Submission in relation to exposure draft of the Online Safety Bill

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I welcome the opportunity to comment on the exposure draft of the Online Safety Bill ('the Bill'). Please consider this email as my submission to the consultation being undertaken by the Department of Infrastructure, Transport, Regional Development and Communications.

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

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 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,..."

It is submitted that as 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 As indicated below, it is submitted that the classification system in the NCC is outdated as it appears to be overly broad and captures categories of content that should not be subject to such restrictive regulation. Specifically, when considered together, Class 1 and 2 of the NCC captures all sexual content, whether violent or not.

Given the broad and outdated framing of Class 1 and 2 of the NCC, it is submitted that it is not appropriate that the Minister has such a broad discretion to determine basic online safety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. It is submitted that it is a dangerous centralisation of power for such a broad discretion for to be invested in one person (ie. the Minister) to determine community expectations, particularly given that the classification code appears outdated and in need of review.

Part 8 - The Abhorrent Violent Material Blocking Scheme

Part 8 of the Bill gives the eSafety Commissioner the power to issue a blocking request or notice to Internet Service Providers (ISPs) to block domain names, URLs, or IP addresses that provide access to such material.

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, it is submitted that the proposed scheme has significant overreaches and fails to strike the appropriate balance between protection against abhorrent violent material and due process for determining whether content comes within that classification.

It appears that the scheme set out in Part 8 fails to 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 such a blocking request or notice should be subject to internal review and appeal.

Under Section 100 of the Bill, blocking notices cannot be for longer than 3 months. However, there are no limitations to the number of times the Commissioner can renew such a blocking request/notice. Given the architecture of the scheme as outlined in Part 8 and section 100, there is a legitimate concern that the scheme will have the potential to be used as a mechanism to suppress and limit dissent and democratic debate. 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*) (article 19). Accordingly, Part 8 should include the express limitation on the eSafety Commissioner's power to issue such blocking requests/notices that the decision is only exercised in limited circumstances (with these 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.*

In addition, there is a concern regarding there broad discretion for the eSafety Commissioner to determine what is 'in the public interest'. Moreover, there are circumstances where violence captured and shared online can be of vital importance to hold those in power accountable and to expose otherwise hidden human rights violations. This is particularly the case in respect of violence from law enforcement officers that is captured on video (e.g. 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). The virality of these videos was an important tool to hold law enforcement officials to account for the use of excessive force. Moreover, it has 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 the use of excessive force.

It is submitted 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 state use of violence and abuses of human rights.

Part 9 - The Online Content Scheme

The Bill relies heavily on the NCC to determine which content may be issued with a removal notice. The classification system in the NCC is outdated and in need of review. 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” (RC). This includes content that deals with sex or “revolting or abhorrent phenomena” in a way that offends against the standards of “morality, decency and propriety generally accepted by reasonable adults.”
- Class 2 material includes content that is likely to be classified as X18+ or R18+. This includes non-violent sexual activity, or anything that is “unsuitable for a minor to see.”

Taken together, Class 1 and 2 material captures all sexual content, violent or not.

It is submitted that this scheme is likely to cause significant harm to those who work in the sex industry, including sex workers, many of whom were forced to work online during the COVID-19 pandemic in order to maintain their livelihoods and sustain their income. The scheme as outlined in Part 9 of the Bill risks undermining their livelihood, and ultimately may force them offline into unsafe working environments.

In addition, it is submitted that the scheme also 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 take down notices,

It is submitted 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 where the Commissioner's decision is challenged.

Conclusion

I have several 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.

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 a 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 (with broad community representation) to review decisions made to remove and block content;
- provision for public reporting of the categories of content take-downs, complaints, and blocking notices issued, including the reasoning. This will allow for public and Parliamentary scrutiny over the ultimate scope and impact of the Bill;
- An effective, accessible internal review process, so people can challenge removal notices in a timely manner, without having to appeal to the AAT.

Thank you for the opportunity to comment on the exposure draft of the Online Safety Bill. I am willing to be contacted to discuss my concerns regarding the exposure draft of the Bill. I also consent to my submission being published on the website.

Yours sincerely,

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