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Submission to the Draft Online Safety (Basic Online Safety Expectations) Amendment Determination 2023

Submission by Mr Garth Hamilton MP
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Introduction

The Online Safety (Basic Online Safety Expectations) Determination 2022 (BOSE Determination), made under section 45 the *Online Safety Act 2021* (the Act), sets out the Australian Government's minimum safety expectations of online service providers for protecting their Australian users. Since January 2022, when the BOSE Determination first commenced, the online environment has continued to rapidly evolve. New online challenges mean that amendments are required to strengthen the BOSE Determination.

This submission makes comment on the draft Amendment Determination, particularly in relation to criminal activity material that is posted online (video footage, photos) by juveniles for the purpose of demeaning victims, gaining notoriety and perpetuating a cycle of criminal recruitment.

Background

Since early 2023, I have been campaigning for stricter control of criminal activity material that is posted on a social media service, a relevant electronic service, or a designated internet service. In March 2023, I introduced the Online Safety Amendment (Breaking Online Notoriety) Bill 2023 (the Bill) into Parliament.

The Bill was for an Act to amend the *Online Safety Act 2021* so that criminal activity material would be explicitly handled in a similar way to how cyber-bullying and cyber-abuse material are treated. The legislation was to provide the eSafety Commissioner with a clearer definition in relation to defining criminal activity material. The Bill defined criminal activity material as *material that is hosted on a social media service, a relevant electronic service, or a designated internet service, and depicts conduct that is, or could be deemed to be, a criminal offence.*

The Bill also sought to provide the eSafety Commissioner with the powers to ensure service providers (big tech companies) respond to complaints made by Australians using social and digital media platforms in regard to the epidemic of criminal activity material being posted online (video footage, photos). This material enables offenders to boast about their crimes and demean their victims, including women, children, and our most vulnerable.

The Bill received support from other Members of Parliament but has not yet progressed through the Parliament. Changes to the draft Amendment Determination could improve safety to end-users in the interim.

Content such as criminal activity material has been demonstrated as being able to provide evidence of the crimes of offenders, and for that reason, such content should continue to be recorded by the appropriate authorities and used for prosecutions. For this reason, people should not be inhibited from posting CCTV footage of crimes committed against them, their place of residence or business, and authorities should be permitted to use video footage, photos or otherwise posted to online platforms to identify and catch criminals. However, I do remain strongly of the view that this content should be removed when reported by community members and victims of crime.

The Queensland Police Service for example now have a dedicated team of twenty-five experts that monitor this content, collect it as evidence and use it to prosecute. Once this is done, the material should be removed.

Removing the content prevents those who posted it from using the material to gain notoriety by boasting about their activities. There is a large base of evidence depicting content developed by youth, of their criminal offences, set against graphics and music.

The evidence shows that social media boasting encourages more juveniles to take up crime. This is particularly the case when the online content is used to glorify crime, encouraging more young people to take up acts of crime and then the cycle repeats itself. Some criminals will always be criminals, but it is possible to cut off their recruitment source.

Recommendations

The draft Amendment Determination proposes a range of new additional expectations and reasonable steps to ensure end-users can use the service in a safe manner and mitigate any negative impact. Service providers are to “ensure the best interests of the child are a primary consideration in the design and operation of any service that is used by, or accessible to, children”. However, children and juveniles are currently exposed to a range of criminal activity material that is posted online.

The additional expectations in the draft Amendment Determination do not include any reference to criminal activity material.

The proposal in my draft Bill does not seek to limit the freedom of users. Rather, it seeks to empower users to ensure material that is of a criminal nature is removed when an adequate complaint is received. The Bill responds to comments by community members that big technology companies and social media platforms are not responsive to community concerns.

The Bill I proposed would give clearer power to victims of crime to ask to have content taken down that is demeaning to them. Currently the digital and social media platforms are not responsive to community concerns by failing to remove the harmful content once it has been reported.

Recommendation 1: Criminal activity material should be clearly defined and treated in a similar way to how hate speech is treated, with criminal activity included as a specific additional expectation, and reasonable steps specified for service providers to take to meet the additional expectation.

There is specific reference in the draft Amendment Determination to hate speech, requiring service providers to have processes in place “for detecting and addressing hate speech which breaches a service’s terms of use”.

I would like to see criminal activity material specifically noted in this section, with examples of reasonable steps that could be taken by a service provider to address and detect criminal activity material. Criminal activity material is having an impact on all members of our community across Australia.

The inclusion of criminal activity material as a specific category will ensure that end-users, including children, are protected from viewing criminal activity material that is often posted online by juveniles for the purpose of gaining notoriety, inciting violence or demeaning victims of crime. A definition of criminal activity material should also be included.

Whilst the Determination includes reference to material that promotes abhorrent violent conduct and material that incites abhorrent violent conduct, specific reference to criminal activity material is essential for distinguishing this type of material. The core expectations are not clear or explicit enough, failing to cover the criminal activity material to which I refer.

Additionally, the draft Amendment Determination adds a subsection that a provider of a service must invest in “systems, tools and processes to improve the prevention and detection of material or activity on the service that is unlawful or harmful”. I would like to see clarification that this paragraph includes criminal activity material, with a definition of criminal activity material provided, in a similar way to how the draft Amendment Determination is adding hate speech, through specific reference and definition.

Recommendation 2: Criminal activity material should be treated in a similar way to how cyber-bullying and cyber-abuse material is treated.

Although a Determination made under section 45 the *Online Safety Act 2021*, does not impose a duty that is enforceable by proceedings in a court, it would be good to extend basic online safety expectations for a social media service to include criminal activity material. I understand this may require changes to the *Online Safety Act 2021*.

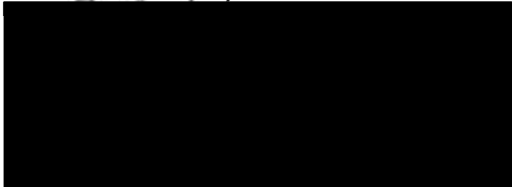
In the absence of this, a Determination made under section 45 can specify additional expectations and reasonable steps, including that the provider of the service will take reasonable steps to minimise the extent to which cyber-bullying and cyber-abuse material targeted at an Australian child are provided on the service.

I would like to see criminal activity material noted as a distinct additional expectation, with service providers being required to take reasonable steps to minimise the extent to which criminal activity material is provided on the service. This would ensure that criminal activity material is treated in a similar way to how cyber-bullying and cyber-abuse material are treated.

Conclusion

I remain very concerned about the increase in juvenile criminal activity in Queensland and in my electorate of Groom over recent years, and I commend efforts by the Government to progress changes to the Online Safety (Basic Online Safety Expectations) Determination 2022.

My submission seeks to further strengthen the BOSE Determination to protect end-users, particularly children. Treating criminal activity in a similar way to how hate speech is treated will provide a stronger mechanism for protecting end-users.



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