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Director, Online Safety Branch, Content Division
Department of Infrastructure, Transport, Regional Development and Communications
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Dear Director,

Online Safety Bill 2020

Prostasia Foundation is a child protection organization that promotes evidence-based policymaking that respects the fundamental human rights of all. We welcome the opportunity to provide our input on the exposure draft of the Online Safety Bill 2020. Our comments are limited to Part 9, the Online Content Scheme. We do not express any views on the other parts of the Bill.

Executive summary

Prostasia Foundation **recommends that Part 9, the Online Content Scheme, be removed** from the Online Safety Bill 2020. The availability of consensually-produced adult content on the Internet is not an issue of safety, but of morality. The power to have content removed from the Internet within 24 hours is a "nuclear option" that is justified only for content that is directly harmful, such as child sexual abuse material. The proposed extension of these existing powers to target adult content is an unjustified extension of Australia's "nanny state" that would disproportionately impact marginalized communities, infringe Australia's international human rights obligations, and do nothing to keep children safer on the Internet. There are better ways in which families can be empowered to mindfully control the adult content that they encounter online, without adopting such authoritarian censorship measures.

The Internet is not a movie theatre

The Online Safety Bill embeds an unexamined, and we believe false, assumption that online content can be treated as equivalent to printed publications, films, or computer games (which we will refer to as "traditional media"). Thus the bill (in sections 106-107) requires the Commissioner to consider how online material would be classified "if the material were to be classified by the Classification Board in a corresponding way to the way in which a film would be classified."

Class 1 material, content that would "Refused Classification" as a film, includes depictions of such common sexual fetishes between consenting adults as spanking, dirty talk, urophilia, and wax play, and could be required to be removed from websites, search engines, and app stores *worldwide* within 24 hours. This places such content in the same category as child sexual abuse material—the abhorrent and illegal depiction of real children being sexually abused.

Class 2 material, that would be rated X18+ as a film, could also be subject to removal within 24 hours, if it is provided from Australia and is not hidden behind a restricted access mechanism nominated by the eSafety Commissioner. This category of content covers a broad range of depictions of nudity and sex between consenting adults, including implied depictions.

This classification regime may be appropriate for films. There are good reasons why a person enjoying a theatrical release should know what to expect; that they won't be exposed to unusual sexual fetishes or to sexualized violence, and that the film's rating will provide them with a general guide of what they may encounter when it comes to sexual and violent content and adult themes and language.

However nobody goes online with these same expectations. It is an accepted fact of online life that the Internet is a global space that permits a greater diversity of expression on all topics than what they can expect from traditional media. Apart from the proper expectation that child abuse content should not be available anywhere online, we know and expect that diversity of sexual expression has a home online.

Although traditional corporate media outlets and publishers have the capacity to adapt their output to the demands of Australia's content classification regime, online content is published quite differently. It is unreasonable to expect the classification regime to be fit for purpose in regulating Internet content, which in comparison to traditional media, is more likely to be user-generated, interactive, and real-time.

No evidence has been presented that Australia's existing classification scheme for traditional media is also appropriate for the classification of Internet content. But even if it had been, Australia is currently in the midst of a review that is expressly intended to adapt the classification regulation framework for today's digital content environment.[1] It makes no sense for the existing scheme to be imported into the Online Safety Bill while that very scheme remains in flux.

Censorship does not work

Unlike films, Internet content can be created by anyone with a smartphone, and can be hosted on any ordinary computer attached to a DSL connection. When Internet content is censored, a typical effect is that it will not disappear but rather multiply, spreading across other platforms that lie beyond the reach of local authorities. Even if all adult content on the Internet were somehow blocked and removed from search engines for Australian users, these restrictions could be trivially circumvented using VPN software that is built into all computers and phones. In short, the Online Safety Act's proposal to control Australians' access to adult content online is wildly overambitious and doomed to fail.

In its February 2020 submission to the consultation paper on the proposed Online Safety Act,[2] Electronic Frontiers Australia stated in summary that online censorship approaches:

1. are almost always trivial to circumvent for anyone with basic technical knowledge;

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1 Review of Australian classification regulation, 8 January 2020, available at https://www.communications.gov.au/have-your-say/review-australian-classification-regulation.

2 Electronic Frontiers Australia. *Consultation on a new Online Safety Act*. 19 February 2020, available at https://www.communications.gov.au/sites/default/files/submissions/consultation_on_a_new_online_safety_act_-_submission_-_electronic_frontiers_australia.pdf.

2. inevitably restrict access to entirely legitimate content;
3. replace parental judgement with bureaucratised or corporate control;
4. are always subject to scope creep, often very quickly; and
5. perhaps most importantly, divert attention and resources away from responses that are likely to be more successful in addressing harm.

We agree. Censorship is not the right way to address the challenges arising from the availability of lawful sexual content online. Attempting to prevent Australians from accessing such content will only increase its allure, and reduce their respect for the law. There is also the risk that it will incentivise Australians to resort to accessing pornographic content on the dark web, where illegal abuse images are also found.

Enabling freedom of expression without unwanted exposure to explicit content

We do agree that explicit adult content should not be knowingly displayed to minors. In 2018 we co-developed a set of guidelines that required content publishers to tag sexual content and hide it from minors by default, and required platforms to facilitate the exclusion of minors from adult areas.[3] We have worked closely with Internet companies to help them design their platforms to support these principles.[4]

Industry best practices such as these have emerged in a light-touch regulatory environment that enabled innovation. This has opened up a diversity of platforms for end users to express themselves in different ways—from blogs, to wikis, to community-moderated forums, to livestreams, and many others. This has given a voice to many people who are otherwise excluded and marginalized in public life.

At the same time, some platforms have not risen to the challenge of taking adequate safeguards to ensure that minors are not exposed to explicit material, and that adults are not exposed to it without their consent. Recognizing this, the Online Safety Bill would allow the Commissioner to warn the public about platforms that fail to meet a set of basic online safety expectations as determined by the Minister.

Beyond this, parents have a responsibility to help ensure that their children are not exposed to age-inappropriate content online, just as they do for TV viewing. Using freely available filtering software, and by supervising their children's Internet usage, parents have the ability to ensure that their children can navigate the Internet confidently and safely, and to talk with their children about any concerns they have.

Inevitably, even if the Online Safety Bill passes as-is, children will still have access to pornography online. It's also inevitable that they may hide their porn usage from parents. That's why it's also essential that porn literacy be included in sex education curricula, to ensure that kids are equipped to assess these depictions critically. Andy Phippin, Professor of Children and Technology at Plymouth University, writes:

> Informed, progressive, critical relationships and sex education, delivered by staff who are trained in the field, is what children are asking for, whether this relates to pornography or any other aspect of "online safety". Why is this so difficult to achieve, and why do legislators believe that they know best? I would suggest that this is because we have lost the youth voice in this debate.[5]

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3 No Children Harmed certification criteria, version 0.25, September 2019, available at https://prostasia.org/no-children-harmed/criteria/.

4 For example a new fan social network Fanexus, whose safety features are described in a tweet thread at https://twitter.com/fanexus/status/1357507761412575234.

5 Phippen, Andy. "Is censoring online porn the best way to keep children safe?", *Prostasia Foundation blog*, 31 January 2019, available at https://prostasia.org/blog/censoring-online-porn-keep-children-safe/.

Sexual self-expression is a human rights issue

Sexual content is a form of self-expression that is protected under international human rights law, including Article 19 of the International Covenant on Civil and Political Rights (ICCPR). Although the ICCPR allows countries to restrict the exercise of this right in order to protect "public health or morals," any such restrictions must be necessary for that purpose, and must be provided by law.

The idea, expressed in section 8, that there are "standards of morality, decency and propriety generally accepted by reasonable adults" that can be used to judge the "offensiveness" of particular material is a fallacy that privileges heteronormative, cisgendered experiences. Similarly, the assessment of whether consensually produced sexual content has "artistic merit" is also highly subjective and gendered.

Whether through direct government regulation or by incentivising corporate speech regulation, sexual expression online can be over-restricted by the application of vague, subjective standards such as "offensiveness." This particularly harms those who are already sexually stigmatized and silenced, such as LGBTQ+ young people, survivors of child sexual abuse, sex workers, and sex educators.

The United Nations Special Rapporteur for Freedom of Expression and Opinion has expressed concern that "platforms have reportedly suppressed lesbian, gay, bisexual, transgender and queer activism"[6] through the application of such standards, and human rights group ARTICLE 19 explains that this can happen due to the discriminatory application of supposedly neutral standards of sexual morality:

> these "morality"-based terms may be enforced discriminatorily against sexual expression by women and/or lesbian, gay, bisexual and transgender (LGBT) persons. Decisions to remove such content often appear to be inconsistent with the treatment of analogous expression by cis-gendered men, or heterosexual people.[7]

In the United States, the 2018 law FOSTA/SESTA uses platform liability rules to restrict the availability of sexual content online, with the putative objective of fighting sex trafficking. However Prostasia Foundation and others have documented how this has also resulted in the removal of legitimate sex education and safety content, and even child sexual abuse prevention resources.[8]

The submission of Eros Association points out that the consumption of online adult content is widespread among Australians and that they do not consider it harmful.[9] Treating such lawfully and consensually produced adult content on the same basis as abuse-based imagery and terrorist content does not amount to a necessary restriction of freedom of expression under human rights law.

Given that Australia lacks an enforceable legal charter of human rights and freedoms, it is incumbent upon lawmakers to ensure that restrictions on freedom of expression, even if taken in the name of protecting children, are necessary and proportionate. Part 9 the Online Safety Bill does not clear this hurdle. Treating consensually-produced adult content on the same footing as child abuse imagery and terrorist content is wildly out of step with contemporary Australian values and international human rights norms.

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6 Kaye, David. *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*. A/HRC/38/35, 2018, available at https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/38/35, p 10.

7 ARTICLE 19. *Side-stepping rights: Regulating speech by contract*. 2018, available at https://www.article19.org/wp-content/uploads/2018/06/Regulating-speech-by-contract-WEB.pdf, p. 26.

8 Amicus Brief of Prostasia Foundation et al in support of Appellants in *Woodhull Freedom Foundation v United States*. February 20, 2019, available at https://prostasia.org/wp-content/uploads/2019/02/Freedom-Network-Amicus-Brief.pdf.

9 Eros Association. *Submission on Draft Online Safety Bill.* 10 February 2021, available at https://www.eros.org.au/wp-content/uploads/2021/02/Submission-to-Online-Safety-Bill-2021.pdf.

Our recommendations

For the reasons given above, **we strongly recommend that Part 9 of the Online Safety Bill be deleted** altogether. There is no way to enact the blanket censorship of adult content online that would not simultaneously fail to achieve its objectives, while creating a chilling effect on sexual speech that would disproportionately interfere with freedom of expression and harm vulnerable minority groups.

If Part 9 is enacted despite our serious concerns, then we have some alternative recommendations for amendments to this Part, which are drawn partly from the Manila Principles on Intermediary Liability, an influential best practices document based on international human rights norms:[10]

1. **Any removal notice must be confirmed by a Federal Court order.** An expedited process could be developed for interim orders to be made by Federal Court judges on an *ex parte* basis, with notice both to the service provider and to the party who uploaded the censored content.
2. **When content is censored under this law, it should replaced with a transparency notice** that explains the provision that was exercised to justify the censorship, and the grounds upon which it was exercised, including an explanation of why the content was deemed "offensive."
3. The powers of the Commissioner to define a specified restricted access system should be much better defined, and should be the subject of a separate public consultation process. Without limiting this, **privacy should be added to section 108(4) as one of the relevant considerations** to be taken into account in declaring a specified access-control system to be a restricted access system.
4. **Removal should only be effected for Australian users.** Australia's adult content regulations are idiosyncratic, and while we doubt whether they even closely reflect Australian community norms, they certainly do not reflect a global view of what content is "offensive". As such, Divisions 2 and 3 should not require that content be removed, but only that it be geo-blocked from Australian users. We also recommend that the provisions of Division 2 should only apply where the service is provided from Australia, which would bring Divisions 2 and 3 into alignment, and avoid creating inconsistency between the requirements of different legal regimes.
5. **Division 5 on link deletion notices should be deleted**. There is no justification for "memory-holing" consensual adult content on the Internet. Link deletion should be reserved for content that causes direct harm, such as abuse images depicting real persons.
6. **Division 6 on app removal notices should be deleted**. The law does not target adult-themed apps. Any app that "facilitates the posting of class 1 material"—which includes social media apps such as Twitter—could be removed if there were as few as *two* occasions in the last year when it was used to post such material, and it declined to remove the material on at least one of those occasions. This is a recipe for over-censorship of legitimate speech.

Conclusion

There is one clearly legitimate use case for the government-directed censorship of online content: the case of child sexual abuse material, which directly harms real children in its production or distribution. The eSafety Commissioner already has the power to issue a takedown notice directing a hosting provider to remove such content from the Internet, and we support this. Treating consensually produced adult content in the same way is a disturbing false equivalence.

10 See https://www.manilaprinciples.org/.

Consensually produced sexual content is not categorically harmful, and it is inappropriate to treat it in the same way as abuse material or content that promotes terrorism. Sexual content has expressive value. For some, its production is part of their livelihood. For others, especially those who don't see themselves in mainstream representations of sexuality, sharing their own sexual content enables them to find community and support with others who are sexually stigmatized and ignored.

We should be mindful about the fact that children will eventually come across content that isn't age-appropriate for them, and we should ensure that parents and educators are resourced to prepare their children to critically evaluate such content. Prioritizing education will always be a more effective way to address these challenges than embarking upon an ill-fated moral campaign to eliminate adult content from the Internet altogether.

We recommend that Part 9, the Online Content Scheme, should be deleted from the Online Safety Bill, pending the completion of the full review of Australian content classification scheme that is already underway. If Part 9 is to be enacted despite our concerns, the amendments that we have suggested above will serve to limit its worst human rights impacts. The eSafety Commissioner should focus efforts on addressing actual abuse content, rather than content that is merely "offensive" to some.

Yours sincerely,

Prostasia Foundation