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This is my submission to the Online Safety Bill Consultation.

My name is David Cake, I have been involved in digital rights and online content issues for many years, in both national and an international processes and issues. In particular, I have been involved in many policy processes as part of the policy processes of the Internet Corporation for Assigned Names and Numbers and other internet governance bodies, and I am very experienced with issues related to domain names and IP numbers. Also this has included several years as Chair and board member of Electronic Frontiers Australia, but I make this submission entirely in my personal capacity, and I have no current connection to that organisation beyond membership.

My experience with international Internet governance processes has made it clear to me that ongoing multi-stakeholder processes is the gold standard for online regulation. Such processes are supported by the Australian government in areas such as Internet governance and cybersecurity, and actively participated in by staff from areas such as the Department of Communications (who attend ICANN meetings and the Global Internet Governance Forum), and the Ambassador for Cyber Affairs. A broadly analogous process for online content regulation would be strongly encouraged.

I have a number of specific concerns and suggestions for ways in which the bill could be significantly improved.

Online Content Scheme

This scheme relies heavily on the existing Classification System. I have previously argued that the Australian Classification system is outdated and requires review, and

there are a large number of critics of the state of the system. In several ways it does not align with global standards, and is of current ten considered overly broad. Using it as the basis for a system to regulate online material is thus immediately somewhat problematic, especially as assumptions about appropriate regulation for publication do not immediately transfer to social media systems. In particular, among the criteria for classification are the 'the persons or class of persons to or amongst whom it is published or is intended or likely to be published' (Classifications Act, section 11, part d) which in online social media may be highly dependent on context. The scheme should also take into account further context such as an equivalent of the conditional cultural exemptions of the classification part (section 6) for online events and services. And the issues of contextualisation of content are complex–not only may a short excerpt from content not be rated as the same level, due to not containing the same level of restricted content, the Classification Board has in the past found that some material should be rated at a higher level without the surrounding context. So simply relying on existing classification for material that is likely to be occurring in a very wide range of changing contexts, and often be transformed through editing and recontextualisation, is likely to result in a lot of content being restricted at an inappropriate level.

I would certainly encourage this to be used with caution if it is to be used at all, while understanding the utility of relying on existing classification schemes.

But if it is to be used, the bill needs provisions for R18+ and X 18+ material to be made available where appropriate restrictions have been put in place to restrict viewing to contenting adults. A mechanism that simply restricts content entirely would be inappropriate for regulating adult consumption of content. For example, mild R18+ content should not be restricted if a service has made adequate efforts to restrict it to viewing by adults.

These complications make it essential that the scheme be expanded to contain an appeals mechanism for those who receive removal notices, and this removal mechanism should ideally be one that is encourages mediation and consultation, and feeds into processes to develop appropriate mechanisms such as industry codes. Transparency around decisions to restrict content is also essential. Appeal through the Administrative Appeals Tribunal is a mechanism that should be retained, but it should not be the first, or only, mechanism by challenge a ruling.

In particular, this scheme should absolutely not be used as a mechanism to restrict adult services and sex work, and should in no way attempt to move the adult services and sex work industry in Australia back to a partial prohibition model through online restrictions.

Abhorrent Violent Material Blocking Scheme

While it is understood that this scheme is designed as a quick and powerful mechanism for emergency blocking of material such as the Christchurch massacre, it still requires some restrictions.

One concern is accidental overblocking, such as directing services to block URLs, domain names or IP numbers, there needs to be a mechanism for rapid appeal or review of blocking orders. In the past blocking orders from Australian authorities have occasionally resulted in significant overblocking.

We must also be extremely wary that this short term blocking mechanism can be indefinitely renewed, and thus become a de facto long term blocking mechanism. I do not believe this scheme should be capable of indefinite renewal, and long term blocking should be accomplished via a scheme that takes into account context, is appealable.

Basic Online Safety Expectations

The concern is that placing increased expectations for filtering and access to content on social media, with no disincentive to overblock and overfilter, will inevitably result in increased use of mechanisms such as machine learning based automated systems, and an increase in arbitrary and biased decisions. This is not a theoretical issue, but a widely observed current phenomenon. For example, in the last week I saw someone was banned from Facebook for a period solely for a post described as inappropriately sexual: they had used the word ‘threesome’ to describe a picture posted to a group about fountain pens that showed three similar pens. Such incidents are merely ridiculous and arbitrary, but can be significantly more problematic when, for example, posts by minority groups discussing slurs used against them are misclassified as hate speech.

I urge that such expectations should only be determined after extensive consultation. My experience in Internet governance has shown that open, transparent multi-

stakeholder processes, involving both the industry and others who must implement the recommendations, and groups such as civil society groups, digital rights groups, industry representatives from related industries (intended to include affected industries (for example, sex work industries for provisions around Class 2 material), not simply the industries directly concerned with service provision, and others. The ministerial requirement to consult with the public must be significant, and should include a need for regular review.

Information Gathering Powers, Investigative Powers, and Encryption

In general, the majority of these powers are inappropriately strong for the eSafety commissioner, and should be referred to law enforcement in cases where they override a users reasonable expectation of privacy. In effect, it makes cyber bullying a crime, makes the eSafety Commissioner a law enforcement agency concerned with that crime, and gives them commensurate powers, but without a full range of safeguards. This section requires further review.

In particular, these powers should not be in any way be interpreted as giving the eSafety Commissioner the power to change the design of their service to undermine privacy, particularly where it involves encryption.

General

Internet content regulation is a complex and fast changing area, one in which technical, legal and social issues often collide, and in which legislation and regulation often has unintended side effects. I would strongly urge that the processes involving online content regulation in Australia as much as possible are not centralised in a single commissioner, but involve ongoing multi-stakeholder consultative processes that are open to ongoing review and policy consultation processes.

David Cake