



Law Council
OF AUSTRALIA

Office of the President

26 November 2024

Senator the Hon Penny Wong
Minister for Foreign Affairs
Leader of the Government in the Senate
PO Box 6100
Senate
Parliament House
CANBERRA ACT 2600

By email: [REDACTED]

Dear Senator

Online Safety Amendment (Social Media Minimum Age) Bill 2024

Given the significant limitations of the inquiry and scrutiny process in relation to the *Online Safety Amendment (Social Media Minimum Age) Bill 2024 (the Bill)*—including providing only one day for the preparation of submissions, which is highly concerning—the Law Council was not in a position to provide a formal submission to the inquiry of the Senate Environment and Communications Legislation Committee’s process.

Rather, we have prepared this letter on the chance that it may assist you in your consideration of the Bill.

In this letter, we set out some of the key concerns that we have identified in relation to the Bill. In the time available, the Law Council has been unable to consult in its usual manner with its Constituent Bodies and expert advisory committees. Nor has it been in a position to consider the Bill in any depth. For this reason, the Law Council’s remarks below should be considered preliminary and subject to amendment or clarification.

Law-making processes

As we also noted in our submission in relation to the *Migration Amendment Bill 2024 (Cth)* last week,¹ truncated processes do not ensure proper democratic scrutiny by the Parliament and the community, and undermine Australia’s standing as a democratic global leader. It is important that Australia’s children and young people remain engaged with its democratic processes, most particularly on the question of laws which affect them.

The safety of children online is an issue of critical importance, and measures designed to promote this safety should be subject of proper consultation with experts, industry, parents and caregivers, and young people before they are passed.

¹ Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Legislation Committee, [Migration Amendment Bill 2024](#) (21 November 2024).

The Law Council is concerned that the Bill has been rushed and may lead to significant (unintended) consequences for many Australians (not only children and young people).

The Bill has also been introduced in the context of several related ongoing reform processes, including the *Privacy and Other Legislation Amendment Bill 2024* (the **Privacy Amendment Bill**) currently before the Parliament, the proposed development of a 'Children's Online Privacy Code (as contemplated by the Privacy Amendment Bill)² and the Government's Age Assurance Technology Trial. With respect to the latter, the successful tender was only announced on 15 November 2024 and a report is not expected until mid-2025.³ The Government is also yet to release the recently completed Final Report of the Independent Statutory Review of the *Online Safety Act 2021*.⁴

The Law Council considers that the Bill should be deferred pending the completion of these processes. While its objectives are, as recognised below, important, the Law Council does not consider that the Bill addresses matters of sufficient urgency to justify a rushed approach to its passage.

Scope of services covered is too broad and uncertain

Proposed section 63C would introduce a new definition of 'age-restricted social media platform' (although the new definition builds significantly on the existing definition of 'social media service' in section 13 of the Online Safety Act). The proposed definition is extremely broad (for example, it could encompass internet-enabled messaging services right through to online gaming with multiplayer in-play messaging features) and is likely to bring significant uncertainty to the application of the proposed legislation.

As is noted at pages 3 and 4 of the Explanatory Memorandum, the definition 'casts a wide net' which will need to be subsequently narrowed through legislative rules made by the Minister for Communications to ensure that it does not capture platforms that predominantly 'provide beneficial experiences, such as those that are grounded in connection, education, health and support'. This is a less than desirable approach to legislation—in particular, in relation to a provision which is so critical to the application of the Bill.

As the Law Council has previously stated,⁵ significant matters, such as those dealing with substantive policy issues rather than matters that are purely technical or administrative in nature, should be included in primary legislation rather than delegated legislation. This is particularly important given that significant civil penalties would apply for breaches of the Bill's obligations by age-restricted social media platforms. Rather than emphasising the role of technology and tooling that could protect children and young people online, social media platforms will instead be required to direct their focus to consent and identity verification measures.

Potential overcollection of personal information

Requiring social media platforms to verify the age of users may create significant privacy risks. Much of the detail of the age assurance requirements remains uncertain. However, it

² See *Privacy and Other Legislation Amendment Bill 2024* (Cth) pt 4 (proposed s 26GC – 'Development of APP codes by the Commissioner—Children's 17 Online Privacy Code').

³ Department of Infrastructure, Transport, Regional Development, Communications and the Arts, '[Tender awarded for Australian Government's age assurance trial](#)' (Media Release, 15 November 2024).

⁴ The Hon Michelle Rowland MP, Minister for Communications, '[Government welcomes report into Australia's online safety laws](#)' (Media Release, 1 November 2024).

⁵ See, eg, Law Council of Australia, Submission to Senate Standing Committee for the Scrutiny of Delegated Legislation, '[Exemption of delegated legislation from parliamentary oversight](#)' (2 July 2020).

is likely to involve the collection of biometric data and/or official identification documents from all Australian users. The Government has attempted to address these privacy risks through the proposed Division 3. However, further scrutiny of these provisions is required to ensure that these protections are adequate.

For example, the Law Council has received feedback from members of the Privacy Law Committee of the Law Council's Business Law Section (**BLS**) that the Bill may drive overcollection of personal information (including about vulnerable young people) and further fragment Australia's privacy protection framework. We have also received feedback that the design of an appropriate consent framework for use of personal information provided for the purpose of age verification is not a straightforward task given the nature of the relationships between social media platforms and their users (particularly young users attempting to use the platform).

Penalties

Noting the above concerns regarding the uncertainty of the application of the Bill, the proposed penalties for non-compliance are significant. Further scrutiny would be helpful to ensure that these are broadly appropriate and consistent with the approach adopted to civil penalties in broader Commonwealth regulatory settings.

The human rights of young people

The Law Council acknowledges that the proposed social media ban is designed to protect children and young people from online harms and the negative impact social media is having on their wellbeing. This is a legitimate objective.

However, the Bill may also have unintended consequences for children's enjoyment of their human rights under the United Nations Convention on the Rights of the Child,⁶ to which Australia is party. The Convention not only requires the protection of children from harm, but also securing children's other rights including their freedoms of expression and association. In this context, the Law Council's National Human Rights Committee have raised articles 12 (ensuring that the views of the child are given due weight in accordance with the age and maturity of the child), 17 (ensuring access to information and material from a diversity of national and international sources) and 31 (recognising the rights of the child to engage in play and recreational activities appropriate to their age and to participate freely in cultural and artistic life). As the Australian Human Rights Commission (**AHRC**) points out, the question arises as to whether the limitations that the Bill imposes are lawful, necessary and proportionate, having regard to less restrictive alternatives which may be available.⁷

Members of the BLS Media and Communications Committee have also raised the need of children to develop digital literacy, including cybersecurity awareness and the ability to detect online fraud, as relevant considerations.

The Law Council is also aware of arguments made that the Bill raises constitutional risks particularly in relation to the implied freedom of political communication.⁸

⁶ Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

⁷ Australian Human Rights Commission, Proposed Social Media Ban for Under 16s in Australia, 21 November 2024.

⁸ Sarah Joseph, 'Banning under 16s from social media may be unconstitutional – and ripe for high court challenge', The Conversation, 25 November 2024.

While the Law Council has not reached a position on the Bill's provisions in this context or with respect to the Bill more generally, it considers that such potential issues should be explored through a more substantial Governmental and/or Parliamentary inquiry process. It observes that rushed legislation may be more likely to result in court challenges.

Contact

The Law Council would be pleased to discuss the matters raised in this letter. [REDACTED]

Yours sincerely



Greg McIntyre SC
President