

# Online Safety Bill Proposal Submission

I am grateful for the opportunity to respond to the consultation for a new Online Safety Act and the unintended impacts likely to affect the community, particularly those of us in already marginalised groups, if the proposed Bill is passed in its current state.

## Recommendations

Before moving ahead with this proposal, and expanding the powers of the eSafety Commission, these areas must receive immediate consideration. Each of these is expanded upon in my comments following this list.

- Review the Classification Act and ensure that it means the standards and expectations of the modern day before relying on it in this new Bill.
- Either remove the subjective aspects of the proposal ("reasonable adult") or appropriately define them so they can be reliably and consistently performed by any nominated representative.
- Remove Part 9 from the Bill because it is not the right place to address content between consenting adults and will limit freedom of expression, disproportionately harming the already marginalised sex work and LGBTQIA+ communities.
- Replace the singular role of an appointed eSafety Commissioner and establish an elected eSafety Commission council, made up of members of the general Australian community, Australian industry, and organisations who are experts in, and practice, harm reduction, such as Scarlet Alliance, ACON, and Headspace.
- Add mechanisms to ensure there is adequate oversight and checks on the power of the eSafety Commission to prevent abuse and add transparency requirements to that oversight.

## Application of an out of date and broken classification system

The Australian Classification System for content is outdated, causing issues in the many modern sectors it covers such as gaming and online content creation

and distribution. Applying this out of date system to yet another type of content that it is not equipped to cover is extremely concerning.

In their current state, the 1995 Act and the Classification guidelines provided to board members, last updated in 2008, effectively exclude most kink activities between consenting adults from being allowed a restricted rating, as well as vague and extremely out of date definitions for many common terms that could easily be used by the Commissioner or investigators to overreach when determining the state of content reported to them.

The governments own Australian Law Reform Commission has stated, in a review of the classification act, that: "Stakeholders have identified aspects of the current classification and content regulation framework that have become dysfunctional, are failing to meet intended goals, and create confusion for industry and the wider community."<sup>(1)</sup>

Classification law and assessment criteria (in particular the subjective criteria of "offensive to a reasonable adult") needs to be updated to be aware of modern views and content creation methods and realities before it can be reasonably and reliably applied to the idea of classifying and reacting to potentially harmful material.

### **This Bill is not the right place amend online content legislation**

Part 9 of the Online Safety Bill proposes to amend the definitions around online content between consenting adults. As this Bill is proposed to provide tool to combat harmful content it is not the right place to amend other legislation or add to the already confusing Classification system.

The inclusion of Part 9 effectively conflates online porn with harmful content, including online harassment, revenge porn, abuse material, and online conducted violent. There is already an appropriate place for this in the review of Australian classification regulation.<sup>(2)</sup>

### **"Reasonable adult" and subjectivity without oversight have no place in law**

As far as I have been able to ascertain by researching the various acts referenced in the Online Safety Bill proposal and it's own supporting documentation, there is no clearly defined concept of a "reasonable adult" other than the subjective view of the relevant representative and the requirement to be "able to balance personal opinion with generally accepted community standards."<sup>(3)</sup>

In the case of the Classification Board that is a group of exclusively white<sup>(4)</sup>, middle and upper income earners with minimal cultural, racial, gender, and sexual diversity. In the case of the eSafety Commissioner it is Julie Inman-Grant, a person who grew up and spent most of her career in a vastly different cultural environment to those she is tasked with representing subjectively. The commissioner also has the right to delegate any of their powers as they see fit, providing even greater distance between the public and the people making these decisions.

During an interview in which she was representing the commissioner's office, she said "Microsoft sent me out to the **formal penal colony in Australia.**" when describing her move here<sup>(5)</sup>. A choice of phrasing that certainly makes it appear she viewed this directive as a punishment issued against her by her then employer. She also makes repeated references to the first amendment of the US constitution in interviews and talks, a right which Australian's do not currently enjoy enshrined in law or constitution. It seems unlikely to me that she would be able to reasonably represent the "average" Australian adult when offensive and irrelevant comments like these are common and said without even a moment of thought.

Relying on this reference to an ill-defined "reasonable adult" and requiring subjective determinations can only be properly balanced by providing clear and transparent public reporting around the decisions made and what influenced them. Without transparency it is impossible to know if the decisions made realistically reflect a "reasonable adult" and without that term being defined it is impossible to even know what basis these decisions are made from.

As a queer kid growing up in country WA, the things that many "reasonable adults" found to be "offensive" or "revolting and abhorrent phenomena" described my existence. Relying on unrepresentative commissioners and boards and allowing undefined terms like these to define policy and law is poor practice and leaves open wide avenues for overreach, abuse, and marginalisation.

The minimum required effort to help avoid excessive over-censoring or unrepresentative boards, commissioners, or others making decisions is to require that those decisions are made transparent, reviewable, and appealable, though ideally better definitions would also be in place.

## **An unelected commissioner with no oversight or transparency requirements**

The eSafety Commissioner, along with the rest of the commission, appear to have little to no oversight, transparency, or appeal requirements, allowing no way to confirm that they are upholding their offices as a "reasonable adult" would expect. As someone who has experienced the marginalisation caused by decisions being made with no transparency I find this extremely concerning when attached to such a far ranging proposal and an office that is intended to protect, not harm.

Transparency is, and should be, the basis around which all government commissions operate and the fact this proposal includes no plan for it shows the lack of thought in design and likelihood for overreach in practice is considered an acceptable trade off.

## **Investigations into potentially criminal activity performed by civilians**

Finally, I am concerned about the eSafety Commissions use of civilian investigators performing potentially criminal investigations, a role that should be handled within the resources and frameworks of the various state and federal police services. As the commission is using civilian investigators, what qualifications does it require? How does it train and maintain the quality of that knowledge amongst those it hires? How does it provide resources to ensure the emotional wellbeing of those staff and the well documented trauma<sup>(6)(7)</sup> associated with viewing and moderating harmful, extreme, and CSAM content? How are these civilians protected under law for viewing illegal content when they are outside of the judicial and justice system?

## **References**

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<sup>1</sup> Assessing the current scheme (29.02.2012)

<https://www.alrc.gov.au/publication/classification-content-regulation-and-convergent-media-alrc-report-118/2-the-current-classification-scheme-2/assessing-the-current-scheme-2/>

<sup>2</sup> Review of Australian classification regulation

<https://www.communications.gov.au/have-your-say/review-australian-classification-regulation>

<sup>3</sup> Guidelines for the Classification of Publications 2005

<https://www.legislation.gov.au/Details/F2008C00129>

<sup>4</sup> Full and temporary members of the Classification Board (as at 10.02.2020)  
<https://www.classification.gov.au/about-us/classification-board>

<sup>5</sup> Safety by design with Julie Inman-Grant (16.12.2019)  
[https://www.childdignity.com/podcasts/2019/12/16/safeguarding\\_podcast-safety-by-design-with-julie-inman-grant](https://www.childdignity.com/podcasts/2019/12/16/safeguarding_podcast-safety-by-design-with-julie-inman-grant)

<sup>6</sup> The Trauma Floor - The secret lives of Facebook moderators in America (25.02.2019) <https://www.theverge.com/2019/2/25/18229714/cognizant-facebook-content-moderator-interviews-trauma-working-conditions-arizona>

<sup>7</sup> Behind the Screen, Sarah T Roberts, Yale University Press, ISBN: 978-0-300-23588-3 (2019)