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Online Hate Prevention Institute submission to the
Senate Standing Committee on Environment and Communications
Inquiry in the Online Safety Bill (2021)

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1 March 2021

1. Introduction

The Online Hate Prevention Institute (OHPI), founded in January 2012, is Australia's only harm prevention charity dedicated to tackling online hate and extremism. This is our sixth consultation response in relation to Online Safety,[i] not including our 2019 report to the Minister.[ii] Our submissions are based on our direct experience in the field of enhancing online safety.[iii]

The Bill is an improvement over the existing Act and addresses some long-standing concerns we have raised in past submissions. At the same time, it falls short of delivering on its objective and some key deficiencies will continue under this new Act. We urge the Committee to recommend amendments to address the deficiencies, while also commending the Minister and the department on the progress which has been made.

2. Scope of Coverage

The Bill introduces an Objective, "to improve online safety for Australians" and "to promote online safety for Australians".[1] We welcome the inclusion of a broad Objective, and we strongly support the wording of this objective.

However, parts of the Bill are too narrow and inhibit the achievement of the objective. The online safety of some Australians is improved, through the four schemes in the Act,[2] while the online safety of others is not. Bullying a child or an adult as an individual are covered,[3] however, attacks on a group that includes that child or adult are not. For the most vulnerable, including those at elevated risk of suicide or self-harm due to online harassment, being targeted as part of a group is just as harmful and such content is as much a threat to online safety. Some of this content is the kind of hate speech which feeds into radicalization.

It is, for example, doubtful Holocaust denial would be covered by the Bill, despite the fact it was some of the earliest online content recognised as unlawful in Australia and subjected to a take-down order through the courts.[iv] White Supremacist content, and other forms of incitement to hate and violence, pose a threat to the community, yet may fall outside the terrorism provisions and may attack groups rather than individuals.[v]

The Bill makes the Commissioner a single point of contact for the removal of online content which has been deemed unlawful due to the harm it poses the online safety of Australians. To meet the objective of the act, the Commissioner must be able to act on any content deemed harmful enough to have been

[1] A Bill for an Act relating to online safety for 1 Australians, and for other purposes, S 3.
[2] Ibid. Part 3, divisions 2, 3, 4 and 5.
[3] Ibid. Part 3, divisions 2 and 4.

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made unlawful. Given the Commonwealth's constitutional Communications Power, and the technology sector's preference for a single point of contact, the Commissioner also needs to be able to act on referral for breaches of state law.

An additional scheme which empowers the Commissioner to act to facilitate the removal of content deemed unlawful under any other Commonwealth or state / territory law would address this gap. It would ensure online/offline conformity by given a general ability to remove online manifestations of content already deemed harmful enough to be unlawful.

3. Engagement with Civil Society

We welcome the inclusion of provisions for *basic online safety expectations.*[4] We also welcome the inclusion of a public consultation requirement on determinations by the Minister on these basic online safety expectations.[5] The public consultation requirement on industry schemes is also welcome.[6]

While we welcome the expectation that service providers will consult the Commissioner on their steps to meet basic online safety expectations,[7] consultation with the Commissioner is not a substitute for community consultation. Significant gaps may emerge between the scheme and the implementation. We recommend the expectation be expanded to include consultation with the community.[vi]

Civil society operates in a complementary fashion to government in delivering online safety. Charities have different relationships with platforms, often different contacts, and the ability to access different processes. The best online safety response for the Australian public involves platforms, government and civil society working in partnership. We welcome the retention of the function of the Commissioner "to consult and cooperate with other persons, organisations and governments on online safety for Australians".[8]

The general power to make Commonwealth grants "in relation to online safety for Australians" has been retained.[9] While broad in intention, in practice it is far too narrowly applied. We recommend replacing it with a power "to make, on behalf of the Commonwealth, grants of financial assistance in relation to online safety for Australians *including through education, training, online monitoring and reporting, efforts to enhance online safety, and the prevention and mitigation of online harms*". We believe this will ensure grant schemes become wider enough to cover a greater variety of online safety activities so both objectives outlined in the Bill are met.

Given the broad objectives and powers of the Commissioner, yet the narrow focus of the four schemes,[10] we believe the legislation should give greater direction on the expectations of the annual report.[11] A record of the kind of matters brought to the Commissioner's attention that involve online safety but which fall outside of the four schemes would be useful to ensure the legislation and

[4] Ibid. Part 4.
[5] Ibid. S 47.
[6] Ibid. S 148.
[7] Ibid. S 46.
[8] Ibid. S 27(1)(l)
[9] Ibid. S 27(1)(g)
[10] Ibid. Part 3, divisions 2, 3, 4 and 5.
[11] Ibid. S 183.

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resourcing of the Commissioner remain fit for purpose. A requirement for specific reporting on engagement with civil society to address online safety matters outside of the four schemes would also help to ensure eSafety engages broadly and collaboratively in achieving its objective.

4. Scheme improvements

We support the inclusion of the civil penalty provision for non-compliant end-users in the new scheme tackling cyberabuse of an adult.[12] We note and support the retention of a civil penalty for non-compliant end-users in relation to the non-consensual sharing of intimate images.[13] However, we see no good reason why, if the victim of cyberbullying is a child, there is no civil penalty provision to force an end-user to comply.[14] A child who cyber bullies an adult is subject to greater penalties than an adult who cyberbullies a child. We recommend providing a civil penalty provision for failure by an end-user to comply with a notice in relation to the cyberbullying of a child. This matter is discussed in more detail in our 2021 submission to the department.

The cyber-abuse provisions include an intention element which is not required by other legislation, including criminal law. As these provisions are simply about removing the content, they should have a lower standard, not this enhanced standard. We recommend removing the intention requirement. We also recommend defining "ordinary reasonable person" to be someone with the same characteristics as the person who was attacked. This is critical as the nature of cyberbullying is often targeted in a way to be most harmful, but which may not be fully appreciated by a generic "ordinary reasonable person". The "ordinary reasonable man" is unlikely to fully appreciate the cyberbullying experienced by women.

We welcome the development of the Online Content Scheme,[15] however, as implemented it has two drawbacks. The first is the lack of a public register of determinations. Declaring specific content, such as the manifesto from the Christchurch attack, to be class 1 material would help ensure all platforms take steps to remove it. It would help civil society find breaches, alert platforms to their breaches, and secure action before the Commissioner needs to become involved. The second deficiency is that it only covers online content. Unless content is also classified, it will still be legal to import it, sell it, etc. via a physical medium. This gap should be closed to ensure online / offline consistency. Either determinations of the Commissioner should count as a classification, pending a classification from the Classification Board, or determinations should trigger a later classification by the Classification Board.

At present, under the existing law, Cl 47 of Schedule 7 of the *Broadcasting Services Act 1992*, the Commissioner must refer content that would be classified as RC to the Classification Board. The Classification Board must determine that terrorist content is classified RC.[16] Section 53 of the *Online Safety (Transitional Provisions and Consequential Amendments) Bill 2021* will repeal this required referral and there is no replacement. This has the effect of reducing the effectiveness of Australia's response to terrorism, and hence undermines the Bill's goal of enhancing online safety.

[12] Ibid. S91, referring to failure to comply with S 89.
[13] Ibid. S80, referring to failure to comply with S 78.
[14] Ibid S 71. The only remedy for non-compliance by an end user is to get an injunction.
[15] Ibid. Pt 9.
[16] *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 9A.

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In S 43 of the Bill the Commissioner may refuse to investigate complaints relating to the online content scheme, the scheme which would cover terrorist content. We are concerned that the effect of S 43(2) may provide a complete discretion to refuse to action terrorist content. There is no requirement to provide written reasons to a complainant, or to report to the Minister and Parliament on the volume of complaints not investigated or the reasons for not investigating. We would recommend including a greater range of reasons for not investigating, including that the complaint was without merit, the complainant lacked standing (e.g. they are not Australian), etc.

We have a particular concern in this regard as even under the existing law we saw a failure to refer a terrorist manifesto OHPI brought to eSafety's attention to the Classification Board. This reduced OHPI's ability as a civil society organisation to convince online platforms and link services that the material was illegal and ought to be at least blocked in Australia.[vii] Government advertising, paid for by Australian taxpayer, ended up appearing alongside a copy of this terrorist manifesto which called for the killing of Jews, Muslims, police and others.[viii] The material was ultimately removed through action initiated by OHPI (civil society). We need a more prescriptive system at least for terrorist content, and one that ensure the material is visibly listed. The simplest solution is to ensure such content must still be referred to the Classification Board when it can be accessed from within Australia.

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[i] The Online Hate Prevention Institute to The Coalitions Review of Online Safety for Children, 2012; OHPI Response to Coalition Discussion Paper on Enhancing Online Safety for Children, 2013; Online Safety Submission to the Department of Communications, 2014; Online Safety Submission to the department of Infrastructure, Transport, Regional Development and Communications' consultation on a new online safety act, 2020; Online Safety Submission to the department of Infrastructure, Transport, Regional Development and Communications' consultation on a new online safety act, 2021.

[ii] Tackling Internet Based Extremism and Hate, Report for the Minister for Communications, Cyber Safety and the Arts, September 2019.

[iii] We do this by: working with platform providers to identify and remove harmful content and terrorist propaganda; monitoring, documenting and reporting on emerging threats and harms; running campaigns to promoting online safety; researching in a multidisciplinary manner ways the public, platforms, governments and civil society can enhance online safety.

[iv] See *Jones v Toben* [2002] FCA 1150.

[v] We note our submission to the Inquiry into Extremist Movements and Radicalism in Australia for the Joint Committee on Intelligence and Security, it may be of further interest on this point.

[vi] The Commissioner could facilitate such consultation, particularly with relevant charities and academic experts. Such consultation is a service to online platforms, and we recommend there should be a provision for the Commissioner to charge fees to recoup the costs of this service, including paying participants for their time. As a point of principle, neither the Australian taxpayers, nor charities, should be subsidizing the cost for online platforms to improve their safety. We recommend costs on a sliding scale by the size of the platform so fees from larger international platforms can subsidize the cost of improving safety on small Australian based platforms.

[vii] Oboler, A., Allington, W., and Scolyer-Gray, P., *Hate and Violent Extremism from an Online Sub-Culture : The Yom Kippur Terrorist Attack in Halle, Germany*, Online Hate Prevention Institute (2019), Section 4.5.2. Online at: https://nla.gov.au/nla.obj-2286730824/view

[viii] Oboler, A., "Advertising supports hosting of terrorist manifesto", Online Hate Prevention Institute, 2020. Online: https://ohpi.org.au/advertising-supports-hosting-of-terrorist-manifesto/