SUBMISSION:

Review of the Online Safety Act

AUSTRALIAN CHRISTIAN LOBBY

About Australian Christian Lobby

The vision of the Australian Christian Lobby (ACL) is to see Christian principles and ethics influencing the way we are governed, do business, and relate to each other as a community. ACL seeks to see a compassionate, just and moral society through having the public contributions of the Christian faith reflected in the political life of the nation.

With around 250,000 supporters, ACL facilitates professional engagement and dialogue between the Christian constituency and government, allowing the Voice of Christians to be heard in the public square. ACL is neither party-partisan nor denominationally aligned. ACL representatives bring a Christian perspective to policy makers in Federal, State and Territory Parliaments.

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Introduction

The import of this submission does not, regrettably, engage directly with the terms of reference (TOR) established for this review, which the ACL argues are wrong in principle. This review is asked to investigate whether existing powers granted to the eSafety Commissioner under the Online Safety Act 2021 are sufficient for the purpose of keeping Australians safe online. This ignores the urgent need to ensure that the online speech of Australians is not unduly restricted by the powers that have already been granted. Given the real concerns Australians have about the potential for a regulator established to prevent "harm" to trespass on freedom of speech that ought to be protected (but apparently is not), any discussion of whether to fortify those powers is, at best, premature.

Interference with freedom of speech, beyond the carefully defined parameters established in the ICCPR, should be recognised a violation of human rights. In the absence of freedom of speech, the necessary preconditions for democracy do not exist in Australia. Trust that the Albanese Government is cognisant of its responsibility to safeguard our democratic system has already been weakened by a series of proposals for legislation to suppress so-called "misinformation and disinformation" in the name of ensuring public safety. The abuse of power by the Department of Home Affairs during the pandemic demonstrated in "the Australian Twitter Files" (exposed by Senator Alex Antic) and the collusion of RMIT's "Fact Lab" with Meta in the lead up to the Voice referendum amply demonstrate the potential for the power of social media platforms to be harnessed in the service of political agendas.

Given the increasingly obvious need for measures to prevent such abuse, the revised timing of this review, with terms of reference that direct attention away from freedom of speech and toward questions about how to strengthen the power to suppress it, is unfortunate. It creates the impression that the government has not only failed to understand the threat to freedom of speech but is working energetically to regularise the mechanisms that facilitate its suppression. This will do nothing to allay public concern.

The ACL urges this Review to recommend an urgent inquiry into protections for freedom of speech online. This must include a reconsideration of the role and function of the eSafety Commissioner and not, as the terms of reference for this review indicate, with a view to fortifying these powers. This submission details some of our concerns about the current operation of the Online Safety Act 2021 and our recommendations for remedial action.

Questions under review:

1) *Are the current objects of the Act to improve and promote online safety for Australians sufficient or should they be expanded?*

One-sided consideration of a two-sided issue

The current objects of the Act speak to only one side of a two-sided issue. The need for safety must be balanced with the need to preserve freedom of speech and the constitutional (implied) right to political communication.

Australians that are so cushioned from contact with "harmful" content are not equipped with the information they need to form independent opinions. It is not the role of any government to act as parent to the populace. We note that the current role of eSafety Commissioner was borne of her former role as the Children's eSafety Commissioner, to protect Australia's children. The remit of the Office of the Children's eSafety Commissioner (2015) was expanded in 2017, when it became the Office of the eSafety Commissioner. The Online Safety Act 2021 broadened the powers of the eSafety Commissioner still further but retained the exclusive focus on safety and preventing harm.

We note, with regret, that the eSafety Commissioner has been the target of personal abuse for fulfilling a duty that she perceives as consistent with her role to protect Australians from harm. On the other hand, since adults are not children, an objection on the part of Australians to being "parented" by the government is understandable. Questions about what decisions the Commissioner is making on behalf of all Australians and what right she has to make them would seem to be justified.

The OSA has strayed from its initial objectives

As summarised on the government's website, the Online Safety Bill 2021:

1. *retains and replicates certain provisions in the Enhancing Online Safety Act 2015, including the non-consensual sharing of intimate images scheme;*
2. *specifies basic online safety expectations;*
3. *establishes an online content scheme for the removal of certain material;*
4. *creates a complaints-based removal notice scheme for cyber-abuse being perpetrated against an Australian adult;*
5. *broadens the cyber-bullying scheme to capture harms occurring on services other than social media;*
6. *reduces the timeframe for service providers to respond to a removal notice from the eSafety Commissioner;*
7. *brings providers of app distribution services and internet search engine services into the remit of the new online content scheme; and*

8. *establishes a power for the eSafety Commissioner to request or require internet service providers to disable access to material depicting, promoting, inciting or instructing in abhorrent violent conduct for time-limited periods in crisis situations.*[1]

When the OSA was first introduced, the government's objectives might well have appeared reasonable and proportionate. According to the second reading speech of Paul Fletcher, then Minister for Communications:

> *"This bill will establish a world-first cyberabuse take-down scheme for Australian adults, based on the success of our cyberbullying scheme for children. This new scheme provides a pathway for those experiencing the most seriously harmful online abuse to have this material removed from the internet …*
>
> *The bill provides for the eSafety Commissioner to publish statements about the performance of digital platforms in meeting the government's expectations. The intent is to drive an improvement in the online safety practices of digital platforms. Where they fall short, the statements will provide advice to the public to inform their use of these services."*[2]

The potential for these benign-sounding initiatives to undermine fundamental preconditions for democracy do not appear to have been canvassed, possibly because Parliament anticipated that the operation of the Act would not interfere with freedom of speech. S. 233 of the Bill explicitly stated that "This Act does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication."[3] The Greens, rightly concerned to prevent private entities censoring Australian public discourse introduced amendments that would require service providers to "take reasonable steps to: (i) ensure that material is not removed unnecessarily; and (ii) ensure that access to material is not restricted unnecessarily; and (iii) minimise the impact of meeting basic online safety expectations on freedom of expression, including expression in the form of advertising and educational materials and as part of the conduct of lawful business".[4] The idea that the Basic Online Service Expectations could or would be used to deliver power to service providers to censor unjustifiably – indeed, to incentivise them to over-censor – may not have occurred to Parliament for the simple reason that such an idea should be unthinkable.

In the course of the two years since the Act came into effect, however, potential problems have emerged that now require remedial action. Before any expansion of the powers already granted to the eSafety Commissioner by the OSA is even contemplated, the ACL would recommend ensuring the extent of those powers are clearly defined and appropriately constrained. The question of where "safety" begins and ends is vitally important.

[1] Online Safety Bill 2021. Accessed 20/06/24.
[2] Mr Fletcher (Minister for Communications, Urban Infrastructure, Cities and the Arts), Second reading speech, House of Representatives Official Hansard, 46th Parliament of Australia, Tuesday, 24th February 2021, 1785ff.
[3] *Online Safety Act, 2021*.
[4] Senate Official Hansard, 46th Parliament of Australia, Tuesday, 22 June 2021, 3579.

Definitional problems

Cyber abuse/image-based abuse

Arguably, powers created with the protection of children in mind are the wrong starting point for a discussion about the balance between "preventing abuse" and "protecting freedom" that is necessary for the government of adults. By way of illustration, a scheme to protect children from "non-consensual sharing of intimate images" is unproblematic. Clearly, this was intended to allow remedial action where, for example, a vengeful boyfriend or girlfriend has circulated naked images of a teenager to their peer group. In such a case, intervention to prevent further dissemination of the image is clearly necessary and correct.

On the other hand, if someone posts semi-naked images of themselves on their own social media pages to advertise their support for a sexualised political movement and this person's professional life involves the care of vulnerable children and young adults, is it "cyber abuse" for others to replicate and circulate that image in order to draw attention to this person's deviant activity for the purpose of warning parents and protecting children? Such a situation would seem to be very different to the first case but might still, conceivably, qualify as "non-consensual sharing of intimate images", "image-based abuse", "cyberabuse" or "cyber bullying" according to definitions applied by the eSafety Commissioner.

Any ambiguity about what is, and what is not, allowable public communication, will predictably be weaponised to suppress one viewpoint at the expense of another, and value-judgments in such cases have political implications. In the first example, government suppression of information is clearly needed to protect a vulnerable child. In the second, government suppression of information could have the effect of working counter to child protection by interfering with the right of Australian parents to know who is doing what with their children. The interface between "child protection" and "political communication" will need to be precisely defined.

Further, the second example points to potential for asymmetric viewpoint suppression by a government agency. It should go without saying that this is inimical to democracy and yet public statements by the eSafety Commissioner indicate a lack of awareness on this point.

In May 2022, Julie Inman Grant told the Responsible Tech Summit that she appreciates the ability of social media to "help serve as a great leveler and a democratizer and speak truth to power" but that she also considers the regulation of what is conveyed on social media – amplification and protection of "vulnerable voices" – as in some sense necessary to achieving this "democratisation". She said:

> *"You can promote voices but if you don't protect them then you're actually leading to the supression of voices, particularly vulnerable voices. So, of course, we know that those who are indigenous, or Torres Straight Islander, who identify as LGBTQI or have disabilities are three times more likely to experience targeted online abuse rooted in misogyny, racism, homophobia, harassment - you name the list of horribles, we all know that they manifest online. So there's the disinhibition effect*

> *and frankly people have been able to do it with relative impunity, I think, until now."*[5]

It seems that view point suppression in the name of protecting "vulnerable voices" is openly contemplated. In January 2022, Inman Grant told attendees of the World Economic Forum's conference at Davos 2022 that there is a need to "think about a recalibration of a whole range of human rights that are playing out online, from freedom of speech to the freedom… to be free from online violence".[6] Her solution to the "problem" (as she sees it) is "safety by design", which entails building an information architecture that would allow both government and private entities to determine the limits of free speech:

> *"Safety by design to me is key. This is putting the responsibility back on companies from the leadership, from the top down, to prioritize safety, build it in at the front end. You know, we have the basic online safety expectations which basically lay out the duty of care and what we expect interactive services to be doing as a right or a license to operate in our country."*[7]

Abhorrent violent conduct

S. 95 of the OSA empowers the eSafety Commissioner to issue a blocking request for material that promotes, incites or provides instruction in "abhorrent violent conduct", which is defined with reference to Subdivision 17 H of Division 474 of the Criminal Code.

This power was invoked in the eSafety Commissioner's recent request for X (formerly Twitter) to block the video of the alleged attack on Bishop Mar Mari Emmanuel at the Wakely church on April 15. As reported by the media, the Commissioner considered her actions in this matter to be consistent with the regular functions of her office:

> *"Our sole goal and focus in issuing our removal notice was to prevent this extremely violent footage from going viral, potentially inciting further violence and inflicting more harm on the Australian community," she said.*
>
> *The commissioner said the key concern throughout the case was the ease by which children were able to access the "extremely violent" stabbing video on X."*[8]

While not concerned about the question put to the Federal Court in the case brought by X as to whether the Australian eSafety Commissioner has power to demand extra-territorial censorship of particular posts, the ACL is concerned to note that X seems to have been the only platform to ask the question. According to the eSafety Commissioner:

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[5] "Responsible Tech Summit: Improving Digital Spaces", 20 May 2022, Consulate General of Canada New York [YouTube].

[6] Australian eSafety Commissioner, World Economic Forum, Davos, 2022, Paridae Vision [YouTube], 26 May 2022.

[7] "Responsible Tech Summit: Improving Digital Spaces", 20 May 2022, Consulate General of Canada New York [YouTube].

[8] Canberra Daily, "X labels eSafety case drop a win for freedom of speech", *Canberra Daily*, 5th June 2024.

> *"Other major social media platforms and search engines complied with our (take-down) requests and removal notices, including Meta, Microsoft, Google, Snap, TikTok, Reddit and Telegram."*[9]

This raises legitimate questions about whether the government has the right to order particular events to be "memory holed" and what else is being taken down by the eSafety Commissioner without our knowing? Transparency is necessary so that Australians can ensure that censorship powers are being used responsibly and with political impartiality. Where intervention to prevent the promotion of "abhorrent violent conduct" is warranted, consideration should be given to how the legitimate objective of preserving public safety can be achieved while minimising interference with the right of Australians to stay informed about what is happening in their own country. For example, instead of issuing "take down" orders for all versions of the Mar Mari video, it should be possible to request that only those portions that are of concern should be screened out while other information in the video is retained.

Cyber abuse and serious harm

The OSA defines "cyber abuse" with reference to material that an "ordinary reasonable person would conclude … was intended to have an effect of causing serious harm" or "would regard … as being, in all the circumstances, menacing, harassing or offensive":

- "Menacing, harassing or offensive" are not defined.
- "Serious harm" is defined as "serious physical harm or serious harm to a person's mental health, whether temporary or permanent".
- "serious harm to a person's mental health includes: serious psychological harm; and serious distress; but does not include mere ordinary emotional reactions such as those of only distress, grief, fear or anger."

These "threshold definitions" – if they can be described as such – are insufficient for the task of ensuring any moderation of the public discourse is appropriately constrained. It is an overly broad definition of "online harm" if it can "encompass a broad range of conduct across differing platforms and online spaces, which is everchanging in a highly dynamic digital environment."[10]

The Commissioner has openly contemplated measures to protect public office holders from "pile on" attacks. Given the capabilities of social media to generate and direct public hostility, there may be some merit in considering ways to preserve the sanity, privacy and reputations of those entering public life. However, such measures should never be considered in isolation from the equal and opposite imperative of ensuring Australians can criticise political leadership and expose activity by those holding public office to hold them to account. In the absence of any discussion about the limits of such powers, the eSafety Commissioner's

[9] Nathan Schmit, "'Dog whistle': Regulator accuses Musk", *NewsWire,* c. 12 June 2024.
[10] Social Media and Online Safety, House of Representatives Select Committee on Social Media and Online Safety, 'Social Media and Online Safety' (March 2022), [2.12], Social Media and Online Safety – Parliament of Australia (aph.gov.au), accessed 16/06/24.

suggestions seem like an irresponsible departure from the principles of democracy and stray into authoritarianism.

Lack of Transparency

The fact that the eSafety Commisioner can suppress communications, without this being observed by the public, points to the further problem of lack of transparency, which is only compounded by the recent changes to the "Basic Online Safety Expectations".

The "Basic Online Safety Expectations" seem to have been designed with consumer law in view. This would explain the pre-eminent concern with ensuring a service is "safe". However, when the services in question are the social medial platforms that are now essential to public political discourse, an exclusive focus on "safety" of that sort is inappropriate. It will be necessary to explain how the Commissioner's enthusiasm for "safety by design", which places the burden of ensuring "safety" on the service providers themselves, can be reconciled with the government's duty to take positive steps to prevent interference from public or private sources, with the freedoms that rightly belong to Australians.

Noting the Minister's intentions to revise the BOSE determination earlier this year, Michelle Pearse, ACL's CEO, raised various concerns which still have not been answered. These concerns bear repetition here:

> "The BOSE determination would seem to impose obligations on Big Tech companies to proscribe and censor the free speech of Australians online in ways that are not transparent, certainly to the public but possibly even to the eSafety Commissioner. Since I'm sure you have considered the grave implications of such proposals for Australian sovereignty and the functioning of our democracy, I would be grateful if you could provide clarification on particular points of concern.
>
> **How will we know what is being screened out?**
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> Considering that Big Tech companies will now (if the BOSE Determination is signed) have the ability to control the digital town square, it will be helpful to understand if the eSafety Commissioner will be able to identify exactly what content is being censored by Big Tech? Further, what mechanisms have been established to ensure that Big Tech does not abuse this power? Perhaps you could clarify if there is to be a central repository created that will allow Australian citizens to access and monitor the information that Big Tech companies are censoring online?
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> **How is this proposal consistent with existing law?**
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> The High Court in Nationwide News Pty Ltd v Wills (1992) 177 CLR 1 and Australian Capital Television v Commonwealth (ACTV) (1992) 177 CLR 106 upheld the view that the Australian constitution implies the right to political communication as a necessary precursor to Australia's system of representative government. Former Chief Justice of the High Court His Honour Justice Brennan observed [at 47]:
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>> *"To sustain a representative democracy embodying the principles prescribed by the Constitution, freedom of public discussion of political and economic matters is essential: it would be a parody of democracy to confer on the people a power to*

> *choose their Parliament but to deny the freedom of public discussion from which the people derive their political judgments".*

> **How is it possible for the Minister to sign the BOSE Determination without infringing on the constitutional (implied) right of all Australians to freedom of political communication?**
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> The *Criminal Code Act (1995)*, Subdivision B proscribes actions that permit foreign interference in domestic Australian affairs. The proposed changes to the BOSE Determination appear to contravene these provisions. How is possible that the Minister and, by deputation, the eSafety Commissioner is able to commission foreign-owned service providers to selectively censor the online political communications of Australian citizens – with potentially election-changing consequences – without contravening this law?
>
> **How is it possible to preserve public trust without transparency?**
>
> Public concern that covert interference with online communications could distort the tenor of Australian political discourse appears justified. Senator Alex Antic's 'Australian Twitter Files' exposed the abuse of anti-terrorist powers by the Department of Home Affairs during the pandemic. Sky News then revealed emails between Facebook and RMIT Fact Lab demonstrating interference in the Voice Referendum. Where these issues ought to prompt remedial action to safeguard freedom of online communication in future, the BOSE Determination – like the Mis/Disinformation Bill that was rejected – would seem to regularise interference in Australian political discourse from both government and private sources.
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> The eSafety Commissioner's recent demand that a particular post on X [this, in reference to the @BillBoard Chris incident] be removed has been justified on the basis that it affects a certain individual [i.e Teddy Cook]. However, given the reach of this particular individual's influence, the effect of such suppression is to reduce the access of Australians to information and opinion 'from which the people derive their political judgments'. How is it possible to selectively protect individuals from 'harmful' comments while maintaining the high level of government transparency that is necessary for the preservation of trust in a functioning democracy?"

The Minister has not responded to these questions.

In 2022, Inman Grant told the Responsible Tech Summit that her powers did not extend to the suppression of political speech and that the mechanisms to ensure transparency on this point were effective:

> *"One thing I can say about our thresholds is that it doesn't cover political speech …We also have transparency mechanisms. I have the responsibility to report extentensively on the types of investigations we're taking on board. We've done about 80 000 regulatory investigations over the course of eSafety. If someone doesn't like a decision – I've never had a decision challenged – but we have systems in place. We have an internal review process, we have a freedom of information act, we have a tribunal, we have an ombudsman and somebody can take us to the federal court and I think that's good. So, I think there needs to be scrutiny when people talk about taking down content."*

With respect, recent events demonstrate that the mechanisms to ensure transparency are insufficient. Perhaps the reason that none of the eSafety Commissioner's decisions have been

challenged is that, until recently those who posted on social media were not aware that their posts were being suppressed? The only reason that certain of the eSafety Commissioner's "take down" requests have come to public attention recently – for example, her request for X to suppress a post by "@Billboard Chris" about Teddy Cook[11] and video by "Celine against the Machine"[12] about a primary school in Victoria running a queer support group for students – is because X, in the interests of transparency, took the initiative in alerting the individuals concerned to this occurrence. The fact that Inman Grant has undertaken 80,000 such regulatory investigations in the name of "eSafety" points to a problem of unregulated power that requires remedial attention.

To that end, the ACL has a number of preliminary recommendations:

Recommendation 1: The Online Safety Act requires positive amendment so that the rights of Australians to freedom of expression guaranteed by Article 19 of the ICCPR are specifically preserved. At a minimum, a clause should be added to state: "Nothing in this Act shall operate in any way as to encroach upon the freedom of expression of the individual under Australian jurisdiction and any reliance on Article 19(3) must be justified fully and rigorously according to the terms of Article 19(3)." A better solution, however, would be for the Australian government to enshrine ICCPR protections for freedom of speech in domestic legislation. This would demarcate the limits of allowable constraints on free speech, both online and offline.

Recommendation 2: That a government inquiry be established to consider how responsibility for upholding these freedoms intersects with the function and role of the eSafety Commissioner and to provide specific guidance as to the execution of those functions.

Recommendation 3: That a public register of material identified by the eSafety Commissioner for "take down" requests be established. This register should be the subject of periodic independent audit, to ensure it is a faithful representation of all such requests. Those affected by such requests should be notified at the time.

2) *Does the Act capture and define the right sections of the online industry?*

This question presupposes that the current program of regulation is reasonable and legitimate. Since the ACL rejects this claim we respectfully submit that this question is misplaced.

3) *Does the Act regulate things (such as tools or services) that do not need to be regulated, or fail to regulate things that should be regulated?*

The Act, as it has been put into effect, seems to regulate a great many things that were not in contemplation at the time that it was passed. For details, please see the answer to Question 1.

[11] @BillBoard Chris, X, 26 March 2024.
[12] @Celine against The Machine, X, 7 June 2024.

4) *Should the Act have strengthened and enforceable Basic Online Safety Expectations?*

No. Please see the answer to Question 1.

5) *Should the Act provide greater flexibility around industry codes, including who can draft codes and the harms that can be addressed? How can the code drafting process be improved?*

Again, this question presupposes that industry codes provide an appropriate mechanism for the regulation of online content. "Flexibility around … who can draft codes and the harms that can be addressed" indicates a myopic concentration on the issue of harm without an appropriate focus on the issue of preserving freedom. The mere fact that this question is asked seems to indicate prior acceptance of the supposition that more and better censorship is the answer to the problem of "harms" and is not itself harmful. The ACL rejects this presupposition as incorrect on both counts.

6) *To what extent should online safety be managed through a service provider's terms of use?*

Not at all. A service provider's terms of use is exactly the wrong tool for regulating online content and provides no means of ensuring that freedom of speech is protected. The question ACL has previously posed to the Minister about how it is possible to commission foreign-owned service providers to selectively censor the online political communications of Australian citizens – with potentially election-changing consequences – without contravening the Criminal Code Act (1995), Subdivision B remains to be answered (see ACL's answer to Question 1).

7) *Should regulatory obligations depend on a service provider's risk or reach?*

Regulatory obligations should be minimal, anchored to objective standards of "harm" and the same for everyone.