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Online Safety Branch

Department of Infrastructure, Transport, Regional Development and Communications  
GPO Box 594  
Canberra ACT 2601

14 February 2021

By Email: [onlinesafety@infrastructure.gov.au](mailto:onlinesafety@infrastructure.gov.au)

Dear Online Safety Branch,

**RE: Exposure Draft of new Online Safety Bill**

EFA welcomes the opportunity to provide comment on the Exposure Draft of a new Online Safety Act.

EFA's submission is contained in the following pages.

#### **About EFA**

Established in January 1994, EFA is a national, membership-based, not-for-profit organisation representing Internet users concerned with digital freedoms and rights.

EFA is independent of government and commerce, and is funded by membership subscriptions and donations from individuals and organisations with an altruistic interest in promoting civil liberties in the digital context.

EFA members and supporters come from all parts of Australia and from diverse backgrounds. Our major objectives are to protect and promote the civil liberties of users of digital communications systems (such as the Internet) and of those affected by their use and to educate the community at large about the social, political, and civil liberties issues involved in the use of digital communications systems.

Yours sincerely,

Justin Warren  
Board Member  
Electronic Frontiers Australia

## **Introduction**

EFA is deeply troubled by the rush to accumulate new power concentrated in few hands and subject to little oversight or review. Authorities' failure to enforce existing laws is frequently used to justify new powers that can be used "more efficiently" which in practice means it will be done with less oversight and with fewer safeguards against abuse.

Power over others should be difficult to use. This difficulty provides an inbuilt safeguard against abuse which is necessary because all power is abused, sooner or later.

Australia is rushing to construct a system of authoritarian control over the population that should not be welcomed by a liberal democracy. It is leading Australia down a very dark path.

## **Summary of Recommendations**

**Recommendation 1:** That an independent review is conducted into the operations and effectiveness of the Office of the eSafety Commissioner before the Bill is introduced.

**Recommendation 2:** That general laws should govern online conduct and prohibited conduct should be precisely defined by those laws.

**Recommendation 3:** That the Bill's introduction be delayed until after a Federal enforceable human rights framework is introduced into Australian law.

**Recommendation 4:** That laws establishing and granting power to the eSafety Commissioner be reviewed prior to the introduction of this Bill to determine if they have met their stated objectives, and what, if any, adverse consequences have resulted.

**Recommendation 5:** EFA recommends that an audit be performed to compare the activities conducted with the outcomes achieved for all reports and complaints made to the eSafety Commissioner under existing legislation prior to the introduction of the Bill.

**Recommendation 6:** That the Bill require the eSafety Commissioner to produce reports providing detailed evidence of its effectiveness in achieving positive outcomes, and, where they exist, any negative outcomes.

**Recommendation 7:** That a diverse panel of domain experts and representatives from civil society be convened to design a transparency and effectiveness reporting regime for the eSafety Commissioner.

**Recommendation 8:** That the Bill should require the eSafety Commissioner to produce regular transparency and effectiveness reports at least yearly.

**Recommendation 9:** That the powers granted by the Bill should automatically expire after 5 years unless renewed by Parliament.

**Recommendation 10:** The definition of *child* used in the Bill should include greater nuance and provide a distinction between different levels of childhood development.

**Recommendation 11:** Penalties included in the Bill should be made proportional to the ability of the person's ability to pay.

**Recommendation 12:** That all use of National Classification Code be removed from the Bill.

**Recommendation 13:** That all uses of a restricted access system be removed from the Bill.

**Recommendation 14:** EFA recommends that section 222 is removed and replaced with a requirement that the Commission (or their delegate) must act with due care, diligence, and skill.

**Recommendation 15:** EFA recommends that a compensation scheme be established so that victims of inadvertent or accidental censorship are provided with a legal remedy to address the harm they suffer as a result.

## **Role of eSafety Commissioner**

EFA is deeply troubled by the rapid accumulation of power by the eSafety Commissioner.

The eSafety Commissioner was originally established a mere six years ago, in 2015, as the Children's eSafety Commissioner, and its scope has rapidly expanded to encompass a range of other activities. EFA is concerned that the government is proposing to add yet more power to the role without taking time to assess the effectiveness of the Office of the eSafety Commissioner, any adverse effects experienced as a result of the exercise of its powers, and any gaps in independent oversight of the role.

EFA proposes that a separate, independent review into the operation of the Office of the eSafety Commissioner should be conducted prior to any expansion in its scope. EFA suggests that the Australian National Audit Office would be well placed to conduct such a review.

**Recommendation 1:** That an independent review is conducted into the operations and effectiveness of the Office of the eSafety Commissioner before the Bill is introduced.

### General law, not regulator fiat

While it is appropriate for there to be targeted, carefully designed limitations to freedom of speech, the exact limits on those freedoms and where they should lie is a matter of intense, perpetual, debate. It is for Parliament to decide, after due consideration, whether to move the boundaries. It is anathema to both freedom of speech and the rule of law for Parliament to delegate to a regulator the power to set limits on individual speech.<sup>1</sup>

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<sup>1</sup> Graham Smith, "A Lord Chamberlain for the Internet? Thanks, but No Thanks.", <https://www.cyberleagle.com/2018/10/a-lord-chamberlain-for-internet-thanks.html> viewed 12 January 2021.

A free society cannot permit its ability to communicate to be subject to the whims and fancies of a single regulator. The rule of general law should apply to everyone, equally.

Prohibited conduct should be precisely defined by legislation rather than left to how an unelected regulator chooses to interpret subjective notions of ‘safety’ on any given day. Vagueness and flexibility are vices, not virtues, when authorities with great power are provided with broad discretion to use that power as they see fit.

The overuse of legislative instruments has the practical effect of allowing individual Ministers or appointed Commissioners to create law without it being subjected to democratic processes. This undermines a central principle of liberal democracy: that the use of state power is subject to the consent of the governed. That consent should be informed, clear, enthusiastic, and ongoing. It should not be assumed.

Expansions in the scope of law should require debate and scrutiny by Parliament to ensure that legislation serves the public interest and not just the narrow objectives of individual people or agencies.

The eSafety Commissioner’s original focus on children has now expanded into powers aimed at regulating the activities of adults. EFA is concerned that an emotionally manipulative “think of the children” approach to regulation will be used to regulate the conduct of consenting adults as if they were minor children.

This is particularly dangerous when there is insufficient precision in the definition of what constitutes harmful speech and a lack of oversight to correct mistakes made by individual Commissioners. The government risks creating a singular vehicle that will stifle speech by already marginalised people at the behest of a vocal, but well resourced minority. This already occurs in Australia<sup>2</sup>, due to a lack of fundamental legal protections for speech in Federal law, and EFA is concerned that the Bill as drafted will make this situation much worse.

EFA recommends delaying the Bill until after a Federal enforceable human rights framework—one that includes protections for freedom of speech—is introduced into Australian law.

**Recommendation 2: That general laws should govern online conduct and prohibited conduct should be precisely defined by those laws.**

**Recommendation 3: That the Bill’s introduction be delayed until after a Federal enforceable human rights framework is introduced into Australian law.**

## **Rapid addition of laws**

The rapid accumulation of new laws, and the addition of powers to the eSafety Commissioner, has not yet undergone a sufficient period of review to fully appreciate the complexity of the issues.

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<sup>2</sup> *Safe Schools Program Ditched by NSW Government* (16 April 2017), <https://www.abc.net.au/news/2017-04-16/safe-schools-program-ditched-in-nsw/8446680> viewed 14 February 2021.

Multiple pieces of legislation have been added in recent years, from the *Enhancing Online Safety Act 2015* (EOS Act) that established the eSafety Commissioner to the *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019* (SAVM Act). It is unclear if these additional powers have had a sufficiently beneficial effect relative to their cost.

EFA believes that, rather than simply adding more laws and more enforcement powers, a more considered approach is required. No time was provided for consultation with experts, industry, or civil society before the SAVM Act was passed, and criticism of the Act's flaws has been widespread.<sup>3</sup> Rushed law makes for bad law.

EFA recommends that a review of the effectiveness of previously enacted laws in achieving their stated objectives should be conducted prior to the introduction of this Bill. The review should be conducted with a view to identifying the true nature of the issues and whether the eSafety Commissioner is the correct method to address these issues. The review should also investigate if undue haste in drafting these laws was a contributing factor to any lack of effectiveness or adverse consequences. Learning from past mistakes would enable us to avoid making them again with this Bill.

**Recommendation 4: That laws establishing and granting power to the eSafety Commissioner be reviewed prior to the introduction of this Bill to determine if they have met their stated objectives, and what, if any, adverse consequences have resulted.**

## Regulatory gaps or lack of enforcement?

Greater explanation is required regarding the specific gaps that the new legislation is attempting to fill, and why the proposed methods of filling those gaps are appropriate.

It is unclear what specific gaps exist in existing legislation that necessitate specific laws against online harms. In discussion with other civil society groups, a common concern was that existing laws are simply not sufficiently enforced.

EFA has heard from various individuals and groups that they have reported harmful behaviour to various authorities (including state and federal police forces, ReportCyber, and the eSafety Commissioner) but their concerns were dismissed or not acted upon. It appears that, rather than a lack of laws or a dearth of evidence, the issue is largely related to a lack of resources and attention given to the areas of concern by authorities.

EFA is concerned that additional laws will merely provide the appearance of action, but will not improve outcomes.

**Recommendation 5: EFA recommends that an audit be performed to compare the activities conducted with the outcomes achieved for all reports and complaints made to the eSafety Commissioner under existing legislation prior to the introduction of the Bill.**

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<sup>3</sup> *Australia's New Social Media Law Is a Mess* (10 April 2019) Lawfare, <https://www.lawfareblog.com/australias-new-social-media-law-mess> viewed 18 February 2020.

## Regular reporting required

EFA recommends that the eSafety Commissioner should regularly report on the outcomes achieved as a result of its actions, rather than merely the activities it has performed. Activity is not the same as effectiveness. These results should be specific, tangible, and beneficial. Any adverse effects experienced as a result of the eSafety Commissioner's actions should also be contained in such reports, so that Australians can accurately determine if the costs of the eSafety Commissioner's actions outweigh the benefits.

Such reports should include, for example:

- The number of reports that resulted in a successful takedown of content.
- The number of reports that did not result in a successful takedown of content, and the reason they were unsuccessful.
- The number of reports made to the eSafety Commissioner that were not actionable or were abandoned.
- The number of reports made to the eSafety Commissioner that were determined to be fake or malicious.
- The number of reports where it was determined that a minor consensually sent content to another minor.
- The number of reports that were repeats or follow-ups to earlier reports.
- The number of reports that were appealed by either the subject of the report or the platform hosting the content, and the outcome of that appeal.
- The number of reports that resulted in a takedown of content where the takedown was later found to have been made in error.

Such reports would provide a more accurate picture of the effectiveness of the powers granted to the eSafety Commissioner in achieving their stated objectives.

**Recommendation 6: That the Bill require the eSafety Commissioner to produce reports providing detailed evidence of its effectiveness in achieving positive outcomes, and, where they exist, any negative outcomes.**

## Improved transparency and accountability

EFA supports an increase in transparency and accountability for all those with power, which includes not just the online service providers but also those attempting to regulate the online service providers.

Transparency reporting should incorporate measures of outcomes, not merely activities. If outcomes are not measured, then success can be declared merely for performing a variety of expensive activities rather than actually making the world a better place.

Expert and civil society advice should be sought when designing the transparency reporting to ensure that they provide information that is useful to those being governed, and not merely what the authorities prefer to disclose. Transparency reports should also include expert opinion,

and the public's perspective, on whether the operation of the scheme is making things better, or worse.

The Bill should include the requirement to public such transparency and effectiveness reports on a regular basis no less than yearly.

**Recommendation 7: That a diverse panel of domain experts and representatives from civil society be convened to design a transparency and effectiveness reporting regime for the eSafety Commissioner.**

**Recommendation 8: That the Bill should require the eSafety Commissioner to produce regular transparency and effectiveness reports at least yearly.**

## **Abuse by authorities**

In far too many cases abuse has been perpetrated by those tasked with protecting us.<sup>4</sup> We know that existing systems are frequently misused by authorities<sup>5</sup> and there appears to be little recourse when this happens. Any new scheme should assume that abuse of power will occur and design mechanisms for addressing this abuse before the power is granted.

EFA recommends that any powers granted to authorities be joined with a sunset threshold: if the given power is abused a certain number of times, or at a given rate, the power will be automatically removed. This would create an incentive within the authorities not to abuse the powers they are given.

Legislation is very rarely repealed and power, once granted, is rarely taken away. No assurance that power will not be abused is credible, so it is important that removal of power is considered before it is granted.

However, this also creates a new risk: the potential for loss of power creates an incentive to hide any abuse so that it is not discovered. Transparency and independent oversight is therefore critical to ensure that bad behaviour is uncovered.

**Recommendation 9: That the powers granted by the Bill should automatically expire after 5 years unless renewed by Parliament.**

## **'Children' is not a monolithic category**

EFA submits that a single, blanket definition of *child* is inappropriate for legislation governing speech.

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<sup>4</sup> Smee B, "Queensland Police Officer Receives Suspended Jail Sentence for Leaking Woman's Details to Violent Ex-Husband" The Guardian, 14 October 2019, <https://www.theguardian.com/australia-news/2019/oct/14/queensland-police-officer-pleads-guilty-leaking-womans-details-violent-ex-husband> viewed 18 February 2020.

<sup>5</sup> Karp P, "Home Affairs Unlawfully Accessed Public's Stored Metadata, Ombudsman Reveals" The Guardian, 10 September 2019, <https://www.theguardian.com/australia-news/2019/sep/11/home-affairs-unlawfully-accessed-stored-metadata-ombudsman-reveals> viewed 11 September 2019.

It is generally recognised that children at different stages of development require different levels of care, and are differently able to make decisions for themselves. What may be an appropriate restriction on what pre-school-age children see and experience should not be required for those in secondary school. Requiring a 17-year-old to be treated as a three-year-old would not only be insulting, it would undermine their ability to grow into a fully-independent adult who can navigate the modern information environment.

Children should not be robbed of the skills they need to become full adult members of today's society because of a misplaced desire to insulate them from any and all harms. As parents, we must one day have the courage to give our children what they most need from us: their independence.

**Recommendation 10: The definition of *child* used in the Bill should include greater nuance and provide a distinction between different levels of childhood development.**

## **Penalties should be proportional**

There is a risk inherent in any increase in regulations that only large and well resourced operators are able to comply with the new regulations. This risks rewarding actors that have accumulated power and influence by exploiting the very gaps the new legislation seeks to fill. Having built their castle, these actors then use the government to dig a moat on their behalf, helpfully protecting them from further competition and entrenching their market dominance.

Legislation must therefore be carefully designed to minimise this risk, and to ensure that market competition is increased rather than decreased.

Penalties or costs should therefore be designed in a proportional manner, in line with other legislation (such as the Privacy Act 1988 and the Corporations Act 2010) that places a larger onus on larger organisations, particularly government owned or public companies. This design principle would protect small, community-minded online services from oppressive regulation aimed at giant for-profit multi-nationals with a lengthy history of poor behaviour.

For monetary sanctions such as fines, an approach similar to the EU's GDPR<sup>6</sup> where sanctions are proportional to global revenue should be considered.

Entities with a greater ability to cause harm should be subject to greater control and scrutiny than those of lower risk. This risk-based, harm minimisation approach is consistent with other safety-focused legislation such as that for possession and operation of dangerous machinery, weapons, and drugs.

**Recommendation 11: Penalties included in the Bill should be made proportional to the ability of the person's ability to pay.**

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<sup>6</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA Relevance) 2016 (OJ L).



## Online classified content

It is entirely inappropriate to use the National Classification Code in the manner provided in the Bill.

Division 2 sets up the eSafety Commissioner as the sole arbiter of whether or not content from anywhere in the world should be subject to Australia's classification scheme. It would allow the Commissioner to determine that any content not already classified should be refused classification and therefore subject to removal from a service, not merely denied to Australians.

This is a breathtaking amount of power to be handed to a single person, regardless of the level of oversight. The severe lack of checks and balances over the exercise of power granted by the Bill only compounds the danger. Granting extraterritorial jurisdiction over all Internet content to an unelected person appointed by the government of the day is an astounding proposition in a country that holds itself out as a liberal democracy.

Australia's classification regulation is currently being reviewed<sup>7</sup>. Until that review is complete, there should be no expansion to the use of the National Classification Code to regulate online content. It was not designed to suit the online world that we now find ourselves in, hence the review..

**Recommendation 12: That all use of National Classification Code be removed from the Bill.**

## Restricted access systems

EFA has long advocated against the imposition of legislated technological measures that amount to censorship in the name of attempting to restrict the ability of minors to access pornography and other arguably harmful content.

EFA remains firmly opposed to such approaches, as they:

- are almost always trivial to circumvent for anyone with basic technical knowledge;
- inevitably restrict access to entirely legitimate content;
- replace parental judgement with bureaucratized or corporate control;
- are always subject to scope creep, often very quickly; and
- perhaps most importantly, divert attention and resources away from responses that are likely to be more successful in addressing harm.

It is entirely inappropriate that the eSafety Commissioner should be able to mandate the use of such a broad censorship mechanism through the use of a legislative instrument as defined in section 108 of the proposed Bill.

**Recommendation 13: That all uses of a restricted access system be removed from the Bill.**

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<sup>7</sup> Department of Infrastructure T, *Review of Australian Classification Regulation* (23 December 2019), <https://www.communications.gov.au/have-your-say/review-australian-classification-regulation> viewed 19 February 2020.

## Liability shield

Section 222 of the draft Bill exempts the Commissioner from liability for damages for mistakes made if those mistakes occurred as a result of the Commissioner, or their delegate, acting in good faith. Further, section 221(2) exempts other parties acting to comply with notices and requests made by the Commissioner.

This would have the effect of providing broad immunity to the Commissioner or complying parties for harms caused as a result of acting in good faith but without appropriate levels of attention, skill, or diligence. This creates a moral hazard and an incentive to over-censor. We have already seen innocent parties harmed by the inept actions of government regulators<sup>8</sup>. It is likely that this will happen again as a result of the exercise of the powers granted by this Bill.

Great power should come with great responsibility. It should not be granted with impunity from consequences of exercise of that power. No matter how good the intentions, if others are harmed as a consequence of mistakes or oversights made in the exercise of power, then those exercising power bear at least some responsibility for those harms.

If the government does not feel that the powers in the Bill can be safely used by the Commissioner or complying parties without exemption from liability then the powers should not be granted.

**Recommendation 14:** EFA recommends that section 222 is removed and replaced with a requirement that the Commission (or their delegate) must act with due care, diligence, and skill.

**Recommendation 15:** EFA recommends that a compensation scheme be established so that victims of inadvertent or accidental censorship are provided with a legal remedy to address the harm they suffer as a result.

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<sup>8</sup> McGrath business reporter P, *250,000 Websites Blocked in "hilarious" Misunderstanding* (27 August 2014) ABC News, <https://www.abc.net.au/news/2014-08-27/asic-accidentally-blocked-250,000-websites-ip-address/5701734> viewed 18 February 2020.