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and privacy
commission
new south wales

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Director, Online Safety Research and Reform Section
Department of Communications and the Arts
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By email: onlinesafety@communications.gov.au

Dear Director

Online Safety Legislative Reform Discussion Paper

The purpose of this correspondence is to provide comments on the Online Safety Legislative Reform Discussion paper released by the former Department of Communications and the Arts on 11 December 2019.

The proposals under consideration aim to develop improvements to Australia's online safety regulatory framework.

The following comments focus on privacy issues raised by the proposals and are provided to assist the Department in its consideration of the issues raised by the Discussion Paper.

The Privacy Commissioner supports in-principle the proposals contained within the discussion paper. In particular, the Privacy Commissioner is of the view that there is value in adopting the current Commonwealth cyberbullying regulatory framework as the basis of an effective broader scheme to address cyberbullying and abuse. Additionally, the Privacy Commissioner supports the establishment of a new cyber abuse scheme for adults.

Basic Online Safety Expectations

The paper proposes that the Online Safety Act would provide a power for the Minister to articulate a set of basic online safety expectations (BOSE) informed by the voluntary Safety by Design principles, the Online Safety Charter, previously announced government priorities and consultation feedback.

The Privacy Commissioner would advocate that the BOSE should explicitly include provisions such as those currently contained in the Online Safety Charter at 2.1 concerning the requirement to provide technical measures and tools that adequately allow users to manage their own safety and that are set to the most secure privacy and safety levels by default. There is considerable merit in the proposal at page 23 of the discussion paper which indicates that government is considering empowering the eSafety Commissioner to specify by legislative instrument that particular types of services or individual service providers with services marketed at children default to the most restrictive privacy settings. Such a power would enable the eSafety Commissioner to act in the event that a service provider or service fails to act to protect the privacy and safety of children.

Cyber abuse scheme for adults

The discussion paper proposes the development of a new scheme for cyber abuse of adults which would apply to serious cases of abuse including online harassment and cyberstalking or online abuse. The focus of the scheme would be for a take-down of material to minimise harm to victims.

It is noted the test proposed at page 32 would require online material to satisfy all three conditions proposed:

- Provided on a social media service, relevant electronic service or designated internet service
- Intended to have an effect of causing serious distress or serious harm to a particular adult
- An ordinary person would regard the material as menacing, harassing or offensive.

This test would establish a very high threshold to be met before a take-down notice could be issued. It is noted that some forms of abusive behaviour, for example publication of personal information such as the name and contact details of an individual or their family members on digital platforms, may not meet this threshold.

Redress for victims

It is noted that the proposals outlined in the discussion paper do not provide the affected individual who has been the subject of online abuse or cyber bullying with a right of action against the perpetrator of that abuse. Considering the significant potential impacts arising from cyber bullying and other forms of online abuse (including loss of employment, damage to reputation or emotional distress), consideration should be given to whether the new scheme should include a statutory cause of action for the serious invasion of the individual's privacy arising from cyberbullying and online abuse.

I have no objection to the publication of this submission provided my signature and contact details of my staff are redacted prior to publication.

I hope these comments will be of assistance to you. Please do not hesitate to contact me if you have any queries. Alternatively, your officers may contact [REDACTED] Senior Project Officer, Legal Counsel and Regulatory Advice, on (02) [REDACTED] or by email at [REDACTED]

Yours sincerely

[REDACTED]

Samantha Gavel
Privacy Commissioner

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