AUSTRALIAN FEMINISTS FOR WOMEN'S RIGHTS

20 June 2024

Submission to the Statutory Review of the Online Safety Act 2021

Australian Feminists for Women's Rights (AF4WR) welcome the opportunity to provide input into this Review. We are a feminist group explicitly of the broad political left (i.e. not specifically aligned to any party), whose object is research-based advocacy on women's sex-based rights.

It is our view that the Online Safety Act (hereinafter the Act) is currently not fit for purpose, because it places no clear limits on the powers exercised by the eSafety Commissioner (hereinafter the Commissioner) and provides no oversight body to which the Commissioner is accountable. This deficiency gives rise to a lack of transparency and public accountability concerning the Commissioner's investigative process and decision-making criteria, notwithstanding information advertised on the website. This lack of transparency and oversight underpins two other problems that we wish to discuss here, both of which have serious implications for the right to freedom of expression in Australia and indeed internationally:

1) Jurisdictional overreach by the Commissioner, resulting in at least one lawsuit and a resulting backdown by the Commissioner, although there are other instances;
2) The use of the Commissioner role to practise surveillance and witch-hunting based on the Commissioner's adoption of genderist ideology, while failing to adequately investigate (or investigate at all) other complaints.

We note that some groups are calling for a repeal of the Act. However AF4WR is of the view that the best course of action for Australian women and girls is to retain the Act with significant review to ensure accountability, oversight and effectiveness. Currently, the Act does not guarantee that unbiased investigation of complaints will occur in order to protect those most vulnerable to online harassment (including sexual harassment), threats, bullying, indoctrination and defamation while balancing those protections against the right to freedom of expression. Those vulnerable groups include children and teenagers (especially but not solely girls), racialised minorities and those expressing views that are strongly critical of particularly controversial or fashionable ideologies and of those institutions and individuals espousing them.

As concerns the protection of children, a glaring issue with the current Act and remit of the Commissioner is the complete silence on the issue of children and young people being groomed and influenced online by adults attempting to recruit them to harmful ideologies. These ideologies include exposure of minors, by adults other than parents or carers, to sexualised material with the intent of grooming children into anti-women or anti-gay/lesbian ideology. The best interests of the child cannot be served through this Act without considered and thorough scientific review of the most harmful ideologies online.

P.O. BOX 497 MARRICKVILLE NSW 1475 info@af4wr.org

There is little to no reference in the Act regarding steps to monitor adults who actively seek out interactions with children online in the context of developing personal rather than professional relationships with children. This should be a pillar of measuring online safety for children and young people.

At the same time, the Act needs to balance protections from online harms, notably harms to adults, against Australia's obligation under its own Constitution and international law to protect freedom of speech. As we have noted previously in our 2023 submission to the Federal Human Rights Framework Australia has few explicit constitutional or federal statutory protections of freedom of expression. We consider these insufficiencies to pose problems for protections of fundamental freedoms in this country. Australia nonetheless has obligations under international law (notably Articles 18 and 19 of the International Covenant on Civil and Political Rights [ICCPR]), and the High Court has established a doctrine of freedom of political communication based on its interpretation of the Australian Constitution. This doctrine is widely referenced as the yardstick for freedom of speech and reasonable limits to be placed thereupon in Australian legislation and caselaw.

However, in the absence of strong statutory protections of freedom of speech, "the place of freedom of speech within Australian political culture has often been uncertain", argues political science professor Katharine Gelber. "On the one hand, opinion surveys have tended to show that a broad spectrum of the population supports the principle of freedom of speech. On the other hand, that support tends to fracture quite easily in the context of controversial or difficult issues" (Gelber 2017, 203).

This "fracture" of support for the principle of freedom of speech has been evidenced in the abovementioned overreach of the Commissioner both within Australia and internationally, which undermines the very principles of freedom of speech that Australia is legally and morally obliged to uphold. That overreach is particularly worrying in the current context of a push, at both federal and state levels, for the adoption of so-called "hate speech" laws, in which certain political biases have become evident. Certainly, the ICCPR itself places some limits on freedom of expression in order, among other things, to "respect…the rights or reputations of others". The issue in the current Australian context is where respect for the rights of others ends and censorship of freedom of expression begins. AF4WR is concerned that Australia is leaning more towards the latter in some areas and the Act has contributed to this problem.

1. Jurisdictional overreach

On repeated occasions the Commissioner has issued takedown orders to overseas or to global media publishers. This extended in one case to legal action in Australia's Federal Court (subsequently withdrawn). Whatever one's personal views about the content of the publications, or the politics of those publishing them, such orders constitute both unreasonable censorship and an egregious jurisdictional overreach.

As Corynne McSherry put it in her affidavit to the Federal Court on behalf of the Electronic Frontier Foundation (EFF),[1] in the case the Commissioner took against Elon Musk, discussed below:

[1] EFF is an international not-for-profit civil liberties organisation dedicated to protecting the digital rights of all. McSherry herself is an experienced lawyer working in this field.

> If an Australian court makes a global takedown order, it may signal to other countries that they can reciprocally impose similar orders under their own laws for several reasons: A global takedown order establishes a precedent that courts of other jurisdictions can rely on to justify adopting the same measure … It could also encourage a "race to the bottom," where the most restrictive rules of one jurisdiction dictate whether online content can be accessed. Finally, takedowns also set a dangerous precedent that could legitimise practices of authoritarian governments, which do not fully value the rights to freedom of speech and access to information (EFF Affidavit 2024, 5–6).

McSherry further noted that the Order "violates the right to freedom of expression by unduly limiting access to information at a global scale without conducting a balancing test", citing both the ICCPR and the Manila Principles on Intermediary Liability, which emphasise that "content removal orders should be minimal and confined to the issuing jurisdiction" (p. 6). Additionally, she noted that the Commissioner's action did not conform to international norms, such as the 2022 EU Digital Services Act.

We are aware of three examples of jurisdictional overreach by the eSafety Commissioner. The first is the one about which the above affidavit was filed: the publication on X of an amateur video of a stabbing at a church in a Sydney suburb. The other two concern overseas publications, one of which was republished in part on X, that were critical of named trans-identified individuals.

The first case, that of the publication of the shooting video, about which the Prime Minister, Anthony Albanese, also weighed in, is arguably the most complicated, both philosophically and practically. It was the object, first, of an attempted global gag order, and second, of a case taken by the Commissioner to Federal Court. The above-cited EFF affidavit concerned that case. The interim Federal order was a global ban; that ban was subsequently lifted and the Commissioner ended up withdrawing the case. Musk celebrated this win as a victory for free speech, although the advisability of showing the content and the political debate it generated have been much discussed, including by specialists in the pages of the university-supported online publication *The Conversation.*

No doubt the extent to which the population must be "protected" against scenes of violence will continue to be debated over the course of this review and well beyond it. However, it is worth remarking that graphic violence against women is frequently portrayed across our culture, and not only in pornographic material. Explicit scenes of violent rape and murder, for example, pepper popular television shows and films, without any censorship. It is not necessarily our argument that they *should* be censored, but they do indicate a certain double standard at work: a video of the stabbing of an Australian prelate is deemed censorable, but widespread images of violence against women in our culture are not.

These questions then remain: Who decides? To whom are those deciders accountable? and, With what intent are the scenes shown and how do we know? Governments clearly cannot control how all individual viewers may react to such scenes, for that would amount to thought policing which is both impossible and undesirable. But does intent matter, and can we know what the intent of X users and owner was in disseminating this footage? The response to such questions is perhaps beyond the scope of this review and certainly beyond the scope of this submission, but they need to be asked. AF4WR would support an extremely

cautious approach to any censorship unless clear and significant harms to individuals or groups can be demonstrated, most especially in the case of alleged harms to adults.

Beyond this complex question is a more simple one: the Australian government has jurisdiction over Australia, not the world, and international law suggests that it does not have jurisdiction over global media platforms, social or otherwise, outside contexts of, for example, demonstrable national emergency.

The second example concerns the publication on the Reduxx independent website of an article critical of a trans-identified Australian soccer player, who is biologically male but has a "woman" gender identity. Reduxx is edited by Canadian journalist Anna Slatz. Slatz received from the Commissioner a takedown notice (or a requirement to at least "heavily censor" the article), due to the article's identification of the player as male (which is a well-known fact)—deemed "misgendering" by the Commissioner—and several allegations that the player has injured female soccer players during matches. (The soccer player in question is visibly much larger than every single one of the female players.) Around the same time, a smaller overseas publication, Ovarit, received the same order.

To the best of our knowledge the allegations of injury to female players have never been properly investigated and the player has returned to play in amateur soccer in 2024 with a team called the Flying Bats, which was originally a wholly female, lesbian team and now includes five trans-identified male players. The team was undefeated during a four-week amateur competition in March 2024, winning a $1,000 trophy. Most of the goals were scored by the transgender-identified males and in a number of games the opposing all-female team scored no goals. Some girls had pulled out of the competition due to unfairness and risk of injury.

The takedown orders ended up generating far more publicity than the initial orders and complaints, which suggests that the Commissioner's orders backfired seriously. However, regardless of one's personal views on the soccer player in question or on the articles, it is a considerable overreach by the Commissioner, first, to suggest that the player in question was done significant harm by the "misgendering" alluded to (there is absolutely no evidence of such harm having been done), and second, to claim jurisdiction over overseas publications.

The third example is another publicity-attracting case involving Elon Musk, who is suing the Australian government over a takedown order issued by the Commissioner concerning publication by X of comments by Canadian man Chris Elston, known as Billboard Chris. Billboard Chris had expressed opinions concerning a transgender individual, of female sex but with a "man" gender identity. The person in question is high ranking within ACON and was named by the World Health Organisation (WHO) as part of its committee to develop transgender health guidelines. The composition of this committee and the WHO's bias have been trenchantly criticised globally, leading the WHO to make some significant changes to the panel's composition, among other things.

As concerns Billboard Chris's comments, much of what he wrote about the person in question is demonstrably true (and supported by the person's own self-presentation in images and words) and he has a right to his own opinion about that person's politics and morals. Yet, once again, the Commissioner issued a takedown order, with a key reason for the order being, again, "misgendering". However—also once again—BillBoard Chris is not based in Australia but in Canada, and his comments are widely reported on several platforms, including his own

website. Whether X took the comments down or not, they would still be findable elsewhere (which was also an argument advanced concerning the church stabbing video). Whether one considers "misgendering" to truly cause actionable harm to an individual or not, for the Commissioner to issue a takedown order to either X or Billboard Chris exemplifies the same problem of jurisdictional overreach as the other two examples cited here.

2. Selective Surveillance, Witch-hunting and non-investigation, or inadequate investigation, of complaints

We are aware of several cases where so-called "gender critical" Australian women have been ordered to take down social media posts where they have criticised individuals or institutions for those individuals' or institutions' publicly-documented views on the politics of gender identity and/or public self-representation as transgender. We discuss these cases in largely general terms to protect those involved.

One case that is worth mentioning here although it is not directly related to the Commissioner's actions, is the issuing by NSW Police of an Apprehended Violence Order (AVO) against the head of the Australian organisation Binary, Kirralie Smith, after Smith discussed the abovementioned case of a transgender soccer player, and allegations of injuries to female players, with the media. Smith lives several hundred kilometres from the player in question and has never to our knowledge physically approached nor even threatened violence against this person. Burwood Local Court subsequently dismissed the AVO, which seems to have been a reasonable response to an order issued on vexatious grounds in the first place. If we mention this incident here, it is to point out that the Commissioner's attempts to censor "gender critical" articles published overseas occur within a context: those wishing to silence people expressing these views will use all available avenues to do so, and the Commissioner appears to have become another resource within that "toolbox".

In the takedown orders directed at Australian social media users and known to us, "misgendering" has been one of the criteria for the orders but not the only one.

Bizarrely, in one case the republication of a name and photograph that were *already* in the mainstream media (for that is where the republication came from), have been deemed to be breaches of the person's privacy, and the criticism of that person's ideology has been deemed "harmful", even though the personal and political choices made by that individual had received significant support within mainstream media.

In another case, the platform X was ordered to remove content posted by one user *one week* after the user published comments critical of a primary school's "LGBTQ club" (for years 3 to 6, that is, children aged from 7 to 11 years old). The content was blocked for Australian users. The user was informed that her post "violated Australian law", without further information given. She deduced that it was because she had named a teacher, who is already *publicly self-identified* as a proponent of the LGBTQ club in question, and had criticised the teacher's actions in promoting the club. In other words, the X user had not disclosed information that was private but criticised views and actions that had been expressed and taken proudly in full public view.

The Commissioner herself has claimed that only 6 percent of adult cyber abuse cases result in takedown notices, which according to her is evidence that the thresholds for taking action are

high. We suggest that they are not, in fact, so much *high* as *selective.* Individuals who hold and who publish in social media particular sets of views about the politics of gender identity and about the individuals who publicly promote them appear to be getting singled out. The question is, why?

We know—because many of us have personally experienced it and some of us have had to block some social media users because of it—that women who publish so-called "gender critical" views are being stalked online by gender activists. These activists watch out for any criticism of their views and then attempt have action taken against the women expressing them by employers, by the media platforms or by government agencies or agents (such as the Commissioner, or the police as noted above in Smith's case). We cannot know for sure whether the Commissioner is herself conducting selective surveillance, but we do know that such selective surveillance exists and that the Commissioner appears to be particularly receptive to it.

We also know that some women who have complained to the Commissioner about harassment, threats and stalking by gender activists have seen their claims left unaddressed.

The Commissioner has gone on the record to state that it is "not her role" to censor what she calls "anti-trans" criticisms or material. And yet, she has done so—with sometimes alarming rapidity. We also take issue with the blanket characterisation "anti-trans". Not all comments published online are *anti-trans* per se. Rather, a focus for many, even most, is the normalisation of certain ideological positions and their potential to harm women and children, and the silencing of any dissenting voices through various forms of intimidation, including through legal action, or, now, complaints to the Commissioner.

The Commissioner's own website states that, in the case of adult cyber-abuse,

> For eSafety to investigate, the harmful content must meet the legal definition of 'adult cyber abuse'. This means it must target a specific Australian adult and be both:
>
> 1. **intended to cause serious harm**, and
> 2. **menacing, harassing or offensive** in all the circumstances. (Emphasis is in the original.)

That is indeed a high bar. Yet in the case of takedown orders of people who are "gender-critical", *that bar is not met in any of the cases that we know about*, including those of jurisdictional overrreach cited above.

Interestingly—and distressingly—the Commissioner herself noted that Elon Musk's vocal response to the ban on the church stabbing video had led to some of Musk's supporters harassing her and doxxing her children. We are very sorry that she and her children have experienced this harassment, and condemn it, but this is *routinely* the experience of women who hold "gender-critical" views. Rather than holding those who harass us to account, the politicians and institutions that are supposed to protect us are adding to the harassment of those women and to attempts to silence them, whether through actively joining in or through failing to heed our voices when we speak up.

This is not what we consider to be best practice in ensuring online safety. In fact, we consider it to be the worst sort of double-standard and the worst sort of authoritarianism.