

Australian Government
Department of Infrastructure, Transport,
Regional Development and Communications

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Dear Hon Paul Fletcher MP

Submission Online Safety Bill 2020 (Exposure Draft)

We welcome the opportunity to comment on the Exposure Draft of the new Online Safety Bill (**the Bill**).

The internet and the pace of technology innovation continues to have a significant impact on the way society communicates, works and socialises. With billions of Internet users globally, and the amount of time spent online increasing across all age groups, the need to address online safety is as important and necessary as the need to preserve and protect the rule of law and human rights.

AUSCL

The Australian Society for Computers and Law (**AUSCL**) is an interdisciplinary think-tank focused on issues arising at the intersection of technology, law and society. It is a registered Australian non-profit charity with a charter to advance education and to inform and provide advocacy in relation to these issues.

AUSCL was officially launched in July 2020 with the appointment of the Hon Justice Michael Kirby as patron, but its member State societies were formed as early as 1981. This year marks the 40th anniversary of the formation of the Victorian Society.

AUSCL provides a forum for learned discussion and debate through its **Working Groups** and **Events Program**, attracting support and engagement across Australia and globally.

AUSCL is also committed to providing balanced and informed advocacy through its **Policy Lab** on issues of critical importance (such as online safety). AUSCL members represent a broad cross-section of sectors and industries including legal professionals, technology professionals, business leaders, government officials, academics, members of the bar and leaders of civil society.

Interest in online safety

AUSCL is committed to addressing the issue of online safety. On 4 November 2020 the AUSCL together with Internet Australia and Clarence Services conducted an online expert panel discussion on **The Future of Cyber Civility**, featuring:

- **Commissioner John McKenzie** Legal Services Commissioner for NSW
- **Dr Felicity Lawrence** Specialist Consultant Happier Workplaces
- **Philip Roberts** Principal Solicitor at PCR Law & Associates
- **Elizabeth Devine** Employment Law Specialist, Founder - Devine Law at Work

A link to the recording is [available here](#). AUSCL also publishes a Journal *Computers and Law Journal for the Australian and New Zealand Societies for Computers and the Law*. AUSCL references the following papers related to the current consultation:

Johnston, Anna "Reforming privacy laws to protect against digital harms" [2021 ANZCompuLawJl 11; (2021) 93 Computers & Law 38 [Available here](#)

Leonard, Peter --- "Data privacy in a data and algorithm enabled world" [2021] ANZCompuLawJl 7; (2021) 93 Computers & Law 22 [Available here](#)

Lawrence, Felicity; Roberts, Phillip --- "Civility matters" [2021] ANZCompuLawJl 5; (2021) 93 Computers & Law 16 [Available here](#)

The key themes discussed include the cost of incivility, online harassment, bullying in the workplace, privacy, the importance of workplace culture, education and policy development.

Submission

In the limited time available, AUSCL has restricted its comments to general observations and some recommendations but welcomes the opportunity to consult with the Department of Infrastructure, Transport, Regional Development and Communications (the Department) to explore additional recommendations and conduct round table discussions with our members. In particular, this could provide the opportunity to explore in more depth how guiding principles (see the following section) should operate in this area.

AUSCL supports the efforts made by the Department to better ensure the safety and protection of Australians (irrespective of age) from online harms, such as image-based abuse and abhorrent violent material.

AUSCL recognises the importance of setting clear parameters around core concepts, such as what constitutes harm and cyberbullying, in order to better define the scope and intent of the Bill as well as assess its impact.

Guiding principles

Any response to online safety, including cyber-bullying, image-based abuse, harassment and abhorrent violent material, through policy development and draft legislation, must have careful regard to a set of guiding principles.

In AUSCL's view, the guiding principles must include respect for the rule of law and human rights, including the right that individuals not be subjected to arbitrary interference with their privacy. An emphasis on these guiding principles will promote human dignity, natural justice, procedural fairness, transparency and accountability, and predictability and consistency in the application of law.

In circumstances where powers exist to limit an individuals' rights and freedoms, including freedom of expression, it is necessary to ensure adequate safeguards to ensure those powers, and the limits they impose, are necessary, reasonable, proportionate and justifiable on the grounds of public interest.

Public Consultation

AUSCL supports the Department's consultation with civil society and stakeholders in drafting the Bill and the following outcomes:

- (a) Articulation of a set of core basic online safety expectations and mandatory reporting requirements for social media services, relevant electronic services and designated internet services
- (b) Reflection of the rights of children in some core provisions, for example, allowing children to make direct complaints to the Commissioner
- (c) Extension of the cyber-bullying scheme beyond social media platforms for children
- (d) Introduction of the new cyber-abuse scheme for Australian adults and abhorrent violent material blocking arrangements
- (e) Reduced timeframes for removal of image-based abuse, cyber-abuse, cyber-bullying and harmful online content and the introduction of consistent take-down requirements
- (f) Modernisation of online content schemes (including Schedules 5 and 7 of the Broadcasting Services Act 1992)
- (g) Improved governance arrangements, including limitations on the ability of the Commissioner to delegate functions or powers to a body corporate (It is noted however that cl 182 of the Bill specifically allows for the Commissioner to delegate some functions and powers to contractors, which may not promote improved governance); and

- (h) Incorporation of a mandatory review by the Minister of the operation of the Bill, under clause 107, within 3 years of its commencement.

For consideration

AUSCL shares the concerns raised by the Australian Law Reform Commission and the Law Council of Australia in their submissions relating to online safety reforms. In particular AUSCL supports the need for:

- (a) a **legislative framework** to outline the role of the e-Safety Commissioner (**Commissioner**) and requirements concerning the expertise of the Commissioner

The Bill does not include provisions from the *Enhancing Online Safety Act 2015 (EOSA)* requiring expertise in ‘child welfare or child wellbeing’ as a criterion for appointment as the eSafety Commissioner. While it is noted that the role of the Commissioner has substantially expanded since it was first established, it is important to ensure that the Commissioner has the appropriate level of skill, expertise and knowledge to respond appropriately to the needs of children, their families and other individuals involved.

Recommendation: The Bill will include comparable provisions to Section 50 EOSA regarding eligibility criteria for appointment as Commissioner, with minimum requirements for substantial knowledge or experience, and significant standing, in relation to child welfare or child wellbeing, and conflict management or resolution; and that appointment not be based only on knowledge, experience or standing in operations in social media or the internet industry, or public policy in relation to the communications sector.

- (b) both **administrative and judicial review** to ensure proper oversight of the role of Commissioner, in addition to the mandatory review of the operation of the Bill (if enacted)
- (c) **increased awareness** through education and training across society (including schools, police and judicial staff), covering, amongst other things, the meaning and interpretation of key terms, and risks and consequences associated with cyber-bullying and the other behaviour addressed under the Bill
- (d) **careful assessment** of the interaction of the Bill with existing laws (avoiding any overlap and inconsistencies), including federal sentencing laws, the Criminal Code (for example, the *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019 (Cth)*), *Privacy Act 1988*, and human rights and international commitments/standards, such as those relating to the protection of children (such as the *UN Convention on the Rights of the Child* ratified by Australia)

- (e) explicit regard being given to the principle of the **best interests of the child** (as expressed in Article 3.1 of the *UN Convention on the Rights of the Child*)

Recommendation: Explicitly incorporate this principle, by specifically requiring the Commissioner to “take proportionate and appropriate action in the best interests of children” (as expressed on page 71 of the Explanatory Memorandum)

- (f) an **assessment of context** and contributing factors, such as the potential lack of community awareness of the core basic online safety expectations through to the various schemes proposed under the Bill

Recommendation: Specific attention be given to resourcing constraints and the need to support front line workers (including counsellors and other support professionals) and the effect of resource restraints on the support available to those affected

- (g) an assessment of the **cost of compliance** on smaller operators, not-for-profits, schools and similar and the availability of potential redress/compensation schemes

- (h) **ensure procedural fairness** through adoption of clear guidelines or criteria for the management of complaints and inquiries, replacing the proposed full discretion granted to the Commissioner under cl 31 of the Bill, which amongst other things provides that the Commissioner can conduct an investigation and obtain information from persons for the purpose of an investigation.

Recommendation: Adoption of criteria and procedural rules for guiding the management of complaints and the conduct of inquiries, with observance of natural justice and principles of fairness, for example, if there is any limit to an individual’s rights, that that limit be reasonable, necessary and proportionate in the particular circumstances.

Thank you once again for the opportunity to make these preliminary observations.

Yours faithfully

AUSCL Australian Society for Computers and Law