



1 March 2021

To: ec.sen@aph.gov.au
human.rights@aph.gov.au

Dear Committee Chairs,

Re: Inquiry into the Online Safety Bill 2021 and the Online Safety (Transitional Provisions and Consequential Amendments) Bill 2021

The Victorian Pride Lobby welcomes the opportunity to provide a submission to the inquiry into the Online Safety Bill 2021 and the Online Safety (Transitional Provisions and Consequential Amendments) Bill 2021.

The Victorian Pride Lobby is a community based advocacy group that works towards equality, social justice and advancing human rights for lesbian, gay, queer, bisexual and same sex attracted Victorians. We work constructively, cooperatively and respectfully with transgender, intersex, asexual and other organisations that support our organisation's mission and vision.

We applaud the work of the eSafety Commissioner in providing online safety advice and support for the LGBTIQ+ community, including being out online and dealing with image-based abuse. However, our submission concentrates on Part 9 of the Online Safety Bill and the impact that it would have on LGBTIQ+ creators and consumers of netpornography. Many LGBTIQ+ people create and use netpornography, and this part of the Bill will negatively impact those people who do this.

We are comfortable with this submission being made public. Please contact us if you would like us to expand on any of the following.

Yours faithfully,

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Co-Convenors, Victorian Pride Lobby

Background

Australia has experienced the growth of a small but increasingly visible line of feminist, LGBTQ+, and independent pornographers who reflect the values of ethical production, self-representation, and community-building in the content they produce.¹ These pornographers are leveraging opportunities created by the increased academic, political, and community focus on independent, queer, and feminist pornography to share their skills, collaborate, and exchange resources. This has in turn created more diverse, accessible, and user-generated genres of pornography, fostering values of self-determination and representation in an industry that otherwise places performers in imbalanced, quasi-exploitative relationships with companies and porn studios.

The proliferation of social media and digital media technologies has created opportunities for the pornographic industry, sex work and sex workers.² Both amateur and professional sex workers and content creators have leveraged such technologies to build virtual profiles that generate economic capital.³ These virtual profiles are showcased on different social media platforms, such as Instagram, Grindr, Twitter, and OnlyFans.⁴ OnlyFans, launched in 2016, allows people to join as either creators or subscribers of content revolutionising digital sex work by creating easy access and payment for those who want to broadcast sexual content.⁵ Individuals who use such platforms provide users with more intimate experiences and in some cases assume micro-celebrity statuses.⁶

Mainstream social media apps such as Twitter and Instagram have come to serve as promotional and marketing platforms on which content creators build large followings via sharing less explicit content. This in turn increases their subscribership on sites such as Onlyfans, JustForFans, or webcam or live streaming sites, as followers from their mainstream social media accounts are channelled towards paid subscriptions of more intimate, and often, more explicit, content.⁷

This arrival of *netporn* - pornographies on online platforms and networks - has contributed to a democratisation of the adult film industry where the removal of agents, producers and other intermediaries, and a dramatic rise in amateur stars, have allowed those with micro-celebrity followers to monetise sexual content.⁸ Creators of pornography now set the terms under which they work and become the principle beneficiaries of their work.⁹ This development has been built upon the interactional trade in sexualised photos and videos online on apps like Grindr and Snapchat, by financially rewarding those with the greatest physical and erotic capital.¹⁰ Newcomers are drawn to digital sex work for the recognised benefits including flexible work schedules, promoting physical safety, and limiting contact with police.¹¹

A recent survey of Australians in adult media found that half identified as LGBTIQ.¹²

¹ Zahra Stardust, "Fisting is not permitted": Criminal intimacies, queer sexualities and feminist porn in the Australian legal context' (2014) 1(3) *Porn Studies* 242.

² Paul Ryan, *Male Sex Work in the Digital Age* (Palgrave Macmillan, 2019) 119.

³ Andrew McLean "You can do it from your sofa": The increasing popularity of the internet as a working site among male sex workers in Melbourne' (2015) 51(4) *Journal of Sociology* 888; Ryan, *Male Sex Work in the Digital Age*, 119.

⁴ Ryan, *Male Sex Work in the Digital Age*, 119.

⁵ *Ibid*, 120.

⁶ *Ibid*, 95, 120.

⁷ *Ibid*, 120.

⁸ Susanna Paasonen, 'Labors of love: Netporn, web 2.0 and the meanings of amateurism' (2010) 12(8) *New Media and Society* 1298.

⁹ Ryan, *Male Sex Work in the Digital Age*, 121.

¹⁰ Jamie Hakim, "The spornosexual": the affective contradictions of male body-work in neo-liberal digital culture' (2018) 27(2) *Journal of Gender Studies* 231.

¹¹ Angela Jones, 'For black models scroll down: Webcam modelling and the racialisation of erotic labour' (2015) 19 *Sexuality and Culture* 785; Ryan, *Male Sex Work in the Digital Age*, 121.

¹² Eros Association, *Adult Media Production Standards* (2018).

The benefits of 'netpornography'

Netporn provides a number of benefits. First, it provides a safer, more flexible, form of sex work when compared to traditional methods such as the street trade or the brothel/agency.¹³ Online work is more accessible, convenient, and provides greater ease for content creators, and ameliorates the accessibility of the profession.¹⁴ Second, there are strong economic incentives for digital sex work.¹⁵ Third, online sex workers and content creators often promote safe sex practices and provide sexual education.¹⁶ Pornographic actors and sexually explicit content creators often participate in programs or create content which addresses sexual education that is specific to the particular realities and needs of LGBTQ+ consumers.¹⁷ Most Australians consume netporn, with only a small minority reporting adverse effects.¹⁸ Finally, the consumption of sexually explicit media can play a role in reaffirming LGBTQ+ identity and overcoming internalized shame in LGBTQ+ consumers.¹⁹

Issues relating to LGBTQ+ creators and consumers of netpornography

Under the provisions of Part 9 of the Bill - the online content scheme - the eSafety Commissioner may:

- give a removal notice to a social media service provided from Australia requiring them to take down X18+ material or 'Category 2 restricted' material (which includes content that depicts actual sexual activity²⁰);²¹
- give a remedial notice to a social media service hosted in Australia requiring them to take down R18+ or 'Category 1 restricted' material (which includes content that contains detailed descriptions of sexual activity, simulated sexual activity and stylised depictions of sexual activity²²) or ensure that the material is subject to a restricted access system;²³ and
- give a link deletion notice to an internet search engine service requiring them to cease providing a link to 'Refused Classification' material (which includes sexual fetishes "which are revolting or abhorrent" and sexual fantasies, including incest fantasies, which are "offensive or revolting or abhorrent",²⁴ such as "golden showers", bondage, spanking or fisting"²⁵).²⁶

Whilst similar to existing legislation,²⁷ these provisions:

- expand the power to order netporn be taken offline to social media services, search engine services and apps;
- expand the power to issue take-down notices for Refused Classification material to anywhere in the world (not just Australian-based websites); and
- increase the penalties that can be imposed on services that host or facilitate netporn.

¹³ McLean "You can do it from your sofa".

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ Samantha DeHaan et al, 'The interplay between online and offline explorations of identity, relationships, and sex: A mixed-methods study with LGBT youth' (2013) 50(5) *The Journal of Sex Research* 422.

¹⁷ *Ibid* 423.

¹⁸ Chris Rissel et al, 'A profile of pornography users in Australia: Findings from the second Australian study of health and relationships' (2017) 54(2) *Journal of Sex Research*.

¹⁹ Jesse Fox and Katie Warber, 'Queer identity management and political self-expression on social networking sites: A co-cultural approach to the spiral of silence' (2015) 65(1) *Journal of Communication* 79.

²⁰ *Guidelines for the Classification of Publications 2005*.

²¹ Online Safety Bill 2021 cl 114.

²² *Guidelines for the Classification of Publications 2005*.

²³ Online Safety Bill 2021 cl 119.

²⁴ *Guidelines for the Classification of Publications 2005*.

²⁵ *Guidelines for the Classification of Films 2012*.

²⁶ Online Safety Bill 2021 cl 124.

²⁷ *Broadcasting Services Act 1992* sch 7, which would be substantially repealed by the Online Safety (Transitional Provisions and Consequential Amendments Bill) 2021 sch 2 cl 2-56.

The effect of these provisions is that any sexually explicit content will be subject to unilateral removal from Australian internet hosting service providers. This unfairly and unreasonably targets legal and consensual adult media for arbitrary removal. If taken to its logical conclusion, the Bill will attempt to censor any online media depicting any sexual activity between consenting adults.

Similar legislation passed in the United States of America led to the emergence of the practice of 'shadowbanning' by Instagram, wherein a user's content on social media sites is blocked in such a way that the user does not know they have been targeted until their account metrics indicate a decline in viewership.²⁸ Of particular concern in this case is the extremely broad powers of the eSafety Commissioner to regulate all manner of netporn, thereby preventing content creators from attaining a specific understanding of what type of content the regulator is seeking to proscribe. A possible result of this regulation is that content creators and sharers will live in fear of triggering a shadowban, having to compromise their content to avoid being targeted. This would subsequently impact the creators' followings, which has a flow on impact on their subscriberships. The subsequent financial impact of censorship, including both the cost of compliance (estimated to be \$6.147 million per annum, according to the Bill's regulatory impact statement) plus the decreased revenue from smaller followings and subscriberships, threatens to undermine the economic benefit afforded to content creators by the proliferation of netpornography.²⁹ Similarly, some content creators may be compelled to resort or return to less safe, empowered, and accessible methods of sex work. All this when there are already existing protections, such as parental filters, in place, which serve to protect children from exposure to adult material.

As Sex Work Law Reform Victoria point out, "when members of the LGBTIQ community create porn, it is more likely to be classified as fetish porn... and therefore attract the most punitive removal notice response... even when these practices are performed by consenting adults."³⁰ This leads to pornographers making compromises in terms of aesthetics and ethics – or in other words, self-censoring – in order to meet classification requirements and avoid law enforcement.³¹ By characterising certain content as violent, abhorrent, and/or objectionable, the legal framework prohibits diversification and user-generated competition within the pornographic industry, and prevents content producers who value and advocate for self-determination, consent, and ethical practices based in trust and intimacy from reaching wider audiences. In addition to this, the censorship and pathologising of non-normative sexual identities by the law marginalises both pornographers and members of such groups.³² The Bill thus impairs the right to freedom of expression. The Government argues that this is necessary to protect "security, public order, health or morals", but provides no basis for this claim nor acknowledgment that there are more proportionate means to deal with the claimed harm, such as parental filters.

Also of concern is the impact on LGBTQ+ consumers who are denied an opportunity to develop or reaffirm their sexual identity,³³ and denied opportunities to learn about safe sex practices.³⁴ Fundamentally, consumers "should be able to read, hear, see and play what they want",³⁵ rather than the government regulating what can and cannot be seen.

²⁸ Anna Iovine, 'Sex workers fear targeting under Instagram's terms of service', *Mashable Australia* (19 December 2020); Erin Taylor, 'How Instagram is failing queer sex workers', *Bitch Media* (30 July 2019).

²⁹ Stardust, "Fisting is not permitted", 252.

³⁰ Sex Work Law Reform Victoria, 'Federal government moves to extend its power to take down online porn' (7 February 2021).

³¹ Stardust, "Fisting is not permitted", 243.

³² Stardust, "Fisting is not permitted", 252-3.

³³ Fox and Warber, 'Queer identity management and political self-expression on social networking sites', 79.

³⁴ DeHaan et al, 'The interplay between online and offline explorations of identity, relationships, and sex', 421; Stardust, "Fisting is not permitted", 248.

³⁵ *National Classification Code 2005* cl 1(a).

Of particular concern is the immediacy and permanency of removal notices. The content owner, or Australian small business operating the service, is not given any warning, chance to respond, or even notification of a removal notice. If an Australian small business is subject to such a unilateral takedown, it could have immediate and devastating financial effect on Australian small business owners who rely on such enterprises as a legitimate source of income. The Bill does not provide any protections for the content owner or small business who is not even notified that the content has been subject to a removal notice.

Worryingly, the Bill absolves the eSafety Commissioner of any liability or damages for the exercise of any power conferred by the Bill. If a content producer or small business has their business damaged in this way, they will have no recourse or recompense for lost income or wages. Realistically, this has the likely effect of pushing Australian businesses to host their services and content on overseas platforms, putting the content outside of Australia's jurisdiction and further denying custom to Australian web-hosting businesses.

Conclusions

The objects of the Bill are “to improve online safety for Australians”³⁶ and “to promote online safety for Australians.”³⁷ Censorship of consensual adult material does not improve online safety for Australians. The online content scheme in Part 9 of the Bill appears to be an attempt to implement a classification-based censorship scheme, which is incongruous with the Bill's objectives and entirely unrelated to protecting Australians from online abuse.

The eSafety Commissioner has said that their “regulatory approach has always been to prioritise content depicting child sexual abuse and exploitation, as well as material that incites, instructs or promotes terrorism or violent extremism. This approach will not change under the new Act.”³⁸ If that is indeed the case, then there is simply no reason for the expansive new powers under this Bill.

We applaud the work of the eSafety Commissioner in providing online safety advice and support for the LGBTIQ+ community, including being out online and dealing with image-based abuse. In this regard, it should be noted that the United States Gay and Lesbian Alliance Against Defamation is developing a Social Media Safety Index to rate social media companies on how well they protect LGBTQ people from abuse.³⁹ **Whilst we strongly support reforms to improve and promote online safety, on the basis of the foregoing, we recommend that Part 9 of the Bill be deleted in its entirety.** The issues raised herein should be addressed through the ongoing Review of Australian Classification Regulation.

³⁶ Online Safety Bill 2021 cl 3(a).

³⁷ Online Safety Bill 2021 cl 3(b).

³⁸ Cam Wilson, ‘Australia’s eSafety Commissioner will be able to force platforms to get rid of BDSM and fetish content - and Australia’s sex industry isn’t happy about it’, *Business Insider* (12 February 2021).

³⁹ Ina Fried, ‘GLAAD’s plan to rate social media on safety’, *Yahoo News* (27 February 2021).