



Australian Government

**Department of Infrastructure, Transport,
Regional Development and Communications**

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- **SUBJECT: Questions on Notice asked by the Senate Standing Committee on Environment and Communications on 5 March 2021 related to the Online Safety Bill 2021 and the Online Safety (Transitional Provisions and Consequential Amendments) Bill 2021.**

Senator Fawcett asked:

1. With reference to Page 32 of the Committee Transcript:

Question 1: Okay. Anyway, if you could take on notice whether or not to put into the EM or give some other indication that the expectation is probably more 12 months than six, that may alleviate one of the concerns raised”.

Answer:

It is our understanding that the timeframes set out in clause 137(2) are not intended to be hard deadlines and that the use of the language “reasonable efforts” provides some flexibility.

2. With reference to Page 33 of the Committee Transcript:

Question: We had another submitter talk to us about consent and put to us that people should be able to change their consent around intimate images. This is particularly in the context of a commercial arrangement. I'm happy for you to take it on notice, but could you come back to the committee as to whether that's even viable under contract law and other considerations, or whether it's practical, from the commissioner's perspective, to deal with situations where somebody, as a result of a commercial arrangement, has provided an image and then has changed their mind?

Ms Inman Grant: Would the scenario be just that, say, an intimate content creator created an intimate video for a subscription service, like OnlyFans, but then it was shared more broadly without consent?

CHAIR: Yes, I think one of the scenarios they provided was that there were different platforms to what was originally agreed in the contract

...

Ms Inman Grant: We'll take that on notice. That's a complicated one.

Answer:

Whether the eSafety Commissioner would be able to assist would depend on the facts.

Part 6 of the Bill deals with the non-consensual sharing of intimate images. For material to meet the definition of ‘intimate image’ a person must be depicted “*in circumstances in which an ordinary reasonable person would reasonably expect to be afforded privacy*”.

As noted in the explanatory memorandum of the Bill ('EM'), at pages 74-76, a reasonable expectation of privacy includes reasonable control over who is permitted to observe the person in the depicted state.

Whether there is a reasonable expectation of privacy would depend on the circumstances of the image and its creation, including the existence of any contract governing the use of the image.

There is provision in the Bill for a person to issue an objection notice under clause 33 of the Bill even where consent was previously given (under contract or otherwise) to post the image. If an objection notice is given the Commissioner *may* consider whether to give a removal notice in relation to the intimate image.

Whether the eSafety Commissioner takes any action would also depend on whether the provision of the intimate image was exempt under clause 86 of the Bill.

With further reference to Page 33 of the Transcript

The Chair asked in regard to a person who did not "...*reveal the nature of their commercial arrangement*" what the eSafety Commissioner could do.

Answer:

It is difficult to respond to hypothetical questions as it will always depend on the facts. However, if the eSafety Commissioner was satisfied of these two items:

- i) The complaint or objection notice involved an intimate image as defined under the Bill
- ii) The provision of the images was not an exempt provision under clause 86 of the Bill.

Then the eSafety Commissioner may have the discretion to consider issuing a removal notice. The contractual arrangement could potentially be relevant in determining eSafety's satisfaction against i) and ii).

The intention is not to capture commercial images where there has simply been a breach of copyright.

3. With reference to page 33 of the Transcript

Regarding Age Verification, Ms Inman Grant offered to table for the Committee, the eSafety Commissioner's submission 'Inquiry into age verification for online wagering and online pornography' to the House of Representatives Standing Committee on Social Policy and Legal Affairs Age Verification Inquiry, November 2019. This is included at Attachment A.

4. With reference to Page 34 of the Transcript

My final question circles back to some questions Senator Green was asking, predominantly in the area of adult cyberabuse. You've talked in your evidence about lifting the evidence above the threshold for child abuse to have the quality of intent and to raise that for the adult. I would like to broaden that discussion out to online content. I will use two examples to ask how you would deal with this. Clearly, with something like the Bill Leak cartoon, which was very controversial, he and the newspaper that published it, including online, highlighted that it was political discussion, that it was dealing with a topical issue. Other people said: 'No, it's racist' or 'I feel humiliated' or 'I feel offended' et cetera and a lot of people called for it to be removed. That was referred to another federal statutory body, the Human Rights Commission, to the race

commissioner, who accepted it, despite all of the protections under 18C et cetera that allow for political speech, valid political debate. How would you deal with that?

Answer:

The threshold for any kind of action under the proposed Online Content Scheme is whether online material is likely to be classified by the Classification Board as R18+.

R18+ content includes material depicting high-impact sex, violence, drug use, language, nudity or themes.

Cartoons of the type as referred to by the Senator would be unlikely to satisfy the impact test required for classification at R18+.

5. With further reference to Page 34 of the Transcript:

Sure. The second example I would like you to look at is Archbishop Porteous in Tasmania, who sent out a pamphlet to the parents at a Catholic school explaining the Catholic teaching on marriage. He was then taken before a discrimination tribunal because somebody said that that was offensive and—I can't remember the exact terms—the tribunal in Tasmania accepted that. But the reasonable person in the street would have said, 'Well, of course they're free to tell parents of children at a Catholic school what the Catholic position on marriage is.' It's slightly different to the Bill Leak situation, but it's equally valid in terms of asking: how does Australia maintain a civil polity where people who have vastly diverging views on some of these issues can have a respectful debate and put their views forward without being blocked by a position such as yours or hauled before another commissioner on a discrimination basis? It would be very valuable if you could come back to the committee before 9 March—

Answer:

The threshold for any kind of action under the proposed Online Content Scheme is whether online material is likely to be classified by the Classification Board as R18+.

R18+ content includes material depicting high-impact sex, violence, drug use, language, nudity or themes.

Material of the type as referred to by the Senator would be unlikely to satisfy the impact test required for classification at R18+.

6. The eSafety Commissioner welcomes any further requests for information from the Senate Committee.

Attachment A: Inquiry into age verification for online wagering and online pornography' to the House of Representatives Standing Committee on Social Policy and Legal Affairs Age Verification Inquiry.