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Dear Australian Department of Infrastructure, Transport, Regional Development,
Communication and the Arts

Re: *Statutory Review of the Online Safety Act 2021 (Cth)*

Thank you for the opportunity to provide input into the statutory review of the *Online Safety Act 2021 (Cth)* ("Act").

My Background

I am a practising lawyer and an Associate Professor at the University of Western Australia ("UWA") Law School. I have worked as both a lawyer and as a law academic for nearly 15 years. Prior to this, I worked in various roles, including as a journalist and television producer. I currently work as a criminal lawyer and previously worked as a full-time litigator and as a family lawyer.

I commenced researching social media and the law in 2011, when I chose it as the topic of my PhD. I was fortunate to graduate from my PhD from Murdoch University in Western Australia in 2014. I have spent thousands of hours, over nearly 15 years, reading and speaking about and critically analysing social media and the law.

Since my graduation, I researched social media and the law and Health law extensively. I also created a unit, LAWS3317 Social Media and the Law, at the UWA Law School in 2018. I taught the unit every year since. Some of the topics that I teach in the unit include: cyberbullying and the law, the non-consensual distribution of intimate images and the law, Body Image Law and social media, defamation on social media, artificial intelligence and the law and the internet of things and the law. I will shortly receive approximately 120 exams in this unit to mark, which has resulted in these submissions being shorter than they might be otherwise.

I am grateful that I have spoken about my social media and the law research internationally, including at the following venues: the Federal Parliament of Australia, the Supreme Court of Canada, Harvard University and the County Court of Victoria.

Some of my other qualifications are: BBA (Hon) (Schulich School of Business, York University), LLB (Dist) (UWA), Graduate Certificate of Population Health Studies (UWA) and Graduate Certificate of University Teaching (Notre Dame).

My comments about the Act are below and partially answer questions 9, 18 and 31.

Question 9: are the complaints schemes accessible, easy to understand and effective for complainants?

Australians must complain to a social media about the cyberbullying of children and cyber-abuse of adults before they may ask the e-Safety Commissioner for help.¹ If the social media does not remove the offending post/s within 48 hours (or a longer period that the e-Safety Commissioner permits), they can complain to the e-Safety Commissioner. The e-Safety Commissioner can send a removal notice to the social media, which then has 24 hours to remove the material (or a longer period that the e-Safety Commissioner permits) or face financial penalties.²

This complaints system gives Australians a practical, straight forward way to address the harms that they face. However, the complaints system does not sufficiently consider the permanency of social media. A harmful post can be on social media for under a minute and still cause considerable damage. It may be online forever, for example, if someone reposted it. Therefore, I strongly suggest amending the Act to lower the time limits that social media have to respond to complaints and require social media to actively search online for every use of the harmful material and remove it. Further, if the material is still online, anywhere, even though the social media abided by the relevant time limits, the social media should receive an appropriate and significant financial penalty.

Admittedly, notwithstanding the above, the harmful material may still be online in some form, but it could still provide some assistance to victims.

I also recommend modifying the Act so that victims of cyber-bullying, cyber-abuse and the non-consensual distribution of intimate images can receive financial compensation directly from the social media for the harm that they experienced. Currently, the Act does not contain this kind of compensation to victims. There are some civil cases in Australia where financial damages were awarded to victims of the non-consensual distribution of intimate images that may be helpful to consider for quantum.³

In the 2022-23 financial year the e-Safety Commissioner received 1,969 complaints relating to child cyberbullying material and 2,516 complaints relating to adult cyber-abuse.⁴ This number appears to be very low considering that, for example, over half of Australian young

¹ *Online Safety Act 2021* (Cth), ss 65, 77, 88.

² *Ibid.*

³ See, for example, *Wilson v Ferguson* [2015] WASC 15.

⁴ eSafety Commissioner, *eSafety Annual Report 2022-23*, 168, 201

<<https://www.esafety.gov.au/sites/default/files/2023-10/ACMA-and-eSafety-Commissioner-annual-report-2022-23.pdf?v=1717471630442>>.

people experienced cyberbullying sometime in their life.⁵ Therefore, I query whether enough Australians are aware of how the e-Safety Commissioner can help them with these challenges.

Question 18: are Australia's penalties adequate and if not, what forms should they take?

The current penalties for breaching the Act are the same for all social media: 500 civil penalty units (under a million dollars).⁶ I suggest modifying all financial penalties in the Act that apply to social media so that they are an appropriate percentage of revenue. This modification may be sufficiently significant to act as a deterrent to social media so that they change their behaviour. As well, it arguably levels the playing field, so smaller social media are penalised financially less than larger ones. Of course, any form of financial penalty (no matter how large) will not be an effective deterrent for some social media to change their behaviour.

Question 31: what features of the Act are working well, or should be expanded?

One of the significant reasons why so much harm occurs on social media is due to its anonymity. A reason why people write hateful, defamatory and/or harmful material on social media is because they can do so anonymously⁷. While one can learn the identity of someone who posts on social media through various legal processes, e.g. (a) pre-action discovery in civil litigation;⁸ (b) serving a subpoena,⁹ and (3) the e-Safety Commissioner can give social media a written notice requiring them to provide information about the identity and contact details of a user.¹⁰ Failure to comply with the notice could attract a 100 point civil penalty.¹¹ Methods (a) and (b) can be lengthy and costly. This would prohibit many people from accessing them. Regarding method (c), the social media may not have the correct information regarding a person's identity and contact details because a social media user could easily lie about them when they join.

I strongly believe that if the Act is modified to remove some of the anonymity associated with social media, it could result in less hate/defamatory/harmful material being posted and it could be positive for the public's mental health.

One way to lower the anonymity on social media is to modify the Act so that it requires people who join social media to share their identification to establish their identity, which is then encrypted. In the United States, legislation was passed that requires young people who join social media to share their identification in the age verification context. For example, legislation in Utah states:

(3) (a) Beginning March 1, 2024, a social media company shall verify the age of an existing or new Utah account holder and, if the existing or new account holder is a minor, confirm that a minor has consent as required under Subsection (1):

⁵ Headspace, *Headspace National Youth Mental Health Survey* (2020) <<https://headspace.org.au/assets/Insights-experiences-of-cyberbullying-over-time-National-Youth-Mental-Health-Survey-2020.pdf>>.

⁶ *Online Safety Act 2021* (Cth); *Crimes (Amount of Penalty Unit) Instrument 2023* (Cth).

⁷ Pan, Hou and Wang, 'Are We Braver in Cyberspace? Social Media Anonymity Enhances Moral Courage' (2023) 148 *Computers in Human Behavior* 107880, 107880; Hollie Sutch, and Carter Pelham, 'Anonymity, Membership-Length and Postage Frequency as Predictors of Extremist Language and Behaviour among Twitter Users' (2019) 13(2) *International Journal of Cyber Criminology* 439, 439.

⁸ See, for example, *Yu v Yong* [2022] SADC 10.

⁹ Patrick George et al, *Social Media and the Law* (LexisNexis Australia, 4th ed, 2023) [7.104-7.122].

¹⁰ *Online Safety Act 2021* (Cth) s 194.

¹¹ *Online Safety Act 2021* (Cth) s 195.

- (i) for a new account, at the time the Utah resident opens the account; or
 - (ii) for a Utah account holder who has not provided age verification as required under this section, within 14 calendar days of the Utah account holder's attempt to access the account.
- (b) If a Utah account holder fails to meet the verification requirements of this section within the required time period, the social media company shall deny access to the account:
- (i) upon the expiration of the time period; and
 - (ii) until all verification requirements are met.
- (4) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, the division, with consideration of stakeholder input, shall make rules to:
- (a) establish processes or means by which a social media company may meet the age verification requirements of this chapter;
 - (b) establish acceptable forms or methods of identification, which may not be limited to a valid identification card issued by a government entity;¹²

While people might understandably be concerned about their privacy when submitting their personal identification documents to social media, it is hoped that the Government would use its best efforts to address this. If people who seek to join social media do not want to share their personal identification documents, of course, they have the option not to join.

This recommendation, unfortunately, does not address the people who are currently anonymous on social media. It only addresses new users. To require existing social media users to provide identification documents to prove their identity could prove very challenging. Users could be given a specific time period during which to provide their documents, for example, six months. If they do not, they could receive a warning. If they do not then comply, the social media could delete their account.

The Act could also be amended so that social media requires people to use their real names on their profiles, to further lessen anonymity. The names used on profiles would need to match the names on the identification provided. Again, many people would raise privacy concerns, but they have the choice not to use social media. The Act should further state that social media's Terms and Conditions must state the above measures and explain why they are required.

Ending the public's current anonymity on social media could be a significant way to help protect people from online harm. If the above ideas are not amenable, I strongly suggest at least thinking of alternative ways to amend the Act to lesson anonymity on social media.

Ending anonymity on social media is a contentious recommendation that a significant number of people would likely vehemently disagree with.

Conclusion

Thank you for reviewing my comments above.

I wholeheartedly encourage the Australian Federal Government to be brave and bold in its efforts to protect the public from the harmful affects of social media when considering modifying the Act. The Government should be prepared to make tough decisions to protect the public, and particularly young people.

Further, I also encourage it to take a proactive, as opposed to a reactive, approach.

¹² *Utah Social Media Regulation Act*, 13-63-102 USC §3 - 4 (2023). Though I note that there have been some legal challenges to this Act, see for example, Bryan Schott, 'Utah's New Social Media Regulation May 'Completely Change' this Year on Heels of Second Lawsuit', *The Salt Lake Tribune* (17 January 2024) <<https://www.sltrib.com/news/politics/2024/01/17/utahs-new-social-media-regulation/>>.

If you require any further information, please feel free to contact me.

Yours faithfully



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