Australian Sex Workers Association

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Online Safety Branch
Content Division
Department of Infrastructure, Transport, Regional Development and Communications
GPO Box 594
Canberra
ACT 2601

Dear Online Safety Branch,

Thank you for the opportunity to provide a submission on the exposure draft of the *Online Safety Bill*.

About Scarlet Alliance

Scarlet Alliance, Australian Sex Workers Association, is the national peak sex worker organisation in Australia formed in 1989. Our membership includes state and territory-based sex worker organisations and individual sex workers. Scarlet Alliance uses a multifaceted health promotion approach to strive for equality, justice and the highest level of health for past and present workers in the sex industry. We achieve our goals and objectives by using best practices including peer education, community development, community engagement and advocacy.

Scope of our submission

We recognise the Bill has multiple components: it administers a complaints system for cyber-bullying targeted at an Australian child; a complaints system for cyber-bullying targeted at an Australian adult; a complaints and objections system for the non-consensual sharing of intimate images; administers an online content scheme; and sets out a framework for basic online safety standards.

In this submission, we limit our comments to (1) discretion, power and oversight, (2) sex worker safety and livelihood, (3) the Online Content Scheme, (4) the Basic Online Safety Expectations and (5) Non-Consensual Intimate Images. We close with a number of recommendations for change to the draft Bill.

1. GENERAL COMMENTS ON DISCRETION, POWER AND OVERSIGHT

Although this Bill seeks to respond to genuine concerns about the power and influence of 'big tech', the viral distribution of non-consensual intimate imagery and young people's safety when navigating the Internet, it affords too much power to the Commissioner to regulate online content and insufficient provisions to address the root causes of these issues. While the Objectives of the Bill are to improve and promote online safety for Australians, the Bill has completely neglected the issues of prevention

and genuine redress. The removal of online content provides a temporary, one-off, band aid fix to mitigate only some of these problems.

Instead, the E-Safety Commission could be doing genuine prevention work, including diverting funds to civil society organisations to develop tailored, targeted and culturally-relevant prevention approaches. For example, providing media literacy training for young people (including porn literacy) to equip them to navigate material they come across online as well as sex and relationship education (including consent training) to give people skills to be responsible media users. The Commission could be providing financial compensation to support people whose privacy and consent is breached when their intimate images are shared non-consensually or their privacy or rights breached. It could be pioneering new human rights-based approaches to content moderation. As presently drafted, the Bill affords the Commissioner virtually unaccountable power to decide what content is harmful and administer this in a way that will require intensive resources and funding.

A key question from Scarlet Alliance to the E-Safety Commission is about how the Bill's success is measured. If the Object of the Bill is to improve safety for Australians, then success cannot be based upon the sheer amount of content that is removed, deleted or remedied. This activity will not necessarily result in long-term meaningful benefits. The number of complaints made by Australian users, the number of notices issued by the Commissioner and the amount of revenue collected by way of civil penalties provide no indication of whether safety is improved for Australians. The quick (24 hour) turnarounds for content removal in the Online Safety Scheme provide almost no opportunity for genuine consideration, investigation or evaluation. Taking down content after the fact (which has a debatable deterrent effect) will not necessarily prevent posting of harmful or non-consensual images in future. We ask the Commission, how will civil society stakeholders know that the administration of this Bill is actually achieving its objectives, and what consequences are there for the Commission if it does not?

The Bill requires urgent amendments to prevent the unchecked use of power. Instead of the broad provisions that permit the Commissioner to escape liability for damage and be protected from civil proceedings (s222), it requires clear oversight provisions (discussed below), a sunset clause and a 12 month periodic review clause to ensure that the enormous powers afforded to the Commissioner are not being abused. To ensure that impacted communities are a consideration in regular review, it could include the engagement of a community board composed of representatives of affected communities appointed to review and report on the impact of the Commission. It requires a mechanism for the Commissioner to report on their progress in relation to the Bill's Objectives (improving and promoting safety of Australians) rather than simply the activity involved in enforcement and compliance. 'Improving safety' ought not to relate simply to raising awareness or taking down content, but actually curbing the root problems that cause people to upload non-consensual or harmful online content or exclude populations from civil participation. At present the Bill proposes a resource-intensive scheme that will operate as a pseudo police force and require substantial funds but not necessarily deliver safety. It positions the E-Safety Commissioner effectively as a Chief Censor, with inadequate oversight.

There must be consequences for when these powers are misused. The Bill needs clear criteria to guide the Commissioner's decision-making (developed with community and stakeholder consultation), clear processes for the Commissioner to give reasons for decisions, processes for users to request review of decisions (before going to the Administrative Appeals Tribunal), publicly available disaggregated enforcement data, record-keeping of content that is removed, and consequences for when the

Commissioner makes too many erroneous decisions that are successfully appealed (such as being liable to pay compensation to people whose websites have been wrongfully blocked or removed).

2. A RISK TO SEX WORKER SAFETY AND LIVELIHOOD

The Bill threatens to cause mass deplatforming of sex workers

As you may be aware from our previous consultation and submissions on this issue, sex workers face a range of barriers to participating in online spaces and accessing digital economies. Frequent experiences of content removal, shadowbanning, deplatforming and discriminatory community standards can have dangerous consequences for sex workers. These include social isolation, a reduction in sites to share crucial health and safety information, lack of access to community support and loss of livelihoods.

Sex workers should be able to work safely online

In this submission we draw your attention to the ways in which the *Online Safety Bill* as currently drafted will impact sex workers in Australia. Many sex workers now engage in online forms of sex work as we navigate an increasingly precarious labour environment and need to diversify our income streams. Sex workers do a variety of types of online work, including live webcam, pornography and direct-to-consumer content provision. Online work can be flexible for sole traders as it can be performed from home around other commitments including care roles or receiving healthcare and managing disability or chronic illness. During the COVID-19 pandemic, increasing numbers of sex workers turned to online work to avoid losing income, to avoid face-to-face in-person services and to comply with public health directions. In fact, sex workers mobilised during lock-down to create national COVID-Safe templates, harm reduction resources and guides for new workers commencing online work. Sex workers must be able to choose and access online sex work without unnecessary barriers.

Impact of immediate removal of sex worker content

Our key concern is that under this Bill, any sexually explicit media (content that would be classified as X18+ or RC) can be removed within 24 hours if the Commissioner thinks fit. Because of its extraterritorial application, this relates not only to material hosted on an Australian server (as is a condition under Schedules 5 and 7 of the *Broadcasting Services Act 1992*) but to any material that can be accessed by an Australian end-user, which will bring challenges in monitoring and compliance. The Bill provides no decision-making criteria for the Commissioner to determine what kind of content ought to be subject to removal and does not require the Commissioner to give any reasons for their decision. This makes it difficult for sex workers to anticipate how they might comply, and puts them at risk of losing online assets and time-sensitive advertising content at short notice with no recourse.

Regression on important gains on sex worker safety through online work and law reform

This Bill carries the potential for sex workers to lose their income and livelihoods, which can have serious public health implications. Australia has pioneered some of the best sex work legislation in the world, with the Northern Territory being the first jurisdiction globally to fully decriminalise sex work. Yet this Bill has potential to wipe out an entire sector of the industry, and with it, sex workers' choice and autonomy over their working environments. While an object of this Act in section 3 is to 'improve online safety for Australians', sex workers are not imagined by this Bill as a class of people whose safety

requires protection. With good human rights-based policy and technology design, the protection of children from experiencing harm online is not mutually exclusive with the preservation of sex worker livelihoods and choice and autonomy over where and how we work.

3. ONLINE CONTENT SCHEME

Need for new approaches to content regulation that keep sex workers safe

We appreciate that technological advance warrants new approaches to the difficult task of content regulation. Existing regulatory frameworks for the classification of films, publications and computer games and broadcasting services are insufficient to capture the platforms and services through which users share media content, as evidenced by repeated failed attempts to revise this framework. We note the importance of keeping privatised platforms transparent and accountable for content moderation decisions.

However, sex worker safety must be considered an important and relevant issue in drafting a framework for online safety. There is no definition of safety in the Bill, but the way it seems to conceive of online safety is restricted to young people's ability to access to sexual material. We advocate for a holistic consideration of safety for all Australian internet users with regard for how marginalised communities construct safe spaces online, or how their safety in real life is impacted by their exclusion from online spaces.

Replicating the problems of classification and broadcasting laws

We are concerned that this Bill replicates and reproduces the problems of existing classification and broadcasting laws by simply transferring them into a new online safety Bill. The *National Classification Code 2005* is inherently problematic in its definition of X18+ content, and yet these problematic categories continue to be reproduced in other legislation such as the *Broadcasting Services Act 1992*, which refers to 'potentially prohibited' content as X18+ and RC content.

There are many problems with the definition of X18+ in the *National Classification Code 2005*. It is extremely narrow in its scope. It expressly precludes the depiction of fetish material (including a wide variety of practices including bondage, golden showers, piercing, fisting and candle wax) even where those activities are perfectly legal to perform. It also precludes 'violence' which can be understood so broadly as to potentially include rough sex, dirty talk, unrealistic violence and violence unrelated to sexual activity. It also precludes the depiction of anyone who 'appears to be' under 18, which can capture youthful-appearing adults engaged in consensual activities as well as various forms of fan-fiction. Any content that includes such material as well as depicting explicit sex (even if they are unrelated) will be Refused Classification and constitute Class 1 material.

The X18+ category has been criticised for producing adult content that is heteronormative and ableist, because of the unsophisticated ways it understands and regulates representations of sex, bodies and sexual practices.[1] As a result of the current definition, the Classification Board has instructed trainees that content featuring women with small breasts (which may be mistaken as 'under-developed') may be Refused Classification, and Customs Officers have misinterpreted g-spot ejaculation to be golden

[1] Thorneycroft, R. (2020). If not a fist, then what about a stump? Ableism and heteronormativity within Australia's porn regulations. *Porn Studies*, *7*(2), 152-167; Stardust, Z. (2014). 'Fisting is not permitted': Criminal intimacies, queer sexualities and feminist porn in the Australian legal context. *Porn Studies*, *1*(3), 242-259.

showers (a 'fetish') and therefore Refused Classification.[2] At present, activities that are legal and consensual to engage in can be Refused Classification. It is a mistake to merely impute the existing flawed classification categories onto a new *Online Safety Act*, both because of the problems inherent in those categories, and because of the impossibility of effectively monitoring the volume of online content that could contain this material.

Defining harmful online content: The problems with Class 2

We are concerned about the broad definition of Class 2, which captures all R18+, X18+, and Category 1 and 2 Restricted materials under the *National Classification Code* without delineation. There is wide variation between all of these categories, which capture material that simply includes nudity or implied sexual activity (Category 1) as well as simulated sex (R18+) and actual sex (X18+). At present, this material is lumped together with no criteria to guide the Commissioner's decision-making about what warrants a removal notice.

If the Bill is concerned with identifying potential 'harmful online content' then there is no reason why X18+ content should be in Class 2 at all. Given that the X18+ category is currently the only category (including G for General Audiences and PG for Parental Guidance) that actually excludes violence, it makes no sense for X18+ to be included in Class 2. The Bill simply conflates sexual content with harmful content on no basis, again failing to clearly define 'harmful'.

Offensiveness as an inadequate and inappropriate test for organising online content

Section 8 of the Bill outlines certain matters to be taken into account for the purposes of dividing whether an ordinary reasonable person in the position of a particular Australian adult would regard particular material as being, in all the circumstances, offensive. These include: a) the standards of morality, decency and propriety generally accepted by reasonable adults; (b) the literary, artistic or educational merit (if any) of the material; and (c) the general character of the material (including whether it is of a medical, legal or scientific character). This section simply replicates the focus of the *Classification Act 1995*.

The previous classification concept of offensiveness as a measure of what material ought to be permissible is outdated and inappropriate. Standards of morality, decency and propriety should not be the measures through which harm is assessed. Whether material has literary, artistic and educational merit and medical, scientific or legal character may have little to do with whether that material is in fact harmful.

Too often, sexually explicit media is assumed to be without merit and in need of redemption by some literary, artistic and educational quality. The presumption is that pleasure itself is not a measure or marker of value, and yet pleasure plays an important part in sex education, connecting communities, self-esteem and wellbeing. There is now a strong body of research in the field of sexual health and sexual rights that emphasises that pleasure can be a valuable social good, in and of itself. The need for material to have 'literary, artistic and educational merit' does not recognise the cultural merit and value of sexual media.

[2] Counihan, B. 'Weird Politics of Small Boobs and Body Fluids'. *Sydney Morning Herald*. 29 January 2010.

For sex workers, this content also has inherent economic value and can be expensive and time-consuming to create. Many invest significantly as sole traders or business owners in curating and producing content that could be deleted overnight. Other cultural industries that produce digital media content are not targeted in the same way.

Encouraging vexatious and malicious complaints against sex workers

In Division 5, the Bill permits any Australian internet user to make complaints to the E-Safety Commissioner about Class 1 and Class 2 content that is not subject to a restricted access system (section 38). It permits the Commissioner to investigate matters on their own initiative where the Commissioner 'thinks that it is desirable to do so', which of course is a subjective test. The only criteria for when an investigation is warranted, or for how it is conducted, is what the Commissioner 'thinks fit.'

Sex workers are already subject to a high level of malicious complaints informed by stigma and discrimination. The legislation effectively invites, emboldens, encourages and incites users to complain about any sexual material online (even simply nudity) by providing extremely broad grounds. A complaint can be made about any Class 2 content that is not subject to a restricted access system, even where there is nothing harmful about the content or no-one's safety is at risk. This will lead to malicious, frivolous, vexatious and vengeful complaints disproportionately targeted to sexual content and consume significant resources that could be better used in prevention or redress. There must be something about the content that makes it harmful in order to justify grounds for a complaint. Simply the fact that it is sexual content should not be sufficient to warrant an investigation.

Problems of age verification processes and need for sex education and media literacy

The basis for complaints regarding Class 2 material includes whether access to the material is subject to a restricted access system. The Commissioner has the power to specify a particular access-control system that must be used as a 'restricted access system'. This means that, for example, the Commissioner may determine that all Class 2 material ought to be subject to an age-verification system. While the Commissioner is required to consider the administrative and financial burdens of imposing a restricted access scheme, they are not required to take into account privacy considerations. Both the Australian and United Kingdom governments have considered age-verification processes to limit minors' access to adult material. This was dismissed by the UK government because of major issues relating to privacy and feasibility.[3]

It is important to recognise that many sex workers already include a self-screening tool on their sites which ask users to click to agree that they are of legal age in the jurisdiction in which they are accessing the content. This is important because the material is accessed in different countries which may have different age access requirements (for example, from 16 - 21). Other sex workers signpost their content with a 'content warning' describing what viewers can anticipate before they scroll down. Social media platforms have also taken similar measures of labeling 'sensitive' content. These kinds of measures should be sufficient to meet the requirement that the content is 'subject to a restricted access system' because it is not publicly available without a user taking an active step to access it.

However, these approaches presuppose that 'exposure' to sexual content is inherently harmful, but do not engage with the necessity of educating young people about media literacy and how to read and

[3] Blake, P. (2019). Age verification for online porn: more harm than good?. *Porn Studies*, *6*(2), 228-237.

understand online sexual content. This approach leads to a digital gentrification of online space, whereby sexual content is siloed into small sections of online space. This in turn leads to inferior conversations about sex and sexuality online and a lack of adequate sex and relationship education. Rather than restricting access to sexual content and sequestering it into isolated parts of the Internet, there are benefits to integrating sex into a range of different platforms alongside other media content because it can open up important social, cultural and educational conversations about pleasure, health and safety that users might not ordinarily have.

Many successful sexual health promotion campaigns employ imagery that could be captured in the definitions of Class 1 / Class 2 material, whether to engage viewers or to provide information (as, for example, does the Scarlet Alliance Red Book Online sexual health resource for sex workers). There is a great deal of value to such images, and an opportunity to support young people to take sexual images in their context, and to have frank and open conversations about them.

Extraordinary power of the E-Safety Commissioner combined with a total lack of decision-making criteria, transparency and accountability processes

One of our key concerns about the Bill is that it affords disproportionate, unnecessary and enormous power to an unelected public bureaucrat. The Commissioner is appointed by the Minister and can delegate functions and powers to administrative decision-makers to make critical decisions about what kind of content is offensive and harmful. Further, the Commissioner can remove content that is not harmful, nor illegal, but simply whatever they consider to be inappropriate.

We note current Commissioner Inman Grant's comments targeting online platform OnlyFans, which is widely used for content sales by sex workers, as a site of 'sextortion' and 'image-based abuse', and have concern for the ways in which any Commissioner's political agenda, organisational or religious affiliations, and personal moral code may impact the process and outcomes of their decisions, particularly where they are informed by stigma surrounding sex work and / or a failure to acknowledge it as a largely legal and legitimate occupation.

The Online Content Scheme lacks decision-making criteria, transparency and accountability processes. There is no criteria listed by which the Commissioner makes decisions on whether material subject to a complaint will be removed. The only criteria is whatever the Commissioner thinks fit. Section 42 permits the Commissioner to instigate investigations of their own initiative where there have been no complaints but the Commissioner 'thinks that it is desirable to do so'. These are very broad powers that effectively allow the Commissioner to single out particular websites and remove them without any justification and without giving reasons. Under this Scheme, the Commissioner has power to remove any sexual material that they don't like within 24 hours with no consequences.

While users are given the option of appealing to the Administrative Appeals Tribunal, the extraordinary discretion afforded to the Commissioner to make decisions as they see fit makes appeals relatively fruitless. There is no process outlined for users to be notified that their material may be removed, no notice period offered to them, no opportunity for them to be given a hearing to speak or write back in relation to the complaint. The expedited 24 hour time frame removes any opportunity for the Commissioner to develop or communicate considered reasons. The lack of transparency about why the material has been removed leaves users with no clarity on how to actually comply with the scheme.

Need for publicly available records of decision-making

In the functions of the Commissioner set out in section 27, there is a requirement to collect, analyse, and disseminate information relating to online safety, to support, encourage and evaluate research about online safety, and to publish public reports and papers on online safety.

However there is no requirement for the Commissioner to give public reasons for or evidence of their decisions. The Bill should require the public dissemination of transparent, accessible and comprehensive data about enforcement, compliance policy and decision-making of the Online Safety Scheme. This includes making internal policies public, providing mechanisms for researchers to access enforcement metrics, having a publicly available Application Programming Interface, allow people to request and receive tailored and disaggregated statistics, publishing enforcement reports that document the number of complaints, removal (and other) notices issued, the kind of content removed, how many appeals were lodged and their outcomes.

Civil society and researchers should be able to access data on enforcement and decision to identify patterns and hold decision-makers into account. Users need access to this data in order to understand the deliberation process and know how to comply. Such requirements can also address the potential for misuse of power, as requiring transparency about the Commissioner's conduct relating to complaints and content removals allows it to be tested by public scrutiny.

4. BASIC ONLINE SAFETY EXPECTATIONS

The Bill gives platforms incentive to remove all sexual content

While it may be reasonable for social media services, relevant electronic services and designated internet services to be subject to basic online safety expectations, we are concerned about the impacts this may have on the kinds of content those services permit and how they comply. We welcome the caveat that such safety expectations will be developed in consultation with community stakeholders and civil society. As a community likely to be highly impacted by this system, sex workers must be considered as community stakeholders.

Sex workers rely on online platforms in order to advertise, screen clients and employ other safety measures, and connect with peers to get essential health and safety information. The key areas of concern for us are the requirements for services to (a) take reasonable steps to ensure that technological or other measures are in effect to prevent access by children to Class 2 material; and (b) ensure the service has clear and readily identifiable mechanisms that enable end users to report and make complaints about breaches.

While these may appear reasonable on first reading, they have the potential to be misused. They provide an incentive for platforms, hosts, providers and other services to either instigate age verification mechanisms, which have a wide range of privacy and feasibility risks, or, where this is too onerous or expensive, simply to create policies that remove sexual content altogether, resulting in the sanitisation of online space and a mass de-platforming of sex workers. The $111,000 penalty for failing to provide compliance reports provides a financial incentive for services to take an over-zealous approach to sexual media. As platforms become responsible for attempting to determine whether

content falls into Class 2, they will likely use artificial intelligence to deal with this at scale, which will likely lead to algorithmic bias, insufficient human oversight and capture of unintended material.

The effects of FOSTA-SESTA legislation in the United States provies an example of this type of 'chilling effect', whereby platforms were required not to 'promote or facilitate prostitution'.[4] This was interpreted so broadly that it led to sex worker advertising sites being shut down, the loss of spaces to share eduction and safety information, and many social media companies (such as Facebook and Instagram) prohibiting many kinds of sexual communication, solicitation, images and even emojis. Sex workers all over the world were deeply impacted by this legislation and continue to face exclusion and discrimination as a result.[5]

4. NON-CONSENSUAL INTIMATE IMAGES

Sex workers can reasonably expect to be afforded privacy

The Bill creates a system whereby a person depicted in an intimate image can make an objection or a complaint about their intimate image being posted online. Intimate images include images of private parts (such as genitals, anus or breasts) or private activity (such as a state of undress or engaging in sexual activity) in circumstances in which an ordinary reasonable person would reasonably expect to be afforded privacy. The definition of 'intimate image' in s15(3) includes circumstances in which an ordinary reasonable person would reasonably expect to be afforded privacy (e.g. in a state of undress**,** using the toilet, showering, having a bath, engaged in a sexual act of a kind not ordinarily done in public, etc).

Sex workers should be understood as having a reasonable expectation of privacy. Even where sex workers have intimate images online for work-related purposes, we still have a reasonable expectation of privacy. For example, sex workers may reasonably expect that our photos will be used in work-related contexts, or on specific advertising platforms, or for a limited duration of time. Simply the fact of having intimate images online does not mean that a sex worker expects that content to be posted and shared without consent.

For sex workers, this part of the Bill could open up better access to redress if a client stealthily takes images or video in a session or session negotiation and posts it online, or if an individual or entity steal and re-post advertising content without the consent of the person depicted. This is an ongoing issue for sex workers that is only partially addressed by copyright law and state-based criminal laws on sharing non-consensual intimate imagery. Sex workers therefore should have equitable access to reporting and be understood as people who can reasonably expect privacy.

For sex workers, equitable access requires the ability to report content anonymously or under a pseudonym. There are many reasons why sex workers have concerns about giving their legal identity details to government bodies or officials, and should not be required to do so in order to access protection under the NCII section of the Bill.

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[4] Albert, K., Armbruster, E., Brundige,E., Denning, E., Kim, K., Lee, L., Ruff, L., Simon, K., Yang, Y., (2021, forthcoming), FOSTA in a Legal Context. *Columbia Human Rights Law Review.* Volume 52.

[5] Blunt, D., Coombes, E., Mullin, S. and Wolf, A. (2020) *Posting Into the Void: A Community Report by Hacking//Hustling*. New York.
https://hackinghustling.org/wp-content/uploads/2020/09/Posting-Into-the-Void.pdf

Differential treatment of body parts

The definition of private sexual material is concerned with sexual organs, anal regions and women's breasts. We note that the definition of intimate image in s15(2) perpetuates a differential treatment of men and women's breasts that has no public policy rationale. These kinds of differentiations have poor consequences in social media content moderation which disproportionately censor women's bodies. For the purposes of this section, it is important that people are able to remove content of themselves. It should have a broad definition that permits people of all genders to object and complain about their content being non-consensually posted, whatever their relationships to their breasts or chests.

Existing section does not recognise withdrawal of consent or limits on consent

Non-consensual intimate images are images where the person depicted did not consent to the posting of the image. However the Bill is unclear about what this means. While section 33(2) provides that the depicted person may make an objection even if they consented to the posting of the intimate image, it is still unclear whether consent can be withdrawn or qualified.

In some scenarios, sex workers may have consented to the posting of the image for certain purposes (such as advertising on a particular escorting website), but not consented to the posting of the image for other purposes or on other platforms (such as continued use of image after leaving the agency, or the pirating or distribution of the image across other platforms). It is a recurrent problem for sex workers that some businesses continue to use a worker's intimate images after the sex worker has terminated their relationship with the agency or establishment without permission. In some cases, they have sold them to other businesses and the photos virally proliferate across multiple mediums. However the removal of such images under current copyright protections remains difficult and ad hoc. The Bill needs amendment to recognise that a person should be able to withdraw their consent to the posting of intimate images and place limits on their consent by specifying how, where, and for how long the image can be posted.

Re-defining consent

In section 21, consent is defined as express, voluntary and informed. The *Online Safety Bill* can learn from the recent state inquiries into consent law reform in New South Wales, Victoria and Queensland. The recent NSW Law Reform Commission report on Consent in relation to Sexual Offences specifically recommends express provisions on consent that allow people to place limits on their consent. For example, it specifies that consent at one time does not mean consent at another time, consent to one activity does not include consent to another activity, and consent with one person does not mean consent with another person.[6] The *Online Safety Bill* could have a similar provision that states that consent to posting an image on one platform does not constitute consent to post the image on another platform.

Relationship to contract law

There is an outstanding question about the extent to which people can withdraw consent to the use of their intimate images where they have contractually agreed to third parties using those images. This is an issue not only for sex workers who sign contracts with porn producers to use and sell their images

[6] New South Wales Law Reform Commission (2020), *Consent in Relation to Sexual Offences*. Report 148. https://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_current_projects/Consent/Consent.aspx

online but also for any model who signs a model release for a photographer to use their fine art nudes or other such content.

Section 75(2) states that the civil penalty does not apply if the person consented to the posting of the intimate images. However it notes that the person posting the picture bears an evidential burden to prove that the person did consent. One can envisage that in this scenario a photographer or producer may refer to a contract, email or other written or oral agreement as evidence that the person consented to the use of their image in a film, on a website, as part of a series, etc.

Commissioner's response to objection notices

Section 35 provides that the Commissioner 'may consider whether to give a removal notice in relation to the intimate image'. This puts power in the hands of the Commissioner without need to justify their decision. There should be a time frame here for the decision, and provisions should be inserted to require the Commissioner to give reasons for their decision and allow the person depicted to lodge an appeal to the Commissioner.

RECOMMENDATIONS

We make the following recommendations for the Bill's amendment.

General

- The Bill should establish a mechanism whereby the Commissioner must regularly report on how and whether the Bill's Objectives of improving and promoting safety for Australians are being met. The number of complaints, notices and penalties issued should not be indicative measures of the Bill's success;
- The Bill should have a 24 month sunset clause and 12 month periodic review clause;
- The Commissioner should be subject to a maximum 5 year term; and
- The Commissioner should not be exempt from liability for damages and should be subject to civil proceedings where appropriate.

Online Content Scheme

- Decision-making criteria on issuing notices should be developed in consultation with affected communities;
- Decision-making processes on issuing notices should be conducted by a multi-member, intersectional board that is designed to be representative of the Australian community and include members of marginalised groups and / or communities disproportionately affected by deplatforming and censorship;
- Commissioner must publish publicly-available reasons for all decisions;
- Commissioner must publish publicly-available records including a log of all complaints and descriptions of content that has been removed, deleted or remedied;
- Commissioner must make transparent, accessible, comprehensive and disaggregated enforcement and compliance data available to researchers, civil society and public;
- The resolution of incidents should not only be timely and appropriate but must also be 'transparent' and 'accountable';

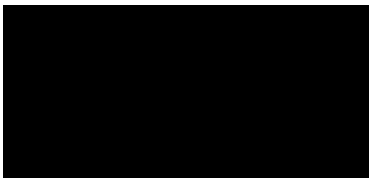
- The Bill should have a process for users to respond to complaints, including a reasonable notice period, opportunities to respond orally and in writing and to be afforded a hearing;
- Users must be able to understand how to comply with the legislation, including what grounds would warrant removal of content;
- The period for investigations of complaints regarding sexual content should be at least 28 days rather than 24 hours and content could be frozen rather than removed during this time;
- Commissioner should be liable to pay user compensation when content is erroneously removed, deleted or blocked;
- Commissioner should be liable to pay penalties when they repeatedly order the removal of content where it is inappropriate, erroneous or unjustified;
- Material that may be classified or potentially classified as X18+ content should require another test of its actual harm to warrant a complaint;
- Consensual sexually explicit material that includes fetishes should not constitute Class 1 material, nor be something that, in and of itself, warrants complaint;
- Any restricted access system imposed should be designed in consultation with industry and civil society stakeholders and must take into account user privacy impacts as well as administrative and financial burdens.

Non-Consensual Intimate Imagery

- Sex workers should be understood as having reasonable expectations of privacy;
- People who are not female should still be eligible to make objections where their breasts or chests are depicted;
- The Bill should clarify that a person can withdraw their consent to the posting of intimate images;
- The Bill should clarify that a person can place qualifications on their consent to the posting of intimate images, including the duration of time they can be posted, the places in which they can be posted and who has permission to post them.

[redacted]

Sincerely,



Jules Kim

Chief Executive Officer