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Hon Paul Fletcher MP
Online Safety Branch, Content Division
Department of Infrastructure, Transport, Regional Development and Communications
GPO Box 594

Re: Online Safety Bill 2020 – Exposure Draft

Dear Minister,

We thank the Department of Infrastructure, Transport, Regional Development and Communications ('the Department') for the opportunity to provide feedback on the exposure draft of the Online Safety Bill 2020 (Cth) ('the Bill') and contribute to the ongoing Online Safety Legislative Reform process.

Overall, we are in broad agreement with the objects of the Bill to improve and promote online safety for Australians.[1] We commend the ongoing work of the Department and the Office of the eSafety Commissioner to consult with multi-stakeholder groups over a sustained period, to pursue decentralised regulatory approaches,[2] and to balance protecting Australians against harmful online abuse with the importance of technological innovation and freedom of expression.[3] These steps are commendable. Addressing complex issues around harmful online content requires nuanced regulatory measures,[4] as well as careful and sustained participation by state and non-state actors.[5] In this submission, we make two high-level recommendations and provide comments on specific provisions, largely pertaining to the Image-Based Abuse and Adult Cyber-Abuse Schemes.

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[1] Online Safety Bill 2020 (Cth) s 3.

[2] In decentralised environments, like the internet, regulation should be 'hybrid (combining governmental and non-governmental actors), multi-faceted (using a number of different strategies simultaneously or sequentially), and indirect'. Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2001) 54(1) *Current Legal Problems* 103, 111.

[3] The Hon Paul Fletcher MP, *New Legislation to Protect Australians Against Harmful Online Abuse* (Media Release, 23 December 2020) <https://minister.infrastructure.gov.au/fletcher/media-release/new-legislation-protect-australians-against-harmful-online-abuse>.

[4] Georgina Dimopoulos and Nicola Henry, *Online Safety Legislative Reform Consultation* (Government Submission, 19 February 2020) <https://www.communications.gov.au/sites/default/files/submissions/consultation_on_a_new_online_safety_act_-_submission_-_rmit_social_and_global_studies_centre.pdf> 7; Alice Witt, Rosalie Gillett and Nicolas Suzor, *Submission to the Online Safety Charter Consultation Paper* (Government Submission, 12 April 2019) <https://eprints.qut.edu.au/128495/9/128495.pdf> 1-2.

[5] See, e.g., Nicolas Suzor et al, 'Human Rights by Design: The Responsibilities of Social Media Platforms to Address Gender-Based Violence Online' (2019) 11(1) *Policy & Internet* 84, 86.

High-Level Recommendations

<u>High-Level Recommendation 1</u>: The eSafety Commissioner should regularly make available granular, disaggregated and de-identified data about the outcomes of the Schemes

We encourage the Office of the eSafety Commissioner to make available granular, disaggregated and de-identified data about all of the proposed regulatory Schemes on a regular basis. By 'granular, disaggregated data', we mean data that is broken down into meaningful and detailed sub-categories that might include the type of content at issue, the applicable regulatory Scheme(s) and relevant online service or internet provider. This data should be de-identified to exclude personal information (e.g., name, age and location) to promote the safety of victim-survivors or targets. While we understand that it is not possible to provide certain types of data for privacy and other reasons, we argue that, to the extent possible, data should be available for stakeholders to evaluate how effectively the proposed schemes regulate different types of harmful content. This includes the actions taken by different regulatory actors. By providing granular, disaggregated and de-identified data, the Commissioner will enhance the transparency and accountability of the Schemes, as well as empower researchers investigating important public interest questions.

<u>High-Level Recommendation 2</u>: Examples could aid interpretation of select provisions of the statutory text

The inclusion of examples in legislation is a sound plain language drafting technique that can aid statutory interpretation by illustrating the meaning of complex provisions.[6] As the Office of Parliamentary Counsel has noted, '[w]ith the picture of the example in mind, the reader can return to the text and better understand the details and how they hang together'.[7] We therefore recommend that examples are included in, but not limited to, the following provisions:

- Section 6: Cyber-bullying material targeted at an Australian child;
- Section 7: Cyber-abuse material targeted at an Australian adult;
- Section 9: Abhorrent violent material;
- Section 15: Intimate image; and
- Section 16: Non-consensual intimate image of a person.

The Department could model examples in the Bill on those in sections 5, 6 and 7 of the *Family Violence Protection Act 2008* (Vic), or those in Part 3A of the *Crimes Act 1900* (ACT). It is important to note that under section 15AD of the *Acts Interpretation Act 1901* (Cth), if an Act includes an example of the operation of a provision, the example is not exhaustive[8] and may extend the operation of the provision.[9]

[6] See Office of Parliamentary Counsel, *Plain Language Manual* (2013) 33.
[7] Ibid.
[8] *Acts Interpretation Act 1901* (Cth) s 15AD(a).
[9] Ibid s 15AD(b).

Targeted Comments on Specific Provisions

Having outlined two high-level recommendations, we now turn to provide targeted comments on specific provisions of the Bill; namely, sections 15, 21 and 24.

Section 15: Intimate images, standards of reasonableness and demarcating the 'private'

Section 15 of the Bill sets out the circumstances in which material constitutes an intimate image of a person. Sub-sections (2), (3) and (4) relate to the depiction of private parts, the depiction of private activity, and the depiction of a person without attire of religious or cultural significance, respectively. Each of these sub-sections concludes with a two-pronged objective test: 'in circumstances in which an *ordinary reasonable person* would *reasonably expect* to be afforded privacy' (emphasis added).

'Ordinary reasonable person'

The 'ordinary reasonable person' standard has been the subject of extensive scholarly critique, particularly within feminist jurisprudence.[10] In the context of defining an intimate image, we consider that this standard should be amended to read: 'in circumstances in which a *reasonable person with the same relevant characteristics as the subject of such images* would reasonably expect to be kept private'.[11]

We believe that this modification would more effectively capture the complexities of image-based abuse, including the diverse range of contexts in which it occurs.[12] In particular, it would ensure that there is some consideration of the position of the particular individual who is the subject of the image, thereby adding an important subjective element. As the Australian Law Reform Commission (ALRC) has noted, 'the phrase "all of the circumstances" highlights that whether this test will be satisfied will depend very much on the facts of each particular case'.[13]

'Reasonably expect to be afforded privacy'

The test of 'reasonable expectation of privacy' has been recommended by federal and state law reform bodies in Australia,[14] and is used in various overseas jurisdictions, including New Zealand[15] and the United Kingdom,[16] in relation to the tort of invasion of privacy. Subject to

[10] See, e.g., Mayo Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (Oxford University Press, 2003) 199-205; John Gardner, 'The Many Faces of the Reasonable Person' (2015) 131 *Law Quarterly Review* 563.

[11] Women's Legal Service NSW, *Civil Remedies Regime f*or Non-Consensual Sharing of Intimate Images (Government Submission, 7 July 2017). <http://www.wlsnsw.org.au/wp-content/uploads/WLS-NSW-civil-remedies-regime-for-non-consensual-sharing-of-intimate-images-fa.pdf>

[12] See, e.g., Nicola Henry et al, *Image-based Sexual Abuse: A Study on the Causes and Consequences of Non-consensual Nude or Sexual Imagery* (Routledge, 2020).

[13] Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (Report No 123, 2014) [6.8].

[14] See, e.g., Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (Report No 123, 2014) Rec 6-1; Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* (Report No 108, 2008) Rec 74–2; Victorian Law Reform Commission, *Surveillance in Public Places* (Report No 18, 2010) Recs 25, 26; NSW Law Reform Commission, *Invasion of Privacy* (Report No 120, 2009) 20-26.

[15] *C v Holland* [2012] 3 NZLR 672.

[16] *Campbell v MGN Ltd* [2004] 2 AC 457.

the amendment to the 'ordinary reasonable person' standard suggested above, we consider that this test, as it features in section 15(2), (3) and (4), is appropriate to take account of the context-specific nature of an intimate image.

We stress that the definition of 'intimate image' in the Bill must remain dynamic, adaptable and responsive to new technologies and new social norms. It must be flexible enough to evolve with changes in community expectations of privacy between cultures and over time. It should not be so narrow as to only capture images that are of a sexual nature. As noted by Adjunct Professor David Watts, Commissioner for Privacy and Data Protection, in his submission to the Discussion Paper on a Civil Penalty Regime for Non-Consensual Sharing of Intimate Images:

> The consideration as to whether an image is intimate or not should firmly rest on whether there was a reasonable expectation of privacy at the time it was captured and/or if there was a reasonable expectation of privacy at the time it was shared. Focussing solely on the sexualised nature of the images runs the risk of adopting a narrow understanding of 'intimate' and overlooking other intimate but not overtly 'sexual' situations.[17]

This underlines the importance of context in addressing issues around image-based sexual abuse, or the non-consensual sharing of intimate images, which we expand on below.

Depiction of 'private' parts, activities, persons without attire

Privacy is 'culturally variable and contextual'.[18] What is considered to be an 'intimate image' is a product of activities, customs, norms and social practices.[19] As the High Court of Australia recognised in *ABC v Lenah Game Meats*:[20]

> There is no bright line which can be drawn between what is private and what is not. Use of the term 'public' is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private. … Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved.

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[17] David Watts, *Submission in Relation to the Discussion Paper on a Civil Penalty Regime for Non-Consensual Sharing of Intimate Images* (Government Submission, n.d.). <https://www.communications.gov.au/sites/default/files/submissions/commissioner_for_privacy_and_data_protection_vic.pdf>.

[18] Daniel Solove, 'A Taxonomy of Privacy' (2006) 154 *University of Pennsylvania Law Review* 477, 484. See also Daniel Solove, *Understanding Privacy* (Harvard University Press, 2008) 98, 183-7; Beate Rossler, *The Value of Privacy* (Polity, 2005) 4.

[19] Daniel Solove, *The Digital Person* (NYU Press, 2004) 212-13; Daniel Solove, *Understanding Privacy* (Harvard University Press, 2008) 50; Judith Wagner DeCew, *In Pursuit of Privacy: Law, Ethics and the Rise of Technology* (Cornell University Press, 1997) 70.

[20] *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [42].

We consider the attempt to define the depiction of body parts (s 15(2)), activities (s 15(3)), and persons without attire of religious or cultural significance (s 15(4)) as 'private' to be overly narrow and restrictive. What privacy means depends on particular individuals and their particular circumstances, and an individual's conception of privacy cannot be determined by reference to an exhaustive, prescriptive list. For instance, the non-consensual sharing of images of a Muslim woman without her head covering, or the non-consensual sharing of an image of a couple holding hands, does not appear to be captured by the proposed legislation; and yet there may be significant ramifications for the disclosure of such intimate images on those depicted in the image, as well as their family members and community. We argue that a non-exhaustive list of considerations should be set out, qualified by the 'reasonable expectation of privacy' requirement (discussed above).[21]

Additionally, in the proposed legislation, section 15(3)(b)(vi) could give rise to the *ejusdem generis* rule. The rule, a syntactical presumption as part of the modern approach to statutory interpretation, is that general words are limited by the specific words that come before them.[22] That is, if this rule applies, it can narrow the meaning of the general word(s). In s 15(3)(b), the list of depictions is seemingly limited, or restricted, by the phrase 'engaged in any other like activity'. Questions arise, for example, about what constitutes a 'like activity' and whether non-normative depictions would fall within the scope of this provision.

Section 21: Consent

Section 21 of the Bill provides that, for the purposes of the application of the Act to an intimate image or private sexual material, consent means:

> (a) express; and
> (b) voluntary; and
> (c) informed;
> but does not include:
> (d) consent given by a child; or
> (e) consent given by an adult who is in a mental or physical condition (whether temporary or permanent) that:
> (i) makes the adult incapable of giving consent; or
> (ii) substantially impairs the capacity of the adult to give consent.

We believe that the definition of consent must take account of two realities of communication in the digital environment: 'context collapse',[23] or sharing of information beyond expected audiences; and mistaken identity.

[21] See, e.g., Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (Report No 123, 2014) Rec 6-2.
[22] See generally Michelle Sanson, *Statutory Interpretation* (Oxford University Press, 2nd ed, 2016) 215.
[23] See Jenny L Davis and Nathan Jurgenson, 'Context Collapse: Theorizing Context Collusions and Collisions' (2014) 17(4) *Information, Communication & Society* 476.

Context collapse

Privacy offers individuals the ability to 'compartmentalize information' about themselves.[24] Online harms and privacy violations can occur 'not only where previously concealed information is revealed, but also where information already made available is made more accessible'.[25] An individual might share an intimate image or private sexual material with another individual or a select group of individuals. If that image or material is then posted elsewhere by the individual(s) with whom it was shared, the privacy violation lies in the 'spreading of information beyond expected boundaries':[26] the intimate image or private sexual material has been subsequently shared beyond the audience intended.

We suggest that the definition of 'consent' in section 21 of the Bill include an additional sub-paragraph, to the effect that a person who consents to the distribution of an intimate image on a particular occasion is not, by reason only of that fact, to be regarded as having consented to the further distribution of that image or any other image on another occasion.[27] This would make clear that consent to the posting of an intimate image or private sexual material on one platform or device does not imply consent to that image or material being posted, distributed or shared on another platform or device. Such a provision would be consistent with a 'communicative model' of consent[28] as exists in sexual offences legislation in some Australian jurisdictions, which recognises that consent 'may be withdrawn at any time or its scope altered', and that consent to one kind of activity 'does not imply consent to any other activity'.[29]

Mistaken identity

Digital and social media facilitate the publication of information anonymously. Online anonymity creates unique challenges for the regulation of image-based abuse, including the notion of consent to the posting or sharing of intimate images or private sexual material. One such regulatory challenge is the phenomenon of 'catfishing', whereby an individual adopts a fake online persona, usually with the intention of deceiving other users into an emotional or

[24] Mark Tunick, *Balancing Privacy and Free Speech: Unwanted Attention in the Age of Social Media* (Routledge, 2014) 45.

[25] Georgina Dimopoulos, '"Divorce with Dignity" as a Justification for Publication Restrictions on Proceedings under the *Family Law Act 1975* (Cth) in an Era of Litigant Self-publication' (2019) 7(2) *Griffith Journal of Law and Human Dignity* 161, 185 (citation omitted).

[26] Daniel Solove, 'A Taxonomy of Privacy' (2006) 154 *University of Pennsylvania Law Review* 477, 535. See also Lior Jacob Strahilevitz, 'A Social Networks Theory of Privacy' (2005) 72(1) *University of Chicago Law Review* 919, 921.

[27] Nicola Henry, Asher Flynn and Anastasia Powell, *Submission in Relation to the Discussion Paper on a Civil Penalty Regime for Non-Consensual Sharing of Intimate Images* (Government Submission, 30 June 2017) https://www.communications.gov.au/sites/default/files/submissions/dr_nicola_henry_dr_asher_flynn_and_dr_anastasia_powell.pdf

[28] See NSW Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [4.30]. See also *Crimes Act 1900* (NSW) s 61HE.

[29] NSW Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [4.30], [5.52].

romantic relationship.[30] In these circumstances, the victim of catfishing may share intimate images or private sexual material with the perpetrator, and give consent to the perpetrator to post or share that image or material.

We suggest that the definition of 'consent' in section 21 of the Bill include a provision, as exists in sexual offences legislation,[31] to the effect that consent does not include consent under a mistaken belief as to the identity of the other person.

Section 24: Convention on the Rights of the Child

Section 24(1) of the Bill requires the Commissioner, as appropriate, to have regard to the Convention on the Rights of the Child (the Convention) in the performance of functions conferred by or under the Act and in relation to Australian children. Although Australia has ratified the Convention, it has not been incorporated into Australian law.[32] Nonetheless, Australia's ratification is important, and we welcome the inclusion of this provision in the Bill, for it reinforces the obligation on the Commissioner to perform her functions consistently with Australia's international obligations.

In *Minister for Immigration and Ethnic Affairs v Teoh*,[33] the High Court of Australia held that, in the event of ambiguity in legislation, courts should favour a construction that accords with Australia's obligations under a treaty or international convention to which Australia is a party, because Parliament, *prima facie*, intends to give effect to Australia's obligations under international law.[34] Similarly, the Full Court of the Family Court of Australia in *Re B and B: Family Law Reform Act 1995*[35] said that the Convention must be given 'special significance' for the purpose of interpreting domestic law,[36] given its almost universal acceptance.

Various Convention rights are engaged by the subject matter of the Bill, including:

- the right to non-discrimination (Article 2);
- the best interests of the child (Article 3);
- the child's right to receive appropriate direction and guidance in the exercise of his or her rights, consistently with the child's evolving capacities (Article 5);
- the right to life, survival and development (Article 6);
- the right to preservation of identity (Article 8);
- the right to express views freely and to be heard (Article 12);
- the right to freedom of expression (Article 13);
- the right to freedom of thought, conscience and religion (Article 14);

[30] See, e.g. Tyler Hartney, 'Likeness Used as Bait in Catfishing: How Can Hidden Victims of Catfishing Reel in Relief' (2018) 19 *Minnesota Journal of Law, Science and Technology* 277; Lauren Reichart Smith, Kenny D Smith and Matthew Lazka, 'Follow Me, What's the Harm: Considerations of Catfishing and Utilizing Fake Online Personas on Social Media' (2017) 27 *Journal of Legal Aspects of Sport* 32.
[31] See, e.g. *Crimes Act 1958* (Vic) s 36(2)(i); *Crimes Act 1900* (NSW) s 61HE(6)(a); *Crimes Act 1900* (ACT) s 67(1)(f); *Criminal Code* (NT) s 192(2)(e); *Criminal Code* (Tas) s 2A(2)(g); *Criminal Law Consolidation Act* (SA) s 46(3)(g).
[32] Gideon Boas, *Public International Law: Contemporary Principles and Perspectives* (Edward Elgar, 2012) 149.
[33] (1995) 183 CLR 273.
[34] Ibid 287 (Mason CJ and Deane J).
[35] (1997) 21 Fam LR 676.
[36] Ibid 743 [10.19].

- the right to freedom of association and peaceful assembly (Article 15);
- the right to privacy (Article 16);
- the right to access information and material from a diversity of national and international sources (Article 17);
- the right to engage in age-appropriate play and recreational activities and to participate fully in cultural and artistic life (Article 31); and
- the right to protection against violence, harm or exploitation or the risk of violence, harm or exploitation (Articles 19, 34, 36, 37(a), 39).

The Bill defines 'online safety for children' as: 'the capacity of Australian children to use social media services and electronic services in a safe manner, and includes the protection of Australian children using those services from cyber-bullying material targeted at an Australian child' (section 5) .

We believe that the Bill should take into account the following pertinent and very recent observations of the United Nations Committee on the Rights of the Child, to ensure that the extended cyber-bullying scheme adequately protects children from both the patent and insidious risks and harms of the digital environment, while still enabling children to engage with and benefit from the digital environment in the exercise of their Convention rights:

- *Preventative measures:* in light of the ever-expanding role of digital technologies in children's lives, States should not only regularly update and enforce legislative and regulatory frameworks, but also take measures to prevent risks of harm to children;[37]
- *Threats to privacy:* threats to children's right to privacy can arise in myriad ways in the digital environment, including from children's own activities; from parents or others sharing photos of and information about children online; from data collection and processing by government, business and organisations; and from criminal activities such as hacking and identity theft;[38]
- *Freedom of expression:* States should provide children with information on how to effectively exercise their right to freedom of expression, including how to create and share digital content, while respecting the rights of others and complying with the law;[39]
- *Children as perpetrators of cyber-bullying:* where children themselves have carried out or instigated cyber-bullying, States should pursue 'preventive, safeguarding and restorative justice approaches whenever possible';[40]
- *Reporting and complaints mechanisms:* such as complaints about cyber-bullying material made by an Australian child pursuant to section 30(1) of the Bill, should be 'accessible, child-friendly and confidential' and be designed in a way that enables children's meaningful participation in the process;[41]
- *Education and awareness:* a robust regulatory framework for online safety should incorporate educational and awareness-raising programs and campaigns, including

[37] UN Committee on the Rights of the Child, *Draft General Comment No 25 (202x) on children's rights in relation to the digital environment* (CRC/GC/, 13 August 2020) [82].
[38] Ibid [69].
[39] Ibid [60].
[40] Ibid [85].
[41] Ibid [88].

'how children can benefit from digital services, how to minimise risks and how to recognise a child victim of online harm and respond appropriately'.[42]

Thank you for considering our submission. [redacted]. We are happy for this submission to be made public.

Yours sincerely,

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Dr Georgina Dimopoulos (Swinburne Law School, Swinburne University of Technology)
Associate Professor Nicola Henry (Social and Global Studies Centre, RMIT University)
Stefani Vasil (Social and Global Studies Centre, RMIT University)

[redacted]

[42] Ibid [33].