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Director – Strategy and Research
Online Safety, Media and Platforms Division
Department of Infrastructure, Transport, Regional Development, Communications and the Arts
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To whom it may concern,

Submission to the statutory review into the operation of the *Online Safety Act 2021*

As a member of the public, I welcome the opportunity to make a submission to the Department of Infrastructure, Regional Development, Communications and the Arts in relation to the statutory review ('the review') into the operation of the *Online Safety Act 2021* ('the Act').

My submission will specifically address questions 27 and 32 which are contemplated in Part 6 of the issues paper, which deals with 'regulating the online environment, technology and environmental changes'.

I have set out below my concerns in respect of the proposed changes to the Act.

Question 27 - Should the Commissioner have powers to act against content targeting groups as well as individuals? What type of content would be regulated and how would this interact with the adult cyber-abuse and cyberbullying schemes?

I'll begin by stating the obvious – defining what constitutes harmful content against groups is inherently subjective and can lead to overly broad interpretations. Online groups have a particular tendency to perceive arguments against a belief widely held within that group as an attack. Consideration of whether the Commissioner's powers should act against content targeting groups must consider this dynamic carefully. These groups would consider a wide array of online content – including good faith arguments and research, as being 'harmful content' against them if it goes against their core group beliefs. There is a real question in my mind on whether it is appropriate or desirable for the Commissioner to be given powers that more influential groups would undoubtedly lobby to be exercised against content they consider to be 'harmful'.

No doubt the Commissioner of the day would seek to allay these fears by stating that they would only exercise their powers to target 'harmful misinformation'. The problem with this is that establishing the veracity of a statement that is related to anything controversial in this day and age is extremely difficult. Furthermore, it is not the Government's place to tell the public what they should believe, nor to filter content that it deems unacceptable from the public view.

Before considering whether these powers should be expanded in scope, it is necessary to consider how the powers currently contained in the Act have been exercised by the Commissioner. Cases such as the recent matter between X (Formerly Twitter) and the Commissioner in which the Commissioner was rebuked for overreaching¹ do not provide me with any comfort that extended powers would be used in a proper manner. We must be wary of an over-zealous regulator in an area of the law in which there are considerable negative incentives to pursue cases that boost the social standing of the person occupying the position of the Commissioner, often at the expense of the interests of the Australian public.

While the intention behind protecting groups from online harm is understandable, expanding the eSafety Commissioner's powers to include group-targeted content is fraught with risks. It threatens freedom of

¹ Mason, M. and Bonyhady, N., 2024. Judge rebukes 'clear case' of government overreach on stabbing video. Australian Financial Review, [online] 14 May. Available at: <https://www.afr.com/technology/judge-rebuked-clear-case-of-government-overreach-on-stabbing-video-20240514-p5jdfv> [Accessed 15 May 2024].

expression, increases the potential for regulatory abuse and overreach, complicates the existing legal framework, and poses significant practical implementation challenges.

Question 32 - Does Australia have the appropriate governance structures in place to administer Australia's online safety laws?

In considering what kind of governance structure would be appropriate, we should consider governance structures that apply to other important government bodies.

Consider the Australian Taxation Office. Given the considerable powers given to the Commission of Taxation such as in section 353-10 of Schedule 1 of the *Taxation Administration Act* 1953, there is a system of external scrutineers in place to ensure the public that we can have confidence in the administration of our taxation system. It is therefore no surprise that the ATO is regularly reviewed by the Inspector-General of Taxation and Taxation Ombudsman.

Similarly, the Financial Regulator Assessment Authority is responsible for assessing and reporting on the effectiveness and capability of the Australian Securities and Investments Commission and the Australian Prudential Regulation Authority. The importance of ASIC and APRA to Australia requires no explanation.

However, no such oversight body exists to ensure that the eSafety Commissioner is operating in a fit for purpose manner. Given the potential impact the powers given to the Commissioner could have on free speech and expression in Australia, it is my view that it is only logical that such an oversight body should be constituted.

Additional governance structures should be implemented to ensure that staff that are employed by the Commissioner are able to exercise their duties in an impartial manner – as required by the APS values as set out in section 10 of the *Public Service Act* 1999. The Commissioner's history of targeting certain companies and individuals such as X (formerly twitter) is indicative of unacceptable attitude towards people who hold certain political views.