Thank you for the opportunity to provide comments in respect of the Department’s review of the online content scheme (the review).

Operation of the online content scheme

In respect of prohibited/potential prohibited content hosted outside Australia (being by far and away the most frequently dealt with prohibited/potential prohibited content dealt with under the online content scheme) paragraph 40(1)(b) of Schedule 5 to the Broadcasting Services Act 1992 (the BSA) provides as follows:

(1) If, in the course of an investigation under Division 2 of Part 3 of Schedule 7, the Commissioner is satisfied that internet content hosted outside Australia is prohibited content or potential prohibited content, the Commissioner must:

[…]

(b) if a code registered, […] under Part 5 of this Schedule deals with the matters referred to in subclause 60(2)—notify the content to internet service providers under the designated notification scheme set out in the code […]

A relevant code is registered, being the Internet Industry Codes of Practice (the ‘Code’ as available at: <http://www.commsalliance.com.au/__data/assets/pdf_file/0003/44607/Internet-Industrys-Code-of-Practice-Internet-and-mobile-content-ContentCodes10_4.pdf>).

Clause 19.2 of the Code sets out the designated notification scheme as follows:

19.2 For the purposes of this Code and in accordance with the requirements of clause 40(1)(b) of the Online Services Schedule, a designated notification scheme comprises:

(a) direct notification, whether by means of email or otherwise, by the ABA to the Suppliers of IIA Family Friendly Filters of information by which the relevant Prohibited or Potential Prohibited Content can be identified; and

(b) notification by email from the ABA to ISPs on a regular basis of Prohibited or Potential Prohibited Content.

However, if this review is properly conducted, it will discover that the eSafety Commissioner is not complying with her legal obligations under the designated notification scheme because she is not notifying ISPs (and have never done so), by email, on a regular basis, of Prohibited and Potential Prohibited Content. Accordingly, the eSafety Commissioner is failing to comply with her legal obligations and should be sanctioned accordingly. Surely a starting point for reviewing the online content scheme should be an assessment of whether or not it is being administered in accordance with the law – it is not. If the designated notification scheme is not being adhered to, then Parliament clearly intends, by paragraph 40(1)(c) of Schedule 5 to the BSA, that Australian ISPs block access to overseas hosted prohibited/potential prohibited content. But this is not what is occurring because the eSafety Commissioner is not acting in accordance with the requirements of the online content scheme.

The intention of the designated notification scheme is that users of accredited Family Friendly filters will be prevented from accessing overseas hosted prohibited/potential prohibited content. Pursuant to clauses 19.5 and 19.6 of the Code ISPs have a range of responsibilities in respect of Family Friendly filter products, including, at subclause 19.3 of the Code, an obligation to make available, to their customers, one or more Family Friendly filters. Simple desk-based research conducted as part of the review will discover that virtually no Australian ISPs comply with their obligations under subclauses 19.5 and 19.6 of the Code. And despite complaints being made to the eSafety Commissioner about this systemic contravention of the online content scheme by the entirety of the ISP industry, the eSafety Commissioner has refused to take any action in response.

Lastly, I suggest a simply process be conducted to test the efficacy of the online content scheme (assuming it were properly administered in accordance with the law – which it isn’t). If all Family Friendly filter products were tested to determine if they block the content of a list of overseas hosted prohibited/potential prohibited internet content as identifed by the eSafety Commissioner (without that content being notified by the eSafety Commissioner to those filter products), I think you’d find that all of that content (or if not, the vast majority of it) would already be blocked by those filter products in addition to a massive amount of other content those products block which is likely to be prohibited/potential prohibited content (after all, these products are designed to actively and dynamically block inappropriate content). In other words, it’s a relatively straight forward matter to determine that even if the online content scheme was being administered in accordance with the law, it's a complete waste of time and money because the content being notified to Family Friendly filter products is already being blocked by those filter products. Further, despite being operational for close to two decades, investigations conducted pursuant to the online content scheme have not lead to one prosecution, domestically or internationally, in relation to content identified as sufficiently serious.

H Johnstone.