Australian Sex Workers Association

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Scarlet Alliance Community Policy Kit

Write Your Own Submission on the new Online Safety Bill

Consultation on the Online Safety Bill is open until the **14th of February, 2021 at 5pm AEDT**. Scarlet Alliance is currently drafting our submission, and we are providing sex workers and allies with information on writing your own. This Info Kit contains a brief explanation of what the Bill proposes to do, information about action you can take now, and a more in-depth exploration of the issues the Bill creates for sex workers to assist in preparing a submission.

A sex worker-only info-session to answer questions about the Bill and discuss your submission ideas will be facilitated by Scarlet Alliance on **Wednesday 3 February at 1pm AEDT.** Register here to attend.

WHAT IS THE *ONLINE SAFETY BILL*?

You may have heard of a government agency called The E-Safety Commission, which has powers relating to cyber-bullying, image-based abuse and illegal and harmful online content. In December 2020, the E-Safety Commission released an exposure draft of their proposed *Online Safety Bill,* a piece of legislation that seeks to improve and promote online safety for Australians.

Scarlet Alliance wrote a 2019 submission to the E-Safety Commission at the early stages of their consultation process and provided feedback as part of their in-person focus groups. Unfortunately, the current draft does not reflect our feedback and has a number of features that are likely to be problematic for sex workers using digital platforms.

The Bill responds to some existing problems like the unregulated platform power of technology companies and the distribution of non-consensual content online, but with an unaccountable approach that lacks transparency and places a high degree of power and discretion in the hands of the E-Safety Commissioner.

The Bill has four main components, and there are three key aspects that can significantly impact sex workers:

- The creation of a new online content scheme;
- A complaints and objections system for non-consensual sharing of intimate images; and
- Basic online safety expectations for social media companies, electronic services and designated internet services.

The Bill has the potential to be harmful to sex workers by:

- Making our advertising, online content, and other digital assets subject to Australia's arcane classification and broadcasting regulation, which previously related to publications, computer games and broadcast media like television and radio. This Bill applies to a range of different online platforms and electronic services, including social media, instant messaging, online games, websites, apps, internet service providers and others.

- Making us vulnerable to malicious complaints and reports about our digital content;
- Causing a 'chilling effect' on platforms that could lead to accelerated de-platforming and loss of access to digital tools and services, including those used to advertise services or sell content;
- Requiring the creation of 'restricted access systems' to our online content.

It also takes an approach that gives a single, un-elected individual (the E-Safety Commissioner) a great deal of power to make decisions about online content with little oversight, transparency, or consequence. It uses a framework of 'offensive' content that leaves a lot of room for subjectivity and leaves a lot of room for subjectivity and is not an appropriate marker or threshold for organising online content. It also does not give any resources to organisations who do work to prevent or redress harm, nor to civil society to support the appropriate development of content regulation standards or 'restricted access systems'.

HOW CAN I CONTRIBUTE?

Individual sex workers, sex worker organisations, and our allies can send in a submission informed by our policy positions on the draft Bill. Submissions can be as in-depth as you'd like, and can even be a simple one-page letter outlining your concerns.

Submissions should be in your own words and can be made anonymously or under a pseudonym. If you wish for your submission to be made public, be sure not to include any personal information that you don't want to have published. If your submission is to be confidential, be sure to mark each page of your submission as 'confidential'. If you're unsure about which you prefer, contact npm@scarletalliance.org.au or register for our info session.

We provide some summaries of our policy positions on the Bill's proposals below, and encourage you to relate your own personal experiences and concerns to the ones that feel most relevant to you. If you are an organisation seeking to write a submission, we are happy to work further with you to explore the potential harms sex workers may experience as a result of the Bill's passing, or to discuss the links between its impacts on your community or membership and our own. Contact research@scarletalliance.org.au to discuss.

Submissions on the Bill are due on 14 February 2020 and can be sent to:

Online Safety Branch Content Division
Department of InfrastructureTransport, Regional Development and Communications
GPO Box 594
Canberra ACT 2601
or by email to OnlineSafety@infrastructure.gov.au.

SUMMARY OF ISSUES

ISSUE 1: Online Content Scheme

Class 1 and 2 Content

In regulating 'harmful online content', the Bill takes various approaches including prohibiting certain kinds of content, requiring access restriction, and inviting a system of complaints.

The Bill creates two new categories of Class 1 and Class 2 material. Class 1 material is content that has been or is likely to be Refused Classification (RC). According to the National Classification Code, RC

content includes content that deals with sex or 'revolting or abhorrent phenomena' in a way that offends against the standards of morality, decency and propriety generally accepted by resonable adults.

Sexually explicit content will be considered RC (and therefore Class 1) if it contains any violence, sexualised violence, coercion, sexually assaultive language, fetishes or depictions which purposefully demean anyone, even if it is between consenting adults.

Class 2 material includes content that has been or is likely to be classified as X18+, R18+, or Category 1 or 2 Restricted. This includes non-violent actual sexual activity, anything that is 'unsuitable for a minor to see', and depictions of nudity and sex, whether they are explicit or implied. Any content we are selling online, our social media posts, and some of our advertising is likely to fall within the scope of Class 2 material.

Restricted access system

The Bill permits the Commissioner to decide what kind of access-control system must be used. In doing this, the Commissioner must consider the protection of children from exposure to unsuitable material, and the financial or administrative burden on internet services. They are not required to consider privacy consequences or undertake public consultation on the appropriate system.

Complaints

The Bill permits any Australian internet user to make complaints to the E-Safety Commissioner about Class 1 content and Class 2 content that is not subject to a restricted access system. 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 very subjective. The only legislated criteria for when an investigation is warranted, or for how it is conducted is what the Commissioner 'thinks fit.'

The Commissioner can take the following actions arising from that investigation towards social media services, relevant electronic services (including any chat, SMS, email or messaging services), or a designated internet service (defined broadly to include any service that allows Australians to access the internet):

- issue a removal notice requiring the content to be removed,
- issue a remedial notice requiring the content to be subject to a 'restricted access system' or to stop hosting the material,
- issue a link deletion notice requiring any links to the content to be deleted, or
- issue an app deletion notice requiring services to stop enabling Australian users from downloading an app.

If a provider of a social media service, a relevant electronic service, a designated internet service or a designated hosting service does not comply with a notice, they may face a penalty of up to 500 penalty units (currently $111,000 under Commonwealth law).

Our concerns about the impact of the online content scheme on sex workers:

Sexually explicit content can be removed within 24 hours of serving a notice, which could have a damaging impact to sex workers' ability to advertise or sell content online.

At present, the *Broadcasting Services Act 1992,* limits 'potentially prohibited content' (X18+ or RC material) to being able to be removed if it is hosted on an Australian server. Under the *Online Safety Bill*, X18+ material can be removed if any Australian internet user can access it, even if it is hosted abroad.

The Commissioner will now have power to order providers in any jurisdiction to take down the content within 24hrs.

The Bill imports the old classification system onto a new online content moderation system.

The definition of Class 1 and 2 material in the Bill uses the existing framework under the *Commonwealth Classification Act 1995* and *National Classification Code 2005*, which classifies films into categories of G, PG, M, MA15+, R18+, X18+ and RC. The existing X18+ category is already problematic, as it is so narrow that it precludes the depiction of fetish material, and potentially even rough sex and dirty talk. These categories are outdated, out of line with community expectations, and have gone through multiple inconclusive reviews in recent years. The government has not come up with a way to improve this system, so it should not be reproduced in the Online Safety Bill.

There is no reason for X18+ material to be considered 'harmful online content'.

As it is currently defined, X18+ is the only classification category to include no violence. There is no reason why it should be considered harmful online content at all. At present, X18+ content, R18+ content and RC content are lumped in together with no other information about what makes such content 'harmful.'

Offensiveness is not the appropriate measure of 'harmful online content'.

The Bill sets out criteria for when the Commissioner should consider material to be 'offensive'. This includes consideration of the standards of morality, decency and propriety generally accepted by reasonable adults, and whether the content has literary artistic or educational merit or medical, legal or scientific character. Offensiveness is an individual and subjective experience and should not be the criteria for determining whether online content is harmful.

The Bill opens up sex workers for vexatious, frivolous and malicious complaints.

Sex workers and sexually explicit media are already subject to a high level of malicious complaints. The legislation emboldens users to complain 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.

The Bill permits the Commissioner to create restricted access systems.

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. 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.

The Commissioner has extremely wide discretion to make decisions about all sexual content.

The Commissioner has enormous power under this Bill to make decisions about what kind of content Australian residents can access. They can decide whether or not to instigate investigations and issue removal notices as they see fit. The Commissioner is appointed rather than elected, they can delegate their authority to other bureaucrats, and they have no obligation to give reasons for their decisions.

There is no transparency or accountability for decisions made under the Bill.

Just as the Commissioner is not required to give reasons for their decision, there is no requirement for the E-Safety Commission to publish publicly-available data on their enforcement and compliance patterns. This means that the public will not know how many complaints have been made against sex workers, how frequently sex workers' content has been removed, or why some content was subject to removal notices while others were not. Users will not be able to edit their content accordingly to comply with the framework if there is no criteria for what content is 'harmful' and warrants removal.

The Bill has the potential to shut down sex workers' businesses and undermine our right to choose how and where we work.

Pivots to online work allowed many sex workers to survive the onset of the COVID-19 pandemic that effectively shut down in-person sex work in Australia for many sex workers. While many of the platforms we use to sell content, do cam work, or other forms of digital sex work have a paywall or other method of restricting user access, without clear guidelines for what that system will be, made in consultation with affected communities, this provision is very likely to cause undue damage to sex worker livelihoods.

There is a risk under this Bill that advertising content could be removed with little to no notice, which could have a disastrous impact on sex workers' income. Restrictions on advertising and / or mode of work are a form of of criminalisation of sex work. Sex workers must be able to advertise their services online without unnecessary restrictions or vulnerability to malicious complaints. Losing access to advertising and revenue streams is an immediate threat to sex worker safety and autonomy.

ISSUE 2: Non-consensual sharing of intimate images

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 provider, host or internet user of a social media service, relevant electronic service or designated internet service may be given a notice requiring them to remove or stop hosting the image.

A person who posts, or threatens to post, an intimate image may be liable to a civil penalty of 500 penalty units (currently $111,000 under Commonwealth law). The civil penalty does not apply if the person consented to the image.

Our concerns about the provisions for non-consensual sharing of intimate images:

Sex workers need equitable access to this provision

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, intro or other interaction and posts it online. It is important for us to advocate for sex workers to have equitable access to reporting. Because the E-Safety Commissioner holds power over investigations and issuing of notices, we are demanding oversight and accountability to ensure that all complainants are handled equitably, regardless of the Commissioner's personal beliefs or stigmas.

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. In some scenarios, sex workers may have consented to the posting of the image for certain

purposes (e.g. advertising on a particular escorting website), but not consented to the posting of the image for other purposes or on other platforms (e.g. continued use of image after leaving the agency, or the pirating or distribution of the image across other platforms). 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.

ISSUE 3: Basic online safety expectations

Under the Bill, the Minister for Communication, Urban Infrastructure, Cities and the Arts may determine basic 'online safety expectations' for social media services, relevant electronic services and designated internet services.

These services may be required to take reasonable steps to ensure that internet users are able to use the service in a safe manner. Some of these steps include:

(1) minimising the extent to which the following material is provided on the service: cyber-bullying and cyber-abuse material, non-consensual intimate imagery, material that promotes, incites or instructs in abhorrent violent conduct or material;
(2) taking reasonable steps to ensure that technological or other measures are in effect to prevent access by children to Class 2 material provided on the service; and
(3) ensuring the service has clear and readily identifiable mechanisms that enable end users to report and make complaints about breaches.

Internet service providers (and potentially hosting companies) are required to prepare periodic reports about their compliance at regular intervals (no less than 6 months). Where the Commissioner gives notice to a person to prepare a compliance report and they fail to do so, they may face a penalty of 500 penalty units (currently $111,000 under Commonwealth law).

Our concerns about the Basic Online Safety Expectations (BOSE):

The Bill gives incentives for platforms to remove all sexual content

The Basic Online Safety Expectations mean that services and providers will have to take active steps to ensure that minors cannot access Class 2 content. This provides an incentive for platforms, hosts, providers and services to either instigate age verification mechanisms, which have a wide range of privacy and feasibility issues, or, where this is too onerous, 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 effects of the US FOSTA-SESTA legislation is an example of this type of 'chilling effect', and virtually all sex workers who use the internet for work in Australia have been deeply impacted by this legislation. This is a great opportunity to discuss the damage of such legislation on your business and community. 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.

Other points to consider including in your submission:

- Other businesses are able to use social media and online platforms to advertise. Sexual material should not be exceptionalised and treated disproportionately to other kinds of media. Sex work is a largely lawful industry and should not be subject to discriminatory regulations.
- Consensual sexually explicit material should not be considered equivalent to violent, harmful or abhorrent content.

- Sex workers require access to public online spaces and online economies as a matter of health, safety and digital and sexual citizenship.
- Sex workers already work to prevent minors from accessing inappropriate content through the use of paywalls, 18+ warnings and user verification pop-ups, and other methods, and as such are already working to ensure that their content is only viewed by adults. We should be meaningfully engaged in these discussions, not positioned as a 'problem' or liability for online safety.