

Exposure draft of the Online Safety Bill

Submission to the Department of Infrastructure,
Transport, Regional Development and Communications
consultation

15 February 2021

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to provide this submission to the Department of Infrastructure, Transport, Regional Development and Communications consultation regarding the exposure draft of the Online Safety Bill ('the Bill').

Part 4 - The Minister has power to determine 'basic online safety expectations'

2. Part 4 of the Bill gives the Minister power to determine 'basic online safety expectations' for 'social media services', 'relevant electronic services', and 'designated internet services.' Section 46 of the Bill details the core expectations that will frame the Minister's determinations by legislative instrument as to the basic online safety expectations for these services. These expectations include to "Minimise cyber-bullying or abuse material targeted at a child or adult, non-consensual intimate images, Class 1 material, and abhorrent violent material,..."
3. The ALA submits that since these expectations are drafted in such broad terms, there is a significant risk that this will result in excessive proactive monitoring and removal of content that falls under Class 1 and 2 of the National Classification Code (NCC). As indicated below, it is submitted that the classification system in the NCC is outdated, as it appears to also be overly broad. As such, it captures categories of content that should not be subject to such restrictive regulation.
4. Given the broad and outdated framing of Class 1 and 2 of the NCC, the ALA submits that it is not appropriate that the Minister has such a broad discretion to determine basic online safety expectations until the NCC has been appropriately revised and updated, following broad community consultation. The ALA submits that it is a dangerous centralisation of power for such a broad discretion to be invested in one person – i.e. the Minister, who would be determining community expectations – particularly given that the classification code appears outdated and in need of review.

Part 8 - The abhorrent violent material blocking scheme

5. Part 8 of the Bill gives the eSafety Commissioner the power to issue a blocking notice to Internet Service Providers (ISPs) to block domain names, URLs, or IP addresses that provide access to material deemed to be 'abhorrent violent material' or to be promoting, inciting or instructing 'abhorrent violent material'.²
6. The live-streaming of the tragic mass shooting in Christchurch, which subsequently went viral, clearly illustrates the need for mechanisms to deal with viral violent videos/content online and the harm they cause. However, the ALA submits that the proposed scheme has significant overreaches and thus fails to strike the appropriate balance between protection against abhorrent violent material and due process for determining whether content comes within that classification.
7. It appears that the scheme set out in Part 8 does not require the eSafety Commissioner to afford procedural fairness to the exercise of the power for issuing these blocking requests or notices. Such a decision to issue this kind of blocking notice should be subject to internal review and appeal.
8. As per section 100 of the Bill, blocking notices cannot be for longer than 3 months. However, there is no limitation on the number of times the Commissioner can renew such a blocking notice. Given the architecture of the scheme, as outlined in Part 8 including section 100, there is a legitimate concern that the scheme will have the potential to be used as a mechanism to suppress and limit democratic debate and dissent. Use of the scheme in such a way would clearly be in breach of Australia's international obligations under the *International Covenant on Civil and Political Rights (ICCPR)*, namely article 19. Accordingly, the ALA submits that Part 8 should include the express limitation on the eSafety Commissioner's power to issue such blocking notices that the decision is only exercised in limited circumstances (with these also detailed in the Act) and that the power cannot be exercised in a way that infringes upon Australia's international human rights obligations under the *ICCPR*.
9. In addition, there is a concern regarding the broad discretion for the eSafety Commissioner to determine what is 'in the public interest', which affects whether certain material is

² Online Safety Bill 2020 (Cth), Exposure Draft, s 95.

exempt from blocking notices. There are circumstances where violence captured and shared online can be of vital importance – and thus very much ‘in the public interest’ – to hold those in power to account and to expose otherwise hidden human rights violations. This is particularly pertinent in respect of violence from law enforcement officers that is captured on video (for example, the video of the killing of George Floyd by a police officer in the US; the viral video of a NSW Police Officer using excessive force against an Aboriginal teenager in June 2020). The viral nature of these videos was an important tool in holding law enforcement officials to account for their use of excessive force. Moreover, these videos have become a vital tool for people in minority groups, First Nations people and people of colour to be able to hold law enforcement officials to account for their use of excessive force. However, these critical avenues for accountability could be undermined by the eSafety Commissioner’s application of this broad ‘public interest’ discretion.

10. The ALA submits that the scheme as currently provided for in the Bill has the potential to provide cover and protection for law enforcement officials to use excessive force out of sight from those who might seek accountability. It is essential that this scheme not be used to hide any use of violence by the government, including by its law enforcement officials, and any abuses of human rights.

Part 9 - The online content scheme

11. Part 9 of the Bill details the process for the eSafety Commissioner to issue removal notices, link deletion notices and app removal notices to the providers of social media services, hosting services, internet search engine services, et cetera.
12. The Bill relies heavily on the NCC to determine which content may be issued with a removal notice. The classification system appears to be overly broad and captures categories of content that should not be subject to such restrictive regulation. For example, Class 1 aligns with content that would be deemed “Refused Classification”. Class 2 material includes content that is likely to be classified as “X18+” or “R18+”. As a result, when taken together Class 1 and Class 2 material actually captures all sexual content, whether violent or not.
13. The ALA submits that the classification system in the NCC is outdated and in need of review. This Bill should not be reliant on such an outdated classification system. The ALA therefore submits that this legislation should not proceed until such a review into the NCC, incorporating community consultation, has been undertaken.

14. The ALA further submits that the scheme does not contain an adequate appeals mechanism for individuals and companies who receive removal notices. While section 220 of the Bill provides a method for people to challenge decisions through the Administrative Appeals Tribunal (AAT), there should be additional opportunities for people to challenge removal notices through internal review.
15. The ALA submits that the scheme requires an internal review mechanism within the office of the eSafety Commissioner, so that there is an effective, efficient method of dispute resolution in the event that the Commissioner's decision is challenged.

Conclusion

16. The ALA has concerns about the Bill as it is currently drafted. In particular, there are significant concerns with regard to the breadth of discretionary power that the Bill affords the eSafety Commissioner and also the Minister with respect to the considerations of community expectations and values in relation to online content. It is submitted that this Bill should not proceed until there has been a substantial review with community consultation of the National Classification Code.
17. Should a decision be made to progress the Bill without such a review of the NCC, the Bill should be amended as specified above. In addition, the Bill should also be amended to provide as follows:
 - A review clause for the legislation to enable a review process that includes public consultation, to assess the effectiveness of the Bill and the powers contained therein, and whether the legislation needs to be amended in any way;
 - Provision for a multi-stakeholder oversight panel, including (broad community representation, to review decisions made to remove and block content;
 - Provision for public reporting of the categories of content removed, complaints, and blocking notices issued, including the reasoning. This will allow for public and Parliamentary scrutiny over the ultimate scope and impact of the legislation;
 - An effective, accessible internal review process, so people can challenge removal notices in a timely manner, without having to appeal to the AAT.

18. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the consultation regarding the exposure draft of the Online Safety Bill. The ALA consents to this submission being published on the Consultation website.



Graham Droppert

President

Australian Lawyers Alliance