From the desk of John Storey, Director of Law and Policy,
and the desk of Margaret Chambers, Research Fellow

Institute of Public Affairs

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Director – Strategy and Research
Online Safety, Media and Platforms Division
Department of Infrastructure, Transport, Regional Development,
Communications, and the Arts
GPO Box 594 Canberra, ACT 2601

Dear Director,

Institute of Public Affairs Submission to the Statutory Review of the *Online Safety Act 2021*

The Institute of Public Affairs (IPA) welcomes the opportunity to share research and analysis as part of the public consultation into the statutory review of the *Online Safety Act 2021*.

The IPA's research on anti-free speech legislation such as section 18C of the *Racial Discrimination Act 1975,* the *Independent Inquiry into the Media and Media Regulation* conducted by Roy Finkelstein, and the federal government's Draft Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 has been vital to informing the Australian public and shaping the direction of policy in Australia.[1]

In this submission, the IPA seeks to provide research into the operation and effectiveness of the *Online Safety Act 2021* ("the Act"). It is the view of the IPA that the current operation of the eSafety Commissioner's Office constitutes a dramatic and immediate threat to the freedom of speech of Australians. The recent episode of the eSafety Commissioner, Julie Inman Grant, attempting to compel X Corp to remove footage of the stabbing of Assyrian Bishop Mar Mari Emmanuel in April 2024 from the global internet is instructive, revealing the excessive powers of the eSafety Commissioner, and overall function of the *Online Safety Act 2021*.

In particular, the IPA finds:

1. The Act contains no presumption of free speech.
2. The Act contains ill-defined concepts and grants the eSafety Commissioner overly broad powers.
3. The powers of the eSafety Commissioner lack democratic oversight.
4. If the eSafety Commissioner is granted 'business disruption sanctions', it would amount to a policy of government sanctioned 'cancel culture'.
5. Online regulation should be narrowly prescribed and emphasise objective standards, free speech, and the protection of children.

The Act contains no presumption of free speech.

The presumption of liberal democratic governments seeking to regulate should always be in favour of free speech, only restricting it if there is a very clear and compelling reason to do so. As the IPA has previously noted, 'Any limitation on freedom of speech needs to be tightly confined, in response to an urgent and pressing problem, and needs to target action, not expression.'[2]

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The Act does not mention the term ‘freedom of speech’. When exercising her powers, the eSafety Commissioner is not required to balance considerations of freedom of speech with the perceived need to remove content online. For example, the eSafety Commissioner invoked section 109 in issuing a take-down notice to X of video footage of the stabbing of Bishop Mar Mari Emmanuel in Wakeley, Sydney. In the exercise of that power, the Commissioner need only meet the requirement of s 109(1)(b), ‘the Commissioner is satisfied that the material is or was class 1 material’. The definition of ‘class 1 material' is set out in section 106 of the Act and means, in short, material that ‘would be likely to be’ classified as restricted content by the Australian Classification Board’.

If the eSafety Commissioner is satisfied that the content meets this definition, she is free to order the censorship of that content without further regard to issues of free speech, free expression, the free communication of ideas, or human rights in any way. Indeed, Inman Grant has called for a ‘recalibration’ of the right to freedom of speech, saying, ‘I think we’re going to have to think about a recalibration of a whole range of human rights that are playing out online, from the freedom of speech to be[ing] free from online violence.’[3]

Section 109 excludes certain content from the Act’s ambit, including ‘parliamentary’, ‘court/tribunal’ and ‘official-inquiry’ content (in effect, various forms of governmental content). Section 233(1) specifies that ‘This Act does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication’. This is a ‘boilerplate’ clause effectively meaning that the Act should not be interpreted in such a way that it breaches the narrow and minimal constitutional limits on the extent to which legislation can impede political communication. It is not a restraint on the eSafety Commissioner nor a requirement for her to consider the impact on freedom of speech.

It is a significant failure of parliament that it has passed legislation that lacks the minimum consideration for the basic rights and liberties of Australians when granting broad powers to the eSafety Commissioner.

The Act contains ill-defined concepts and grants the eSafety Commissioner overly broad powers.

The power of a regulator should always be narrowly defined so as to prevent abuse. The more discretionary the power to censor, the more likely that censorship will reflect the personal subjective preferences of the censor.

Part 3 of the Act sets out four categories of complaints that members of the public can make about online content. In response to these complaints the eSafety Commissioner can launch investigations, issue orders for content to be taken down, and issue fines for non-compliance.

Division 2 of Part 3 of the Act relates to ‘complaints about cyber-bullying material targeted at an Australian child’. Division 3 relates to ‘complaints about, and objections to, intimate images’. Division 4 relates to ‘complaints about cyber-abuse material targeted at an Australian adult’. Each category requires a complaint to be made about a matter that specifically affects an individual.

In contrast, other censorship powers under the Act are much broader and thus the danger of mission creep and abuse is much more likely. The fourth category of complaint in Division 5 of Part 3 of the Act is ‘complaints relating to the online content scheme’, or in effect complaints made about ‘class 1 and class 2 material’. Where class 1 material is material that

would be ‘refused classification’ by the Australian Classification Board, class 2 material is material that would be labelled as pornography by the Australian Classification Board.

This in effect gives the eSafety Commissioner a broad scope to censor material. The National Classification Code, which the Australian Classification Board applies to classify films and other material, defines publications as being classified ‘RC’ (refused classification) that:

a) describe, depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be classified; or
b) describe or depict 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
c) promote, incite or instruct in matters of crime or violence.

Thus, the relevant standard is whether or not content ‘offend[s] against the standards of morality, decency and propriety generally accepted by reasonable adults.’ The test is highly subjective and in effect circular (the standard is something that breaches standards). What ‘offends’ or what is ‘moral’ is likely to be very different for different people. Further, any member of the public could make a complaint about such content, whether or not it personally affects or targets them.

Part 8 of the Act goes even further and allows the eSafety Commissioner to block ‘material that depicts abhorrent violent conduct’, and this power can be exercised regardless of whether a complaint has been made. The eSafety Commissioner may at her discretion determine that such content be blocked, subject only to her being satisfied that ‘the availability of the material online is likely to cause significant harm to the Australian community’ (paragraph 95(1)(c) of the Act). In determining whether material online is likely to cause significant harm to the Australian community, subsection 95(4) requires the eSafety Commissioner to consider:

(a) the nature of the material;

(b) the number of end-users who are likely to access the material;

(c) such other matters (if any) as the Commissioner considers relevant.

So, in effect, it is at the complete discretion of the eSafety Commissioner. The decision on whether material is ‘likely to cause significant harm to the Australian community’ is inherently subjective as the ‘community’ is an abstract notion, not a precise person or group. The decision will ultimately depend on the political and personal perspectives of the decision maker.

It should be no surprise that the most controversial action ever taken by the eSafety Commissioner since the inception of this scheme, namely the removal of footage of the Wakeley stabbing from X globally, was done using powers in the Act that are the most broad, ill-defined, and open to the complete discretion of the eSafety Commissioner.

The eSafety Commissioner’s decision to pursue X Corp with litigation received widespread criticism as regulatory overreach and an intrusion on free speech. An affidavit of Toby Dagg, General Manager of the Regulatory Operations Group within the Office of the eSafety

Commissioner, revealed that the Commissioner's Office used Meltwater, a 'social listening' application, to track daily mentions of 'eSafety Commissioner' and 'Julie Inman Grant' online. The affidavit noted that on the morning of 15 April 2024, prior to the stabbing attack, the Commissioner was mentioned 239 times globally. In comparison, on 24 April, after the Commissioner had issued a removal notice and had obtained an injunction against X Corp through the Federal Court, the number of mentions of the Commissioner had skyrocketed to 31,870, with the court file attaching many X posts from the public criticising the Commissioner's actions. The enormous outcry against the Commissioner in response to her pursuit of X Corp illustrates that the powers of the Commissioner are already seen as controversial and excessive.

The powers of the eSafety Commissioner lack democratic oversight.

Every public official who exercises regulatory power should be subject to a high degree of democratic oversight and accountability to the parliament and the community. Instead, the scheme of the Act is such that the eSafety Commissioner has broad discretions and minimal oversight.

The very nature of the office is unusual and lacks proper oversight. It effectively sits within the Australian Communications and Media Authority ('ACMA') but section 186 of the Act makes it clear that the eSafety Commissioner is not subject to the direction of ACMA. In fact, section 181 of the Act allows the eSafety Commissioner to delegate powers to any member of the staff of ACMA, even down to an APS level 6 employee. Under such an arrangement it is unclear who the staff of ACMA are responsible to, and how the taxpayer funded resources of ACMA are being utilised. This unorthodox and ad hoc arrangement should not be tolerated within the public service at all. In fact, given that the agency concerned has broad discretionary power that may harm individual liberties, the highest standards of oversight and governance should be expected.

Even the communications minister's oversight of the eSafety Commissioner's office is narrowly defined. Section 188 of the Act allows the communications minister to 'give directions to the Commissioner about the performance of the Commissioner's functions or the exercise of the Commissioner's powers,' but these directions 'must be of a general nature only' (subsection 188(2)). In effect, the eSafety Commissioner is free to exercise her considerable powers at her sole discretion.

These powers are largely unaffected by the accountability measures within the Act. Section 220 of the Act contains administrative appeal rights for some parties affected by decisions of the eSafety Commissioner, but such administrative reviews focus on procedure rather than the merit of the decisions. There is also some limited external scrutiny of the office, including obligations under freedom of information laws and the eSafety Commissioner's mandatory attendance at relevant Senate Estimates inquiries, but there is otherwise no governing body overseeing the decisions of the eSafety Commissioner. The communications minister cannot intervene in her decisions, and her employment as eSafety Commissioner cannot be terminated unless she falls foul of one of the items set out in section 176 of the Act such as 'misbehaviour', 'bankruptcy', or 'absence'.

There is a fundamental flaw in the legislation when the same official that holds the power to regulate public debate, by way of removing speech online at her discretion, can also participate in the public debate. The Commissioner plays an active role in engaging with current events and politics, while simultaneously fulfilling the mandate to protect Australians

from 'online harm'. Through her own contributions to the debate, the Commissioner implicitly indicates which political opinions are acceptable and which contribute 'harm' to the community. This has an inherently chilling effect on the debate. For example, Inman Grant warned that adult cyber abuse targeting Indigenous Australians was likely to intensify during the October 2023 referendum, stating, "This is an historic opportunity and we need to make sure the online spaces are relatively safer spaces to be able to get this information out."[4] While the reality of adult cyber abuse complaints related to the Voice was extraordinarily low, amounting to just two complaints, Inman Grant's comments indicated what speech was acceptable and therein chilled the debate.[5]

Broad powers should not be delegated to an unelected public official, and if elected representatives are uncomfortable wielding those powers because of potential political or social consequences, then this demonstrates that it is a power that should not exist.

The eSafety Commissioner being granted 'business disruption sanctions' would amount to a policy of government sanctioned 'cancel culture'.

The eSafety Commissioner has consistently argued that Australia's enforcement powers and penalties must be on par with global regulators. The *Statutory Review of the Online Safety Act 2021 - Issues Paper* suggests 'business disruption sanctions', such as those contained within the United Kingdom's *Online Safety Act 2023*, as a potential solution to the practical challenge of enforcing the eSafety Commissioner's decisions outside of Australia. The *Issues Paper* offers little clarification as to how the business disruption sanctions would operate in Australia, only referencing that in the British example, 'in the most extreme cases, with the agreement of the courts, Ofcom will be able to require payment providers, advertisers, and internet service providers to stop working with a Service, preventing it from generating money or being accessed from the UK (business disruption powers).'[6]

It is clearly the preferred outcome of the eSafety Commissioner that her powers be expanded. In a statement to *The Australian,* Inman Grant said 'Why should these companies that aren't abiding by our laws be monetising our citizens' personal data and taking our advertising funds? This is where we need to look, particularly with the more recalcitrant players.'[7] In a Senate Estimates hearing, she expressed to the Environment and Communications Legislation Committee that she was 'hopeful' that business disruption powers would be an outcome of the Online Safety Act Review.[8]

Legislative amendments that grant greater punitive powers to the eSafety Commissioner's office by way of business disruption sanctions would rightly be understood as draconian internationally and within Australia.

Online regulation should be narrowly prescribed and emphasise objective standards, free speech, and the protection of children.

There are, nonetheless, clear and immediate issues with some online content, particularly children's access to violent, obscene, or otherwise inappropriate content, and for the capacity of law enforcement to track and trace potentially criminal behaviour. To the extent that these concerns require a degree of state regulation of online content, such regulations should be narrowly prescribed, as broad, ill-defined, and highly subjective standards invite such powers to be used in a politically partisan manner.

The following are three principles which should guide any legislative response to issues with online content:

1. Objective standards only. Government power must be exercised according to well-established legal concepts based on clear and objective standards.

2. Presumption of free speech. The removal of speech online should be the last resort and only used when there is a clear need that can be objectively determined by those accountable to Australian voters. Regulation should focus on incitement to action, not expression.

3. Prioritise protecting children. It should be recognised that children are the most vulnerable to inappropriate online content. This however cannot be used to justify the arbitrary removal of legitimate speech online. Lawmakers should instead look to alternative policies for protecting children that do not involve the removal of speech, including age verification technology, mandatory warnings on content, 'child friendly' modes on some devices and applications, or simply limiting the access children have to technology like smart phones.

The IPA thanks the Director for the opportunity to provide this submission. Please do not hesitate to contact John Storey [redacted] for further consultation or discussion.

Kind regards,

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[1] See, for example, Chris Berg, Simon Breheny, Morgan Begg, Andrew Bushnell, and Sebastian Reinehr, *The Case for the Repeal of Section 18C* (Institute of Public Affairs, Research Paper, 2016); Chris Berg, *The Finkelstein Report into Media and Media Regulation: Licensing, Censorship and Accountability* (Institute of Public Affairs, Briefing Paper, 2012); Morgan Begg and John Storey, *Canberra's Digital Ministry of Truth: Research report provided to the Public Consultation on the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023* (Institute of Public Affairs, Research Report, 2023).
[2] Chris Berg and Simon Breheny, *Submission to the Department of Communications Discussion Paper 'Enhancing Online Safety for Children* (Institute of Public Affairs, Research Submission, March 2014).
[3] Joshua Klein, 'World Economic Forum: Australia's eSafety Commissioner Calls for 'Recalibration' of Human Rights, Free Speech,' *Breitbart,* 24 March 2022 (accessed 19 June 2024): https://www.breitbart.com/politics/2022/05/24/world-economic-forum-australias-esafety-commissioner-calls-for-recalibration-of-human-rights-free-speech/
[4] Josh Butler, 'Government puts social media giants on notice over misinformation and hate speech during voice referendum,' *The Guardian* , 29 March 2023 (accessed 19 June 2024): https://www.theguardian.com/australia-news/2023/mar/29/government-puts-social-media-giants-on-notice-over-misinformation-and-hate-speech-during-voice-referendum
[5] eSafety Commissioner, *Commissioner's Summary: eSafety FOI 23145* (Commonwealth of Australia: FOI Document, released 31 January 2024).
[6] Department of Infrastructure, Transport, Regional Development, Communications and the Arts, *Statutory Review of the Online Safety Act 2021: Issues Paper* (Commonwealth of Australia, April 2024), 65.
[7] Geoff Chambers, 'eSafety chief Julie Inman Grant pushes powers to ban tech giants from local advertising cash and data,' *The Australian* (5 June 2024): https://www.theaustralian.com.au/nation/politics/esafety-commissioner-abandons-court-fight-with-x/news-story/2d50bbd3df645e3b3e4df1575d528265.
[8] Evidence to Senate Environment and Communications Legislation Committee, Commonwealth of Australia, Canberra, 30 May 2024, 68 (Julie Inman Grant).