communications and materials. If this were to occur, it would constitute a more significant interference with privacy given the breadth of materials captured by these obligations.

2.149 Further, the statements of compatibility note that the standards do not require or expect providers to undertake actions that are inconsistent with their obligations under the *Privacy Act 1988* (Privacy Act), the *Telecommunications Act 1997* (Telecommunications Act) or *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018*.[154] The Commissioner advised that regulated entities are required to comply with the Privacy Act and the Australian Privacy Principles (APPs), including requirements regarding using or disclosing personal information. The Commissioner further advised that section 7 of the *Telecommunications (Interception and Access) Act 1979* prohibits a person intercepting a communication passing over a telecommunications system, meaning carriage service providers are prohibited from listening to or recording a communication over their telecommunications system. They stated that the Standards do not require carriage services to listen to or record communications. Regarding the Telecommunications Act, the Commissioner stated that section 276, which prohibits a provider from disclosing or using the contents or substance of a communication that has been carried by a carrier or carriage service provider, does not apply when a person is undertaking actions required by the standards. However, the Commissioner further noted that nothing in the standards requires a carrier or carriage service provider to disclose or use the contents or

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153 See also Online Safety (Relevant Electronic Services—Class 1A and Class 1B Material) Industry Standard 2024, subsection 15(3), which provides that the systems and processes to respond to breaches of the terms of use must include ones which the provider reviews reports by end-users of the service in Australia that class 1A material is accessible using the service.

154 Online Safety (Relevant Electronic Services—Class 1A and Class 1B Material) Industry Standard 2024, statement of compatibility, p. 6 and Online Safety (Designated Internet Services—Class 1A and Class 1B Material) Industry Standard 2024, statement of compatibility, p. 7.

substance of a communication. If a provider were to operate beyond the scope of the standards, section 276 would apply.

2.150 Provisions prohibiting the use and disclosure of personal information and private communications in the above privacy and telecommunications legislation may serve as safeguards with respect to the right to privacy. However, noting there are several exceptions to the prohibition on use or disclosure of personal information contained within the legislation, the strength of these safeguards may be somewhat limited in practice. The Parliamentary Joint Committee on Human Rights has stated on a number of occasions that compliance with the Privacy Act and the APPs are not a complete answer to concerns about interference with the right to privacy for the purposes of international human rights law. In particular, the exceptions in the Privacy Act to the prohibition on the use or disclosure of personal information may be broader than permitted in international human rights law. Further, a 2022 review of the Privacy Act (the review) identified numerous inadequacies in the Privacy Act in protecting privacy and personal information.[155] It made several recommendations to strengthen privacy protections, including requiring that the collection, use and disclosure of personal information must be fair and reasonable in the circumstances, which would involve consideration of a range of factors such as the potential adverse impact or harm to the individual, whether any privacy impact is proportionate to the benefit, and whether there are less intrusive means of achieving the same objective.[156] The government's recent response to the review agreed to a number of recommendations and agreed in principle with others, such as the recommendation with respect to fair and reasonable handling of personal information.[157]

2.151 As to the existence of other safeguards, the statements of compatibility state that the standards adopt an outcomes and risk-based approach so that services with a higher risk profile must meet more obligations. They indicate that this ensures that the measures are proportionate to the risk a service presents in respect of classes 1A and 1B materials and minimises the potential for illegitimate restriction of personal expression.[158] The Commissioner reiterated this point in their response. This risk-based approach may assist with proportionality. However, generally services which are considered to be high risk under the standards and are therefore subject to more compliance measures, are those services which contain more personal information. For example, the obligation to identify, detect and remove known pro-terror material

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155 Attorney-General's Department, *Privacy Act Review: Report 2022* (February 2023).

156 Attorney-General's Department, *Privacy Act Review: Report 2022* (February 2023) Recommendation 12, pp. 1, 8.

157 Australian Government, *Government Response: Privacy Act Review Report* (September 2023) p. 27.

158 Online Safety (Relevant Electronic Services—Class 1A and Class 1B Material) Industry Standard 2024, statement of compatibility, pp. 4 and 6 and Online Safety (Designated Internet Services—Class 1A and Class 1B Material) Industry Standard 2024, statement of compatibility, pp. 5 and 7.

applies to 'communication relevant electronic services', which are services that enable a user to communicate with another user, such as online messaging services, some video conferencing services and email services.

2.152 With respect to access to review, the Commissioner advised that service providers have the ability and discretion to implement review processes where material has been removed through breach of terms of use provisions and where an end-user may raise a complaint. The Commissioner noted that it is standard practice for online services to have complaints and appeals processes, but ultimately the availability of these processes is a matter for individual providers. The Commissioner stated that they will provide industry with regulatory guidance that will encourage providers to make available appeal and complaint mechanisms for users. If users were able to seek review of or appeal a content moderation decision or make a complaint regarding a potential breach of their right to privacy, this would assist with proportionality. However, as the availability of these mechanisms is at the discretion of providers, the strength of this safeguard is weakened. A discretionary safeguard is less stringent than the protection of statutory processes as there is no requirement to follow it.

*Right to an effective remedy*

2.153 Finally, if an end-user's rights to freedom of expression or privacy were violated, for example where their material or expression was incorrectly moderated or their private communications were arbitrarily interfered with, there does not appear to be an effective remedy available. The right to an effective remedy requires the availability of a remedy which is effective with respect to any violation of rights.[159] It includes the right to have such a remedy determined by competent judicial, administrative or legislative authorities or by any other competent authority provided for by the legal system of the state. While limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), states parties must comply with the fundamental obligation to provide a remedy that is effective.[160]

2.154 The only remedy identified by the Commissioner is the potential availability of internal complaints and appeals processes for end-users. However, as noted above,

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159 International Covenant on Civil and Political Rights, article 2(3). See, *Kazantzis v Cyprus*, UN Human Rights Committee Communication No. 972/01 (2003) and *Faure v Australia*, UN Human Rights Committee Communication No. 1036/01 (2005), States parties must not only provide remedies for violations of the International Covenant on Civil and Political Rights, but must also provide forums in which a person can pursue arguable if unsuccessful claims of violations of the Covenant. Per *C v Australia*, UN Human Rights Committee Communication No. 900/99 (2002), remedies sufficient for the purposes of article 5(2)(b) of the International Covenant on Civil and Political Rights must have a binding obligatory effect.

160 See UN Human Rights Committee, *General Comment 29: States of Emergency (Article 4)* (2001) [14].

the availability of such processes is at the discretion of providers and, even if such processes were available, it is not clear whether the outcomes of these processes would constitute an effective remedy. While non-state actors such as businesses have a responsibility to provide access to appropriate remedial mechanisms, which is important in realising the right to an effective remedy, ultimately States hold the duty to respect, protect and fulfil the right to an effective remedy.[161] The UN Working Group on the issue of human rights and transnational corporations and other business enterprises has observed that:

> …merely providing access to remedial mechanisms will not suffice: there should be an effective remedy in practice at the end of the process. This is why access to an effective remedy as having "both procedural and substantive aspects" is recognized in the Guiding Principles [on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework]. As duty bearers, States should, therefore, ensure that they put in place effective remedial mechanisms that can deliver effective remedies. Similarly, when a business enterprise provides remediation in cases in which it identifies that it has caused or contributed to adverse impacts, such remediation should be effective in terms of both process and outcome.[162]

2.155 The provision of access to remedial mechanisms by businesses should complement (and not replace) state-based judicial and non-judicial remedial mechanisms.[163] While there may be state-based mechanisms available, these are not identified in the explanatory materials or by the Commissioner. For example, with respect to the right to privacy, a user may be able to make a complaint to the Office of the Australian Information Commissioner regarding the handling of their personal information by an organisation that is covered by the Privacy Act. However, as noted above, the Privacy Act may permit the use and disclosure of personal information in circumstances that may not be permissible under international human rights law. Thus, it is not clear that this complaint mechanism would necessarily be sufficient for the purposes of the right to an effective remedy. With respect to the right to freedom of expression, it is not clear that there is a state-based remedial mechanism available. For example, it is unclear whether, in circumstances where purported compliance with these standards by a private company resulted in arbitrary interference with a person's human rights, the affected person would have a cause of action in respect of

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161 UN General Assembly, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, A/72/162 (2017) [14]–[15].

162 UN General Assembly, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, A/72/162 (2017) [15].

163 UN General Assembly, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, A/72/162 (2017) [86](j)].

the Commonwealth for such a breach.[164] Thus, if the measures resulted in a violation of an individual's rights, it has not been established that the measures would be compatible with the right to an effective remedy.

*Conclusion*

2.156 While the measures pursue legitimate objectives, it is not clear that regulating the *full range* of materials captured by the measures is rationally connected to the stated objectives, particularly that of preventing harm and improving online safety. Additionally, noting the use of broad and vague terms in the standards, the capability of providers to effectively implement the standards in practice will depend on the quality of industry guidance prepared by the Commission, the nature of the measure, the type of material in question, and the individual service provider. If providers interpreted the scope of materials captured by the measures too broadly, the causal nexus between the materials being regulated and the potential harm caused by viewing such material becomes more tenuous.

2.157 As to proportionality, it has not been established that the measures are sufficiently circumscribed, noting the broad range of materials captured by the measures, the lack of guidance as to how key terms in the standards are to be interpreted and applied by providers, and the use of multiple definitions. These factors may contribute to providers excessively restricting material and significantly interfering with privacy so as to ensure compliance with the standards and avoid liability. There is also a risk that the measures may significantly interfere with rights, noting that while not required to do so, providers have the discretion to proactively scan private communications in order to comply with their obligations under the standards. While the measures are accompanied by some safeguards, such as exceptions for end-to-end encryption services, it is not clear these are sufficient, noting that many safeguards are discretionary. As such, there is a risk that the measures may not constitute a proportionate limitation on the rights to freedom of expression and privacy.

2.158 Further, if an individual's rights to freedom of expression or privacy were violated, it is not clear that there would be an effective remedy available. The measures therefore do not appear to be compatible with the right to an effective remedy.

***Committee view***

2.159 The committee thanks the eSafety Commissioner for this response.

2.160 The committee notes that these legislative instruments, made under Part 9 of the *Online Safety Act 2021* (Online Safety Act) establish industry standards for

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[164] In this respect, it is not clear whether an affected person would have a specific cause of action against the Commonwealth, or would otherwise be able to seek a remedy pursuant to a broader 'act of grace' payment scheme.

'relevant electronic services' and 'designated internet services' with respect to classes 1A and 1B materials, which include child sexual exploitation material; pro-terror material; extreme crime and violence material; crime and violence material; and drug-related material.

2.161 The committee notes that, in its preliminary analysis, it noted that it has previously concluded that it is not clear that the Online Safety Act online content scheme was sufficiently circumscribed such that it constituted a permissible limitation on the right to freedom of expression.[165] The committee also noted that requiring relevant electronic service and designated internet service providers to implement measures to reduce the risk that their services will be used to solicit, generate, access, distribute and store harmful material, including material depicting child sexual exploitation and sexual violence, and pro-terror material that reaches the threshold of incitement to national, racial or religious hatred, likely promotes numerous human rights, and likely permissibly limits the rights to freedom of expression and privacy.[166]

2.162 The committee notes that the scope of materials captured by the measures is much broader than material depicting child sexual exploitation and sexual violence, and pro-terror material that reaches the threshold of incitement to national, racial or religious hatred, and considers that it is necessary to undertake an analysis of whether the regulation of these other types of material is reasonable, necessary and proportionate.

2.163 In this regard, the committee considers that the measures pursue the legitimate objectives of respecting and protecting the rights of victim-survivors, promoting and improving transparency and accountability of online services and improving online safety for Australians. However, the committee considers that it is not clear that regulating the full range of materials captured by the measures is rationally connected to the stated objectives, particularly that of preventing harm and improving online safety. The committee further considers that it has not been established that the measures are sufficiently circumscribed, noting the broad range of materials captured by the measures, the lack of guidance as to how key terms in the standards are to be interpreted and applied by providers, and the use of multiple definitions. The committee considers that there is also a risk that the measures may significantly interfere with rights, noting that while not required to do so, providers have the discretion to proactively scan private communications in order to comply

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165 Parliamentary Joint Committee on Human Rights, *Report 5 of 2021* (29 April 2021) pp. 45–83. The committee has also previously raised concerns with respect to the compatibility of legislation that restricted and criminalised pro-terror expression with the right to freedom of expression. See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament*, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (28 October 2014) pp. 50–52; *Report 9 of 2023*, Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023 (6 September 2023) pp. 61–121.

166 The committee's full initial analysis is set out at Parliamentary Joint Committee on Human Rights, *Report 7 of 2024* (21 August 2023), pp. 41–43.

with their obligations under the standards. The committee notes that the measures are accompanied by some safeguards and welcomes the Commissioner's advice that they will prepare regulatory guidance to industry that will include further information to support providers in complying with their obligations. However, noting that many of the safeguards accompanying the measures are discretionary, it is not clear these are sufficient. The committee therefore considers that there is a risk that the measures may not constitute a proportionate limitation on the rights to freedom of expression and privacy.

2.164 Further, if an individual's rights to freedom of expression or privacy were violated, it is not clear that there would be an effective remedy available. The committee therefore considers that the measures do not appear to be compatible with the right to an effective remedy.

**Suggested action**

2.165 The committee recommends that the statement of compatibility be updated to reflect the information provided by the eSafety Commissioner.

2.166 The committee draws these human rights concerns to the attention of the minister, eSafety Commissioner and the Parliament.

# Tax Agent Services Amendment (Register Information) Regulations 2024[167]

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| **FRL No.** | F2024L00856 |
| **Purpose** | This legislative instrument amends requirements for the publication of information about tax practitioners on the Taxation Practitioner Board register |
| **Portfolio** | Treasury |
| **Authorising legislation** | *Tax Agent Services Act 2009* |
| **Disallowance** | 15 sitting days after tabling (tabled in the House of Representatives and in the Senate on 12 August 2024. Notice of motion to disallow must be given by 4 November 2024 in the House and by 19 September 2024 in the Senate)[168] |
| **Rights** | Just and favourable conditions of work; privacy; work |

2.167 The committee requested a response from the minister in relation to the instrument in *Report 7 of 2024*.[169]

## Expansion of information on Tax Practitioner Board public register

2.168 This legislative instrument expands the scope of information to be included on the register maintained by the Tax Practitioner Board (the Board). The register is a publicly available database that includes the details of all currently registered, and in some cases, formerly registered tax practitioners (including individuals). People can search the register to identify tax practitioners and can view any conditions or sanctions imposed on the tax practitioners.

2.169 This legislative instrument enables the Board to publish more detailed reasons for tax practitioner sanctions, including terminations, on the register; and publish a wider range of information, decisions and outcomes on the register. The instrument also removes time limits on how long certain information appears on the register. For example, the register would be required to include:

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167 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Tax Agent Services Amendment (Register Information) Regulations 2024; [2024] AUPJCHR 73.

168 In the event of any change to the Senate or House's sitting days, the last day for the notice would change accordingly.

169 Parliamentary Joint Committee on Human Rights, *Report 7 of 2024* (21 August 2024), pp. 44–49.

- past names and registration numbers during the previous 5 years for certain entities on the register for misconduct, and details of registration applications rejected on integrity grounds;
- details of Board orders, suspension and termination decisions for misconduct, and details of a Board investigation finding that an entity breached *Tax Agent Services Act 2009* (the Act);
- details or updates to Register information for any appeals to the Administrative Appeals Tribunal or a court, including the fact that an application was made and updates for the outcomes (could include removing an unregistered entity's record if they were exonerated); and
- details of applications by the Board to the Federal Court for a civil penalty or injunction, and details of decisions if the court finds a breach of the Act, orders a penalty, grants a non-interim injunction or makes a finding of contempt of court, and details of any appeals of those decisions.

2.170 Further, if the Board considers it 'appropriate' to include additional information about the order or injunction, other decisions or findings the Federal Court makes in the same proceedings, and other decisions or findings made by the Federal Court or another court in related proceedings, then that additional information must be entered on the register.

2.171 The legislative instrument provides for some flexibility in including information on the register. If the Board is satisfied that entering historical information about an entity (such as a previous name) on the register would pose a safety risk to the individual or a member of their family, and having regard to their safety, it would not be appropriate to enter that information on the Register for a certain period, that information is not to be entered.[170]

## Summary of initial assessment

### *Preliminary international human rights legal advice*

*Rights to just and favourable conditions of work; work; privacy*

2.172 By requiring the publication of personal information about tax practitioners on a public register, this legislative instrument engages the right to work, the right to just and favourable conditions of work and the right to privacy. The right to work provides that everyone must be able to freely accept or choose their work, and includes a right not to be unfairly deprived of work.[171] The right to just and favourable

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170 Section 25B.

171 International Covenant on Economic, Social and Cultural Rights, articles 6–7. See also, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18: the right to work (article 6)* (2005) [4].

conditions of work includes the right of all workers to adequate and fair remuneration and safe working conditions.[172]

2.173 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.[173] It also includes the right to control the dissemination of information about one's private life, and protects against arbitrary and unlawful interferences with an individual's privacy and attacks on reputation.[174] These rights may be permissibly limited where the limitation pursues a legitimate objective, is rationally connected to (that is, effective to achieve) that objective and is a proportionate means of achieving that objective.

2.174 The statement of compatibility identifies that the measure engages and limits the rights to work and to privacy.[175] It states that the objective of the measure is to enable clients to make informed choices and promote the integrity of the tax profession and tax system.[176] It also states that compliance with relevant laws is 'a foundation of competence in this field', and that details about these decisions reflects the competence of the person, which would be relevant factors were an employer considering whether to promote that person. Ensuring the integrity of the tax profession, and that members of the public may make informed choices, would likely be a legitimate objective for the purposes of international human rights law. Including this information on a public register would likely be rationally connected to (that is, effective to achieve) that objective.

2.175 However, a key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. It is not clear whether there would be any flexibility to not publish information on the register where an individual considered that such publication would unfairly damage their reputation, for example, and whether the person would have the opportunity to make submissions in this regard. It is not clear that an individual could seek the exercise of a discretion to not include their current registration information if they had concerns about family violence. In addition, it is unclear why the register would include details about a contempt finding that has been made in relation to an individual,[177] and how

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172 See, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18: the right to work (article 6)* (2005) [2].

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

174 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).

175 Statement of compatibility, pp. 26–29.

176 Statement of compatibility, p. 26.

177 Section 25K.

including such information would be necessary to achieve the stated objective of the measure. Further, it is unclear why the register includes information from up to five previous years, and why a shorter period of time would not be sufficient to achieve the stated objective. In addition, it is not clear that there would be flexibility in individual matters to not include information about a court application.

***Committee's initial view***

2.176 The committee noted that requiring the publication of information about tax practitioners on a public register engages and limits the rights to work, just and favourable conditions of work, and privacy. The committee considered further information was required to assess the compatibility of this measure with these rights. The committee therefore sought the advice of the minister.

2.177 The full initial analysis is set out in *Report 7 of 2024*

## Minister's response[178]

2.178 The minister advised:

> In the Committee's Human Rights Scrutiny Report 7 of 2024, you sought my advice as to:
>
> > (a) whether the legislative instrument is compatible with the right to just and favourable conditions of work;
> >
> > (b) whether there is flexibility to not publish information on the register where an individual submits that publication would unfairly damage their reputation, and whether the person would have the opportunity to make submissions in this regard;
> >
> > (c) why the discretion to not include information on the register where there would be a risk to a person's safety does not apply in relation to a person's current registration information and whether any other flexibility would apply in relation to them;
> >
> > (d) why the register would include details about any contempt findings in relation to an individual, and how including such information would be necessary to achieve the stated objective of the measure;
> >
> > (e) why the register would include information from up to five previous years, and why a shorter period of time would not be sufficient to achieve the stated objective; and
> >
> > (f) why there is no discretion for the register to not include information about an application made to a court or tribunal (before any criminal or civil conduct has been proven).

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178 The minister's response to the committee's inquiries was received on 23 September 2024. This is an extract of the response. The response is available in full on the committee's website.

The *Tax Agent Services Amendment (Register Information) Regulations 2024* (the Regulations) amends the *Tax Agent Services Regulations 2009* to prescribe details of information that the Tax Practitioner's Board (TPB) is to include on the Register maintained under section 60-135 of the *Tax Agent Services Act 2009* (the TAS Act). The Register assists those seeking to engage a tax practitioner to provide s tax agent service (including members of the general public) by providing them with critical information about the practitioner and allow them to search tax practitioners based on the expertise needed or location. The Register also provides visibility of any conditions or sanctions imposed on the entity. As noted in the Explanatory Statement, the Regulations address a number of loopholes and inconsistencies in relation to the information published on the Register. In particular, the Regulations replace the TPB's general discretion to include 'other relevant information' on the Register with specific requirements as to the information that is to be published in certain circumstances, in order to ensure members of the public have available to them the information they need to make fully informed decisions.

*Compatibility with the right to just and favourable conditions of work*

The instrument is compatible with the right to just and favourable conditions of work, which requires that workers have safe working conditions, fair remuneration, equal opportunity for promotion and appropriate working hours. As outlined in the Explanatory Statement, publishing the specified information on the Register does not of itself restrict an individual from working or being promoted as a tax practitioner, or working or being promoted in any other line of work. Publishing information about these entities is necessary to maintain appropriate oversight of the tax profession, to protect the public from potential dishonesty, misconduct or fraud, and maintain high standards of the profession.

The Register is directed to ensuring the integrity of the tax profession, which is a trusted and regulated profession which is required to comply with professional and ethical standards. It is appropriate that, in addition to processes to sanction conduct that breaches those standards, there is a mechanism to alert current or potential clients, or current or potential employers, if the entity has been subject to sanctions or engaged in conduct that does not align with those professional standards. The inclusion of such information on the Register does not limit the right to just and favourable conditions of work. It is common for many professions to be subject to professional standards and to have certain details made available on a public register to achieve a legitimate objective of upholding the standards of that profession and protecting the public from unscrupulous operators.

*Damage to reputation*

As noted in the Explanatory Statement, the Regulations apply to current or former members of a regulated profession or individuals who provide tax

agent services. Of that cohort, it will only be a limited subset that will be subject to the requirement to publish information that goes to their integrity and professional conduct. The information that is required to be published on the Register is factual information about the individual, including about findings by the TPB or courts, which need to follow due process and afford procedural fairness. The Regulations reduce the discretion for the TPB to include other information about individuals on the Register, ensuring that a consistent approach is taken to the information that appears on the Register.

The decision that certain information in respect of the entity be published on the Register is a reviewable decision under section 70-10 of the TAS Act. The entity is entitled to procedural fairness and may make submissions to the TPB for it to consider before making a decision. Those submissions may be directed to matters including whether the individual considers publication would unfairly damage reputation, and this would be considered by the TPB. However, it would not be appropriate for the TPB to be required not to publish information that may damage the person's reputation, as this would undermine the policy intent of the Register. The Register is intended to have a deterrent effect against such behaviour, as well as providing transparency to the public, in order to prevent harm to the public. It is likely to only be considered 'unduly damaging to their reputation' if the information proposed included inaccurate details or a greater amount of information than is necessary to comply with the requirements of the Regulations. The Regulations seek to strike the right balance between ensuring the members of the public are provided with timely information about a tax practitioner in order to make informed decisions about procuring services, and ensuring tax practitioners are afforded due process where they disagree with the actions of the TPB, the tribunal or the courts.

*Personal safety exception*

The personal safety exception to publishing historic details on the register applies if the TPB is satisfied, on the basis of an application in writing from the individual, that publishing the person's past name or registration number on the Register would pose a safety risk to the individual or member of their family. This is an important safeguard, recognising that an individual may have changed their name or registration number specifically to reduce or avoid a safety risk to themselves or their family member. Expanding the exception to include current name and current registration would not further address this matter. The Register is intended to be a complete list of all currently registered tax agents able to provide tax agent services according to the law, so as to allow the public to confirm the genuineness and legality of the services being offered. Having a complete list of all currently registered tax practitioners is consistent with the existing approach and with other similar public facing registers.

*Contempt findings*

Section 25J of the Regulations provides for the Register to include certain information if a court makes a finding of contempt against the entity in relation to proceedings for an order under Subdivision 50-C of the Act or an injunction under Subdivision 70-A of the Act. Including details of contempt findings in those applications supports the objective of the Register, as these are matters that go to the entity's professionalism and integrity. The example in the Explanatory Statement is of an entity advertising tax agent services while unregistered in contravention of the regulatory framework and an interim injunction imposed by the court.

If the Register includes details of such a contempt finding, it must include a statement outlining details of the court's finding and the conduct, which provides context as to the nature of the contempt finding. Information about contempt findings is to be included on the Register for 'such a period as the Board considers appropriate' and this period must not extend beyond five years from the day the information is entered on the Register. This enables the TPB to have regard to the facts and circumstances and context of the contempt finding in determining the appropriate period for the information to be on the Register.

*The five-year period*

Including information from the previous five years was considered an appropriate amount of time having regard to the objectives of the Regulations in enabling members of the public to be able to make informed decisions, and to act as a strong deterrent to tax practitioners engaging in conduct that breaches minimum professional standards. The five-year timeframe is consistent with the criteria for determining whether an individual is a fit and proper person under section 20-15 of the TAS Act, which goes to their eligibility for registration as a tax agent.

*Information about an application made to a court or tribunal*

Including information on the Register indicating that an application has been made to a court or tribunal for an order or injunction under the TAS Act is appropriate and necessary to achieve the legitimate policy objective of the Register. It enables employers and clients to be aware that a tax practitioner may be subject to legal proceedings that relate to their integrity and professional conduct. An application to a court can only happen after the TPB completes a formal investigation in accordance with the Act. Given that court and tribunal proceedings can be lengthy, awaiting until there is an outcome of such proceedings would likely frustrate the purpose of the measure, and could be open to abuse by efforts to simply prolong proceedings. In these circumstances, the privacy impact on the individual is outweighed by the public interest in transparency of information on the Register, and the need to ensure the public is protected from potential harm caused by an unscrupulous adviser or a fraudster.

As noted above, the information on the Register is factual. It will indicate that the person is subject of an application, and that no finding has yet been

made by the court. If the person ultimately has no adverse findings made against them, those details will be immediately removed from the Register.

## Concluding comments

### *International human rights legal advice*

2.179 As to whether the legislative instrument is compatible with the right to just and favourable conditions of work, the minister stated that publishing the specified information on the register does not of itself restrict an individual from working or being promoted as a tax practitioner, or working or being promoted in any other line of work. Rather, the register is directed to ensuring the integrity of the tax profession, and serves as a mechanism to alert current or potential clients, or current or potential employers, if the entity has been subject to sanctions or engaged in conduct that does not align with those professional standards. The minister stated that publishing information about these entities is necessary to maintain appropriate oversight of the tax profession, to protect the public from potential dishonesty, misconduct or fraud, and maintain high standards of the profession.

2.180 As to whether there is flexibility to not publish information on the register where an individual submits that publication would unfairly damage their reputation, the minister stated that a practitioner may make submissions to the board for it to consider before making a decision, including in relation to privacy and reputation. In this regard, however, the minister stated that it is likely to only be considered 'unduly damaging to a person's reputation' if the information proposed included inaccurate details or a greater amount of information than is necessary to comply with the requirements of the regulations. It may be, therefore, that this process offers limited safeguard value in practice. The minister also stated that a decision to include certain information on the register is subject to external review.[179] The availability of review does assist with the proportionality of a measure, albeit noting that in these circumstances it appears that the relevant information will already have been published.

2.181 Further information was also sought as to why the register would include details about any contempt findings in relation to an individual, and how including such information would be necessary to achieve the stated objective of the measure. The minister stated that this information goes to a person's professionalism and integrity. They noted that if the register did include details of such a contempt finding, it must include a statement outlining details of the court's finding and conduct itself, which would provide context as to the nature of the finding. The minister stated that an example of such conduct could include an entity continuing to engage in the profession in breach of an injunction barring them from doing so. In this example, it would appear that there is a clear nexus between conduct constituting contempt, and a person's professionalism and integrity.

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179 *Tax Agent Services Act 2009*, section 70–10.

2.182 In relation to why the register would include information from up to five previous years, and why a shorter period of time would not be sufficient to achieve the stated objective, the minister stated that five years was considered to be an appropriate amount of time having regard to the objective of enabling the public to make informed decisions and deterring practitioners from breaching the professional standards. The minister also noted that this five-year timeframe is consistent with the period of time that is used to determine whether a person is fit and proper and eligible for registration as a tax agent. This additional information would suggest that a shorter period of time may not be effective to fulfil the stated objectives of the register.

2.183 As to the inclusion of information about applications which have been made to a court or tribunal (before any criminal or civil conduct has been proven), the minister stated that this is regarded as appropriate and necessary because it enables employers and clients 'to be aware that a tax practitioner may be subject to legal proceedings that relate to their integrity and professional conduct'. The minister noted that such an application can only happen after the Board has completed a formal investigation. This appears to indicate that an application will only be made where it is considered that there is sufficient evidence establishing that conduct constituting misconduct may have occurred, *prime facie*. The minister stated that given that court and tribunal proceedings can be lengthy, awaiting until there is an outcome in such proceedings would likely frustrate the purpose of the measure, and could be open to abuse by efforts to simply prolong proceedings. The minister stated that the privacy impact on the individual is outweighed by the public interest in transparency of information on the register. The minister stated that the content will indicate that the person is the subject of an application, and that no finding has yet been made by the court, and if no adverse findings are made that information will be removed immediately. Based on this additional information, it appears that the inclusion of such information about the fact that an application has been made may constitute a permissible limit on the rights to privacy, work, and to just and favourable conditions of work in practice.

2.184 Information was also sought as to why the discretion to not include historical information on the register where there would be a risk to a person's safety does not apply in relation to a person's current registration information and whether any other flexibility would apply in relation to this information. The minister stated that this exception would apply only where an individual may have changed their name or registration number specifically to reduce or avoid a safety risk to themselves or their family member. The minister stated that expanding the exception to include current name and current registration 'would not further address this matter'. The minister stated that the register is intended to be a complete list of all currently registered tax agents so as to allow the public to confirm the genuineness and legality of the services being offered. Consequently, this measure would appear to have very limited application, and therefore have very minimal safeguard value.

2.185 However, on balance, having regard to the additional information provided by the minister, it appears that this measure may constitute a proportionate limit on the rights to privacy, work and just and favourable conditions of work in practice.

***Committee view***

2.186 The committee thanks the minister for this response.

2.187 The committee considers that, on balance, based on the additional information provided by the minister, it appears that this measure may constitute a proportionate limit on the rights to privacy, work and just and favourable conditions of work. In particular, the committee notes that a decision to include information about a tax practitioner on the register is subject to external review. The committee considers that had this additional information been included in the statement of compatibility, it would not have sought further information in relation to it.

**Suggested action**

2.188 The committee recommends that the statement of compatibility be updated to reflect the information provided by the minister.

2.189 The committee considers that its concerns have therefore been addressed, and makes no further comment in relation to this legislative instrument.

# Work Health and Safety Amendment (Penalties and Engineered Stone and Crystalline Silica Substances) Regulations 2024[180]

| | |
|---|---|
| **FRL No.** | F2024L00766 |
| **Purpose** | This regulation amends the Work Health and Safety Regulations 2011 to increase monetary penalty levels; prohibit the use of engineered stone benchtops, panels and slabs; and regulate the processing of materials containing crystalline silica. |
| **Portfolio** | Employment and Workplace Relations |
| **Authorising legislation** | *Work Health and Safety Act 2011* |
| **Disallowance** | 15 sitting days after tabling (tabled in the House of Representatives on 25 June 2024 and in the Senate on 26 June 2024. The disallowance period ended in the House on 9 September 2024 and in the Senate on 10 September 2024)[181] |
| **Rights** | Right to just and favourable conditions of work; health; privacy |

2.190 The committee requested a response from the minister in relation to the instrument in *Report 7 of 2024*.[182]

## Disclosure of worker health monitoring reports

2.191 The regulations amend the Work Health and Safety Regulations 2011 (WHS Regulations) to require an employer to provide health monitoring for all workers carrying out the processing of a crystalline silica substance (CSS) that is high risk in accordance with the health monitoring duties outlined in the WHS Regulations.[183] CSS is found in sand, stone, concrete and mortar and is used to make products including engineered stone (used to fabricate kitchen and bathroom benchtops).

2.192 The WHS Regulations require an employer to: provide for health monitoring by a medical practitioner; obtain a health monitoring report; and give the health

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180 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Work Health and Safety Amendment (Penalties and Engineered Stone and Crystalline Silica Substances) Regulations 2024, *Report 9 of 2024*; [2024] AUPJCHR 74.

181 In the event of any change to the Senate or House's sitting days, the last day for the notice would change accordingly.

182 Parliamentary Joint Committee on Human Rights, *Report 7 of 2024* (21 August 2024), pp. 50–54.

183 Subsection 529CE(c).

monitoring report to the worker, regulator and relevant employers who have a duty to provide health monitoring for the worker.[184]

2.193 The health monitoring report must include the following information in relation to a worker:

- the worker's name and date of birth;
- any test results that indicate whether or not the worker has been exposed to a hazardous chemical, and any advice that test results indicate that the worker may have contracted a disease, injury or illness as a result of carrying out the work that triggered the requirement for health monitoring;
- any recommendation that the employer take remedial measures, including whether the worker can continue to carry out the type of work that triggered the requirement for health monitoring; and
- whether medical counselling is required for the worker in relation to the work that triggered the requirement for health monitoring.

2.194 An employer must also ensure that health monitoring reports in relation to a worker are kept as a confidential record identified as a record in relation to the worker and held for at least 30 years after the record is made.[185]

2.195 The statement of compatibility explains that health monitoring is undertaken to detect the early signs of adverse health effects, help identify control measures that are not working effectively, and assist in protecting workers from the risk of exposure to silica dust.[186] Further, in undertaking risk assessments for any processing of CSS, employers must also have regard to the results of any relevant health monitoring previously undertaken at the workplace,[187] and previous incidents, illnesses or diseases associated with exposure to respirable crystalline silica at the workplace.[188]

2.196 The regulations also prohibit the use, supply and manufacture of engineered stone in the Commonwealth work health and safety jurisdiction.[189]

## Summary of initial assessment

### *Preliminary international human rights legal advice*

*Right to just and favourable conditions of work, health and privacy*

2.197 Insofar as the measure requires the health monitoring of workers carrying out the processing of a CSS that is high risk, and the disclosure of information to the

184 Work Health and Safety Regulations 2011, Part 7.1, Division 6.

185 Work Health and Safety Regulations 2011, section 378.

186 Statement of compatibility, p. 38.

187 Subsection 529CA(2)(f).

188 Subsection 529CA(2)(g).

189 Schedules 2 and 3.

regulator and employers to ensure monitoring, compliance and enforcement activities can be undertaken for the health and safety of workers, this measure would promote the rights to just and favourable conditions of work and the right to health. The right to just and favourable conditions of work includes the right to safe working conditions,[190] and the right to health is the right to enjoy the highest attainable standard of physical and mental health.[191]

2.198 However, by requiring the provision of personal health information and permitting the use and disclosure of that personal information, this measure also 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.[192] 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.

2.199 Protecting workers from health risks at work is a legitimate objective for the purposes of international human rights law, and gathering and using health information in the context of regulating exposure to a health risk appears to be rationally connected to (that is, capable of achieving) that objective. In order to be proportionate, a limitation on the right to privacy should only be as extensive as is strictly necessary to achieve its legitimate objective and must be accompanied by appropriate safeguards. It is not clear whether a worker would be informed that their health monitoring report has been shared with the regulator or other relevant employers. It is also unclear whether individual health information needs to be shared with the regulator and employers in order to achieve the stated objective. Further, it appears that a report could include other health information relating to the worker that may be relevant to assessing whether the worker has contracted a disease (for example, comorbidities that are otherwise unrelated to CSS exposure). It is unclear whether reports can be anonymised or redacted before being provided to the regulator and employers or, if not, why it is necessary to provide individual health information in all circumstances. Further, where the *Privacy Act 1988* does not apply, the explanatory materials do not identify what safeguards would protect the confidential health information of a worker.

***Committee's initial view***

2.200 The committee noted that the regulation requires health monitoring for all workers carrying out the processing of a crystalline silica substance (a substance used

190 See, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18: the right to work (article 6)* (2005) [2].

191 International Covenant on Economic, Social and Cultural Rights, article 12(1).

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

to make products including engineered stone) where that is high risk. The committee considered that this is an important measure that promotes the rights to just and favourable work conditions and the right to health.

2.201 However, the committee considered that disclosing health monitoring reports (including a worker's personal health information) to the regulator and employers, engages and limits the right to privacy. The committee noted that the health monitoring framework to which this regulation applies (the Work Health and Safety Regulations 2011) was established prior to the committee's establishment, meaning that the committee has not assessed its human rights compatibility as a whole.

2.202 The committee considered that further information was required to assess the proportionality of the measure with the right to privacy, and as such the committee sought the minister's advice.

2.203 The full initial analysis is set out in *Report 7 of 2024*.

## Minister's response[193]

2.204 The minister advised:

> *(a) why the provision of anonymised or redacted health monitoring reports to the regulator and employers would be ineffective to achieve the objective of the measure (having regard to the functions of the entities receiving the information)*
>
> Providing anonymised or redacted health information would undermine the effectiveness of health monitoring. As well as identifying issues with controls at a workplace, health monitoring is intended to support a person conducting a business or undertaking (PCBU) to put in place safety arrangements that a worker with identified health conditions needs.
>
> This process is detailed in the Model Health Monitoring Guide for Crystalline Silica (The Guide) which has been developed by the national work health and safety (WHS) policy body Safe Work Australia to support PCBUs to comply with the WHS laws. The Guide outlines that following the receipt of a health monitoring report, a PCBU must consult with the worker and explain any recommended remedial measures they must take. For example, removing the worker from continuing to perform silica work or implement additional control measures. It is not appropriate for the health monitoring reports to be anonymised or redacted as a PCBU needs to know the worker's identity and details of the tasks performed to protect that worker.
>
> The Guide also outlines that a PCBU should consult with the worker if they need to do further health monitoring, this is not possible without knowing the identity of the worker. The Guide further outlines that a PCBU should also examine their work practices and procedures to see if tasks are being

193 The minister's response to the committee's inquiries was received on 5 September 2024. This is an extract of the response. The response is available in full on the committee's website.

done correctly and if controls are not effective or being bypassed. If necessary, they should review and revise worker training programs.

In terms of disclosure of personal information to the regulator, compliance and enforcement activities would also be undermined if the report is anonymised or redacted. For example, it may be necessary for the regulator to interview the worker or to inspect training records at the workplace.

*(b) whether there is any flexibility for individual employees to request that certain information not be disclosed, or only be subject to limited disclosure*

Regulation 374(2) provides that certain information must be included in a health monitoring report. If the mandatory information is provided, there would be scope for a worker to request that other information not be disclosed in the report or be subject to limited disclosure.

The information which is specified in regulation 374(2) is the information which is required to manage WHS risks associated with exposure to hazardous chemicals. For example, a clear indicator that controls at a workplace have failed is that a worker has contracted an occupational disease. It is important that the health monitoring report includes this information and that it is available to the PCBU and relevant regulator.

*(c) in circumstances where the Privacy Act 1988 does not apply, what safeguards would protect the confidentiality of a worker's health monitoring report*

If the *Privacy Act 1988 (Cth)* does not apply, section 271 of the model Work Health and Safety Act which has been adopted by all jurisdictions, except Victoria, would apply. This section safeguards against a person, for example a regulator, disclosing information or documentation they gained access to when exercising any power or function they have under the WHS laws, unless a limited exception exists. The limited exceptions having consent of the person, the information is necessary for monitoring and enforcement purposes, required by a court or tribunal etc.

Further, some states have health records legislation which may apply to certain workers in the private and public sector. For example, New South Wales has the *Health Records and Information Privacy Act 2002* which applies to public government agencies, universities, private organisations, health service providers or businesses (with a turnover of more than $3 million) which collect, hold or use health information.

## Concluding comments

### *International human rights legal advice*

2.205 The minister stated that it is necessary for a person conducting a business or undertaking (PCBU, namely, an employer) to receive identifiable health monitoring information about their workers, in order to support the employer to put in place safety arrangements for the worker. The minister stated that the *Model Health*

*Monitoring Guide for Crystalline Silica* (the guide) provides further detail as to the process by which health monitoring activities must be undertaken.[194] The minister stated that the guide outlines that after an employer has received a health monitoring report they must consult with the worker and explain any recommended remedial measures they must take, including any further health monitoring. The health monitoring report template sets out a substantial amount of personal health information which is to be collected by a medical practitioner (including questions about a wide range of prior medical conditions, prior smoking, and the worker's views about the adequacy of dust control and safety measures at prior workplaces). However, it appears that only a limited section of the report (the results of a chest x-ray and spirometry and related recommendations) is provided to a person's employer (and any associated employer), and only where the report has indicated that the worker may have contracted a disease or includes recommendations for remedial measures.[195] This limited disclosure of personal medical information assists with the proportionality of the measure.

2.206 As to whether there is any flexibility for individual workers to request that certain information not be disclosed, or only be subject to limited disclosure, the minister stated that the information set out in subsection 374(2) must be disclosed. This includes the worker's name, date of birth, any test results indicating whether the worker has been exposed to a hazardous chemical, and whether medical counselling is required for the worker in relation to the work that triggered the requirement for health monitoring. The minister stated that the regulator must receive identifiable health monitoring information in order to oversee compliance with the obligation to monitor the health of workers, and to undertake enforcement activities. As only a narrow scope of personal health information is to be provided to the regulator (as set out in the guide identified by the minister), and noting that a report will only be provided where it has indicated that the worker may have contracted a disease or includes recommendations for remedial measures, it would appear that a no less rights restrictive alternative approach would be effective to achieve the stated objective.

2.207 The minister stated that if the mandatory information is provided 'there would be scope for a worker to request that other information not be disclosed in the report or be subject to limited disclosure'. While this may have safeguard value, the process described by the minister would appear to place the burden on a worker to actively request that certain information not be disclosed by their medical practitioner – a process which would rely on the worker knowing that they could make such a request.

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194 See, Health monitoring for crystalline silica | Safe Work Australia. See also, Working with crystalline silica substances (safeworkaustralia.gov.au).

195 See, the template Health Monitoring report at pp. 14–27 (Health monitoring for crystalline silica | Safe Work Australia). The first section of the report template (pp. 14–17) states that a copy of that section should be provided to the employer. The second section of the report template (pp. 18–27) indicates that it should be retained by the medical practitioner.

However, the health monitoring report template set out in the 'Health Monitoring Guide for crystalline silica' published by Safe Work Australia, clearly distinguishes between pages of the report which are to be provided to an employer (the contact details of relevant parties and whether a chest x-ray and other tests have returned normal or abnormal results), and the pages to be retained by the medical practitioner (the worker's detailed medical and working history).[196] This suggests that, in practice, registered medical practitioners are made aware that the detailed medical information about a worker's other health conditions and general health is not to be provided to the employer without the worker's consent. This assists with the proportionality of the measure.

2.208 As to the legislative safeguards which would protect a person's privacy where the *Privacy Act 1988* does not apply, the minister stated that section 271 of the model Work Health and Safety Act would apply (in all jurisdictions other than Victoria, where it has not been adopted).[197] Section 271 provides for the confidentiality of information (and outlines a civil penalty or offence for breach), subject to a several exemptions.[198] This assists with the proportionality of the measure where that model law applies. However, it is unclear what privacy safeguards would operate in Victoria, where this model law has not been adopted. The minister stated that some states have health records legislation which may apply to certain workers, citing one such example in New South Wales. However, the minister did not particularise any further such legislative frameworks. The existence of other privacy requirements may assist with the proportionality of this measure. However, without the specific details of those additional legislative safeguards it is not possible to conclusively assess their safeguard value.

2.209 On balance, however, based on the additional information provided by the minister, it appears that this measure likely constitutes a proportionate limit on the right to privacy.

***Committee view***

2.210 The committee thanks the minister for this response.

2.211 The committee notes that, while there is no flexibility for a worker to request that health information related to exposure to crystalline silica substance is not to be provided to their employer or to the regulator, only a narrow scope of information that is directly related to such exposure is required to be provided to an employer (and then, to the regulator). The committee considers that, based on the *Model Health Monitoring Guide for Crystalline Silica* identified by the minister, a medical practitioner would appear to be made aware that any additional medical information about a worker who has been referred for a health monitoring report is only to be provided to

196 See, Health monitoring for crystalline silica | Safe Work Australia.

197 See further, Model WHS laws | Safe Work Australia.

198 See, for example, *Work Health and Safety Act 2011* (ACT).

their employer with their consent, and is not otherwise required to be provided. The committee considers that this assists with the proportionality of the measure. The committee further considers that it does not appear that there would be a less rights restrictive means by which to achieve the objective of the measure.

2.212 As to safeguards, the committee notes the minister's advice that where the *Privacy Act 1988* would not apply to the protection of personal information, other legislative safeguards would apply. The committee considers the statement of compatibility should identify what other state-based legislative safeguards may apply in each relevant jurisdiction, as this information would facilitate a conclusive assessment of that legislation's safeguard value with respect to the right to privacy.

2.213 The committee considers that, on balance, and having regard to the additional information the minister outlined, this measure likely constitutes a proportionate limit on the right to privacy. The committee notes that, had the statement of compatibility included the additional information outlined by the minister, the committee would not have sought further information in relation to this legislative instrument.

**Suggested action**

2.214 The committee recommends that the statement of compatibility be updated to reflect the information provided by the minister, and to particularise the state and territory legislative measures which would protect the confidentiality of a worker's health monitoring report in circumstances where the *Privacy Act 1988* does not apply.

2.215 The committee considers that its concerns have therefore been addressed, and makes no further comment in relation to this legislative instrument.

**Mr Josh Burns MP**

**Chair**

# Coalition Members' Additional Comments[199]

**Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024**

2.216 Coalition members dissent from the assessment of the Committee majority that this Bill is rationally connected to, or capable of achieving, a legitimate objective.

2.217 Coalition members contend that Bill is not a proportionate limit to the right of freedom of expression or the right or privacy.

2.218 Significant issues have been raised with the Bill by thousands of Australians and groups including the Human Rights Commission, civil liberties bodies, the Australian Law Council, and religious institutions.

2.219 Coalition members are alarmed that honestly held opinions of ordinary Australians can be treated as misinformation under this Bill.

2.220 Coalition members consider this Bill to be a dangerous overreach that will result in the erosion of the Human Rights of Australians.

**Fair Work (Registered Organisations) Amendment (Administration) Bill 2024**

**Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024**

2.221 Coalition members consider these laws to be entirely necessary due to the lawless actions of the CFMEU.

2.222 Coalition members note that since 2003, the CFMEU has been the subject of findings of contraventions of federal workplace laws on more than 1,500 occasions, plus 1,100 contraventions by its office holders, employees, delegates and members. Across 213 court cases total penalties ordered against the CFMEU total more than $24 million, plus at least $4 million ordered against its office holders, employees, delegates and members.

2.223 Coalition members note that the CFMEU has donated $6.2 million to the Labor Party since the current Prime Minister became the party's leader.

2.224 This legislation is a direct consequence of the Labor Government's previous action to hand control of the construction sector to the CFMEU by abolishing the Australian Building and Construction Commission. Since the ABCC's abolition, the construction sector has descended into chaos.

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199 This section can be cited as Parliamentary Joint Committee on Human Rights, Additional Comments, *Report 9 of 2024;* [2024] AUPJCHR 75.

2.225 Coalition members consider these measures to be a proportionate limit on rights.

| **Mr Henry Pike MP** | **Senator Matt O'Sullivan** | **Senator Ross Cadell** |
|---|---|---|
| Member for Bowman | Senator for Western Australia | Senator for New South Wales |