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RE: Consultation on a new Online Safety Act

Thank you for the opportunity to provide feedback into the *Online Safety Legislative Reform: Discussion Paper*.

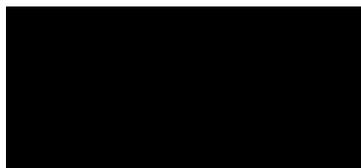
Scarlet Alliance is the national peak body representing a membership of individual sex workers, and sex worker networks, groups, projects and organisations from around Australia since 1989. Through our objectives, policies and programs, Scarlet Alliance aims to achieve equality, social, legal, political, cultural and economic justice for past and present workers in the sex industry.

Scarlet Alliance is a leader when it comes to advocating for the health, safety and welfare of workers in Australia's sex industry. Through our work and that of our member organisations, we have the highest level of contact with sex workers in Australia including very high access to sex industry workplaces in the major cities and many regional areas of Australia. Scarlet Alliance represents sex workers on a number of government and non government committees and advisory mechanisms.

Scarlet Alliance has played a critical role in informing governments and the health sector, both in Australia and internationally, on issues affecting sex workers in Australia.

If you have any questions relating to our submission please do not hesitate to contact, CEO Jules Kim at 

Regards,



Jules Kim
Chief Executive Officer
Scarlet Alliance, Australian Sex Workers Association

Executive Summary

The advent of the internet and online services, such as Craigslist, Backpage, Twitter, social platforms and other website production platforms, have resulted in sex workers using these technologies to gain greater control over our work environment, increase safety, build sex worker communities, market our businesses and services, and share vital information with each other. Online sex worker only spaces provide a critical safe space for sex worker to share experiences, list bad clients, share sexual health and safety information, and organise around our rights. The internet has proven to be a powerful tool for sex workers to gain autonomy, financial security, and safety.

Sex workers rely on using trusted, well-known online platforms, such as Facebook, Twitter, and Instagram to name a few, to connect with other sex workers and easily share and find a broad range of sex work specific information. The current targeted discrimination against sex workers in the guise of 'upholding community guidelines' or preventing 'illegal or harmful content' via increasingly narrow Terms of Use agreements have directly negatively impacted our ability to use these technologies to increase our safety and build community.

Scarlet Alliance is deeply concerned that the provisions proposed in the *Online Safety Legislative Reform: Discussion Paper* (hereafter referred to as the 'Discussion Paper') do not consider the current online discrimination experienced by sex workers. We are also deeply concerned many of the proposals listed in the *Discussion Paper* will exacerbate the existing banning, shadowbanning and invisibilising of sex workers from online spaces. For these reasons, we assert that further consultation with sex workers is needed before implementing many of the provisions stated in the *Discussion Paper*. In particular, we strongly oppose:

- amending the *Broadcasting Service Act 1992* (Cth) (also referred to as *BSA 1992*) to ensure that a wider range of service providers develop codes to address 'illegal or harmful' online content. Codes of practices need to be created and implemented in consultation with affected communities; *and*
- providing the eSafety Commissioner (also referred to as eSC) with discretionary powers for decision-making .

While the Classification Board makes decisions about film and print media that are public, and appealable, and is made up of individuals intended to be representative of the community, the decision-making ability of the eSafety Commissioner has no such accountability or transparency mechanisms. It is not sufficient for one individual to make decisions loosely with reference to the National Classification Code. The criteria for decision-making, the decisions themselves and process for review and appeal must be made public. Without that we will end up with potentially countless blacklisted websites with no recourse or accountability.

Scarlet Alliance recommends that:

- X18+ material should be permitted on Australian servers
- X18+, RC and MA content should not be categorised as Class 2 content that can automatically attract a complaint
- The National Classification Code should be amended to include fetish materials including BDSM

- A representative body should be established to make decisions about appropriate online content with membership that includes representation of sex workers, LGBTIQ+ communities, and Aboriginal and Torres Strait Islander people
- A register should be established where decisions are published within 7 days with detailed reasons for the decisions
- Criteria for removal of content and what constitutes harmful material must be developed with meaningful consultation and must be made public and accessible
- Criteria should be reviewed periodically (every 12 months) by public consultation
- Scarlet Alliance and its members should form part of an industry working group to establish an industry Codes of Practice.

It is critical that an Online Safety Act does not arbitrarily and unfairly restrict online sex worker spaces, including those that sex workers use to conduct our businesses, advertise our services, and organise for our rights and safety.

Sex workers are currently routinely banned from online platforms.

In 2018, the United States (US) enacted SESTA/FOSTA (Stop Enabling Sex Trafficking Act/ Fighting Online Sex Trafficking Act) which made internet administrators and hosts broadly liable for the content generated by their users if the content ‘facilitates or promotes’ sex work or sex trafficking.¹ The passage of SESTA/FOSTA created a mass ‘chilling effect’ on US based platforms who hosted a variety of sex worker content whereby platforms immediately deleted and banned sex workers and sex work content from their service to avoid possible criminal charges.

As many Australian sex workers were using US based sites, such as Reddit, Craigslist, Backpage, and Instagram, Australians sex workers were directly impacted by SESTA/FOSTA and had our content and online communities deleted overnight. While the proposed intent of SESTA/FOSTA was to criminalise online ‘sex trafficking’ and breaches to sex industry regulation, the law has been criticised by free speech advocates², sex workers, survivors of trafficking³, tech companies⁴ and even the American Department of Justice⁵ for having the unintended consequences of pushing sex workers and victims of trafficking further underground.

The impact of SESTA/FOSTA on sex workers was also examined in the study *Erased: The Impact of FOSTA-SESTA and the Removal of Backpage*. This study, which was published in 2020, examined the effect of SESTA/FOSTA on sex workers’ health and wellbeing, safety, labour rights and ability to be self-determined. It indicated that SESTA/FOSTA has made sex workers more vulnerable to exploitation by removing the online resources and tools sex workers were utilizing to maintain our safety and wellbeing.⁶ For example, the closure of Backpage, a well-known advertising platform used

¹ *The Fight Online Sex Trafficking Act /Stop Enabling Sex Trafficking Act (SESTA/FOSTA)* (US)

² <https://www.woodhullfoundation.org/our-work/fosta/>

³ survivors of sex trafficking <https://survivorsagainstsesta.org/>

⁴ http://docs.techfreedom.org/Letter_SESTA-FOSTA_Hybrid_2-23-18.pdf

⁵ Assistant Attorney General. (2018). *Letter to Hon Robert W Goodlatte*. Retrieved 20/02/20 from <https://assets.documentcloud.org/documents/4390361/Views-Ltr-Re-H-R-1865-Allow-States-and-Victims.pdf>.

⁶ Blunt, D. and A. Wolf (2020). *Erased The Impact of FOSTA-SESTA & the Removal of Backpage*. Retrieved 20/02/20 from <https://hackinghustling.org/erased-the-impact-of-fosta-sesta-2020/>.

by sex workers around the world, including Australia, meant that sex workers could no longer utilise this platform to screen clients and clearly negotiate the terms of our services.⁷

Since the passage of the SESTA/FOSTA, sex workers around the world, including in Australia, have been frantically trying to find ways to continue to use mainstream online services and challenge online discrimination against us. These platforms are essential for sex workers to be visible online so we can build sex worker communities, share vital information with each other and market our businesses and services. However, our online presence being deleted, banned and invisibilised from online platforms continues to be a real risk for sex workers. For example, while Instagram does not explicitly ban sex work content, sex workers accounts are frequently captured by automated filters, deleted, shadow banned and banned.⁸ A wide range and diversity of sex workers have been negatively impacted by this, and have found their accounts being shadow banned as they were automatically filtered out for breaching ‘community guidelines’. In Australia, the sex worker collective, Actual Sex Workers, and their large following of sex workers internationally and locally were permanently deleted from Instagram for containing ‘sexually suggestive content’ and ‘solicitation’. However, the Actual Sex Worker Instagram account has only being used to build sex worker community and discuss rights and politics.

The Online Safety Act

Demanding service providers to enact and enforce Codes of Practices will exacerbate the existing online discrimination against sex workers.

The Discussion Paper proposes to update the existing provisions in the *BSA 1992* (Cth) to ‘stipulate that codes [of practice] should be developed by a wider range of service providers’ to encourage industry to play a stronger role in preventing ‘harmful content’ on their platforms.⁹ The paper also indicates that services that have ‘a greater degree of control over the content made available through their sites’ will be expected to ensure that content that is classified as RC or X18+ are not hosted on Australian sites.¹⁰ When online content is not explicitly classified as RC or X18+, online service providers will be expected to classify content with guidance from the National Classification Code (hereafter referred to as the NCC).¹¹ Failure to do so will be ‘treated very seriously and could trigger an investigation by the [eSC]’.¹² Additionally, the eSC can intervene and create ‘rules for the industry in the event that the codes are not operating effectively.’¹³ Compliance with the industry standard set by the eSC is mandatory.

While many of these provisions currently exist in the *BSA 1992* (Cth), demanding that a wider range of service providers create Codes of Practices raises major concerns for sex workers in this current

⁷ Blunt, D. and A. Wolf (2020). Erased The Impact of FOSTA-SESTA & the Removal of Backpage. Retrieved 20/02/20 from <https://hackinghustling.org/erased-the-impact-of-fosta-sesta-2020/>. Pg 4.

⁸ Cole, S. (May 7 2019). A Sex Workers Union Is Organizing Against Instagram Discrimination. *Vice*. Retrieved 20/02/20 from https://www.vice.com/en_us/article/3k3d45/apag-union-sex-workers-account-deleted-from-instagram.

⁹ Department of Communications and the Arts (December 2019). Online Safety Legislative Reform: Discussion Paper. Retrieved 20/02/20 from <https://www.communications.gov.au/have-your-say/consultation-new-online-safety-act>. Pg 40.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid. Pg 41.

online climate of service providers implementing policies and practices that explicitly invisibilise and ban sex workers from their service. As highlighted in the *Discussion Paper*, 'digital platforms often face challenges in moderating the vast volumes of content being uploaded/created by their users'.¹⁴ In order for digital platforms to ensure they are not publishing content that may be in breach of their Code of Practice, digital platform providers often rely on automated filters to find and delete content. These automated filters are not sensitive enough to distinguish nuances within the content and censorship often targets already marginalised communities. As highlighted above, sex workers and a wide range of sex work related content which may not necessarily be in breach of a service's 'terms of use' are captured by automated filters and deleted.

While the *Discussion Paper* indicates that the 'codes would be developed by industry in consultation with stakeholders', it is unclear which stakeholders will be consulted. Scarlet Alliance and our members should be meaningfully included in the development of the industry Codes of Practice. Scarlet Alliance is also deeply concerned that the eSC alone is empowered to review and approve Codes of Practices designed by industry and implement industry standards if Codes of Practices are deemed ineffective.¹⁵ While *the BSA 1992* (Cth) states that the eSC is required to consult industry when determining the industry standard¹⁶, the eSC is not required to consult community to ensure the industry standards they are setting do not unnecessarily negatively impact the community. Without acknowledging and implementing a strategy to mitigate the existing problems with online service provider's content moderation policies and strategy, Scarlet Alliance does not support expanding the requirement for service providers to implement Codes of Practices and the eSC to implement industry codes without adequately consulting affected communities. The eSafety Commissioner is not equipped to make decisions about what is appropriate sexual content and must consult meaningfully and appropriately with sex workers.

The powers afforded to the eSC to prevent harmful or illegal content are not embedded in principles of transparency and accountability and sets a dangerous and risky precedent.

The Discussion Paper proposes to empower the eSC to assess unclassified online content to determine if it 'meets the threshold for seriously harmful content'¹⁷, circumventing the role of the NCC in assessing and classifying content. While some criteria are provided for the eSC in assessing material, such as content that is illegal under the Commonwealth Act will be classified as 'harmful material'¹⁸, the eSC can use discretion in deciding whether particular content will be classified as 'harmful'. The eSC can also request take-down notices to content they have classified as 'harmful'. As *the Discussion Paper* proposes to broaden the powers of the eSC to allow them to request take down notices to international service providers, the eSC's ability to independently classify and request take down notices is broadened to any online service.¹⁹

It is also proposed that the eSC is provided with powers to request search aggregator and services to delist or de-rank websites and digital distribution platforms to cease offering apps or games that

¹⁴ Ibid. Pg 36.

¹⁵ Ibid. Pg 41.

¹⁶ *Broadcasting Services Act 1992* (Cth), Volume 2 (Schedule 5, section 77).

¹⁷ Department of Communications and the Arts (December 2019). Online Safety Legislative Reform: Discussion Paper. Retrieved 20/02/20 from <https://www.communications.gov.au/have-your-say/consultation-new-online-safety-act>. Pg 41.

¹⁸ Ibid.

¹⁹ Ibid.

'have been found by the [eSC] to be systemically and repeatedly facilitating the ... hosting of seriously harmful content'.²⁰ Scarlet Alliance acknowledges that the eSC can only request rather than require take down notices for content they have classified as 'harmful'. However, these provisions provide the eSC with broad discretionary powers to make decisions and sets the precedent that communities do not need to be involved in these decision-making processes. These are critical conversations about acceptable content and community values that should be visible in the public domain. As highlighted above, when communities are not adequately consulted, marginalised groups are unfairly and negatively impacted. Scarlet Alliance is deeply concerned that providing the eSC with discretionary powers to decide what content is considered 'harmful content' will result in the eSC being forced to take on this responsibility without being adequately informed or supported to make such assessments. It also encourages the eSC to act on what they know, which is often skewed by individual bias, reducing the fairness, transparency and accountability of the process and violating the rights of communities.

Additionally, different communities are important stakeholders in decision making processes. When it comes to appropriate sexual content, sex workers amongst other marginalised sexualised communities are important stakeholders and need to be closely involved in deciding what is considered appropriate or 'harmful' sexual content.

While the *Discussion Paper* implies that businesses can challenge notices issued by the eSC by taking it to the Federal Tribunals, such as the Administrative Appeals Tribunals and the Federal Court²¹, these avenues for challenging the decisions made by the eSC are overly onerous and inaccessible for many individual people, including for sex workers, individuals who are engaged in providing webcamming services, selling customised content or running member-based websites. As a result, many marginalised communities with reduced access to these avenues will have little recourse in addressing unfair and discriminatory decisions made by the eSC.

Recommendations

Scarlet Alliance strongly oppose:

- amending the *Broadcasting Service Act 1992* (Cth) (also referred to as BSA 1992) SA to ensure that a wider range of service providers develop codes to address 'illegal or harmful' online content.
- providing the eSafety Commissioner (also referred to as eSC) with discretionary powers to enact their responsibilities.

Scarlet Alliance recommends that:

- X18+ material should be permitted on Australian servers
- X18+, RC and MA content should not be categorised as Class 2 content that can automatically attract a complaint
- The National Classification Code should be amended to include fetish materials including BDSM

²⁰ Ibid. Pg 52.

²¹ Ibid. Pg 58.

- A representative body should be established to make decisions about appropriate online content with membership that includes individuals from sex work and LGBTIQ+ communities, Aboriginal and Torres Strait Islander people
- A register should be established where decisions are published within 7 days with detailed reasons
- Criteria for removal of content and what constitutes harmful material must be developed with meaningful consultation and must be made public and accessible
- Criteria should be reviewed periodically (every 12 months) by public consultation
- Scarlet Alliance and its members should form part of an industry working group to establish an industry Codes of Practice.