Regulation of Australian online content: cybersafety and harm

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Key issue

Although an integral part of modern society and essential to the modern economy, the cyber environment can also cause harm to Australians and has increasingly played a role in criminal activity.

The new Parliament may consider the adequacy and appropriateness of existing legislation to deter online criminal activity and protect Australians.

Key recent developments

During the 45th Parliament, Australia responded to the potential harms caused by online content through Commonwealth legislation and inquiries, and inter-governmental action.

Legislation

Legislative measures passed by the last Parliament included restrictions on online gambling promotion, as part of the Turnbull Government’s Broadcast and Content Reform Package.

Civil and criminal responses to harmful online content were also legislated in the last Parliament, including penalties for posting, or threatening to post, intimate images on the Internet without consent. New offences that criminalise acts done online to prepare or plan to cause harm to, or engage in sexual activity with, a person under the age of 16 were also enacted. This includes a person misrepresenting their age online as part of a plan to cause harm to a person under 16.

In April 2019, the Parliament swiftly passed legislation creating new offences that will apply to providers of internet, hosting or content services who: fail to refer to police ‘abhorrent violent material that records or streams conduct that occurring’ in Australia; and do not ‘expeditiously’ take down ‘abhorrent violent material’ capable of being accessed within Australia. This legislation was in response to the live streaming of violent material by the perpetrator of the terrorist incident in Christchurch, New Zealand. That material circulated on social media very quickly and was viewed thousands of times before it was removed.

The protection of children online continued to be a high priority for the last Parliament, with the introduction of legislation relating to online grooming, and the provision of electronic services to facilitate dealings with child abuse material online. In response to recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse, the Morrison Government proposed new offences for the possession or control of ‘child abuse material’ in the form of data held in a computer or on a data storage device. Both these Bills lapsed at the end of the 45th Parliament and may be reintroduced in the new Parliament.

Parliamentary inquiries

In November 2016 the Senate References Committee on Environment and Communications released its report Harm being done to Australian children through access to pornography on the Internet which recommended, amongst other things, that the Australian Government commission dedicated research into the exposure of Australian children and young people to online pornography and other pornographic material.
In 2017 the Senate Legal and Constitutional Affairs Committee inquired into the adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying. This included consideration of the adequacy of the policies, procedures and practices of social media platforms in preventing and addressing cyberbullying. In 2018 the Committee recommended that the Australian Government consider increasing the maximum penalty for the current Commonwealth cyberbullying offence from three years to five years imprisonment.

Inter-governmental action

At the Council of Australian Governments (COAG) meeting in February 2018, COAG agreed to establish a working group to consider existing and potential initiatives to help combat bullying and cyberbullying and establish a work program led by the Education Council. In December 2018, COAG leaders also supported in-principle the ‘right to be forgotten’ for victims of cyberbullying and abuse and agreed that the Commonwealth would prepare a COAG proposal to achieve this outcome. The right to be forgotten would allow an individual to request that organisations, including social media providers, permanently delete information about them.

eSafety Commissioner

Originally established to promote children’s safety online, the Australian eSafety Commissioner is now empowered under the Enhancing Online Safety Act 2015 to promote online safety for all Australians. The eSafety Commissioner administers the Online Content Scheme, which provides a complaints mechanism for prohibited content based on the classification categories in the National Classification Scheme.

In the 2018 discussion paper on the Reviews of the Enhancing Online Safety Act 2015 and the Online Content Scheme, the Government identified a need for review of the Online Content Scheme. In particular, the Government indicated that ‘developments in anonymous and encrypted networking and new hosting arrangements are increasing opportunities for prohibited conduct to be distributed, making it more difficult to determine where it is hosted’. The existing scheme, contained in Schedules 5 and 7 of the Broadcasting Services Act 1992, is outdated and the eSafety Commissioner has highlighted it is ‘misaligned with current technologies, usage patterns, community concerns and enforcement mechanisms’.

The Government tabled the report of the independent review (the Briggs Review) of the Enhancing Online Safety Act 2015 and the Online Content Scheme in February 2019. The key recommendation of the review is that ‘existing out-of-date and inconsistent legislation should be replaced by a new Online Safety Act and a new single code of industry practice’. The Government is considering the recommendations as a whole, but has announced its acceptance of the recommended Online Safety Act, which will be a ‘single, consolidated piece of online safety legislation that includes greater transparency and reporting requirements for industry’.

During the election campaign the Government committed to introducing mandatory reporting requirements for major social media platforms on the number, type and response to complaints of illegal, abusive and predatory content by their users.
Online harm

The technological ability of a user to film and quickly distribute digital content has led to violent and disturbing material being available online. As noted above, in response to the Christchurch terrorist attack in March 2019, the 45th Parliament swiftly passed legislation introduced by the Morrison Government that aims to ensure the timely removal of abhorrent violent material by internet service providers. The targeted material is not limited to engaging in a terrorist act but extends to murder, attempted murder, torture, rape and kidnapping. Due to the speed with which the legislation was passed by Parliament, and the associated lack of Committee inquiry, there have been calls for the implementation and effect of the legislation to be scrutinised by the 46th Parliament.

Another form of online harm is technology-facilitated domestic violence which is becoming increasingly common in Australia and has significant ‘real world’ implications. The conduct might include monitoring, tracking, surveillance, or the use and distribution of another’s personal information for the purposes of intimidating or harassing both online or in the physical environment. The new Parliament may consider a new national initiative, through a revised Family and Domestic Violence Strategy to prevent abuse through the use of technology.

International responses to online harm

Internationally, countries are grappling with the harmful effects of hate content online and the often anonymous perpetrators of hate speech. Online media platforms such as YouTube, Facebook and Twitter remove violent extremist content regularly. Whether these companies’ policies and methods are adequate is being questioned and the Prime Minister has suggested that G20 countries forge a global agreement to ensure that technology firms meet their obligations regarding prevention, protection, transparency and deterrence.

Christchurch Call

Following the Christchurch terrorist attack, New Zealand’s Prime Minister Jacinda Ardern and France’s President Emmanuel Macron, held a political summit in May 2019 to ‘bring together countries and tech companies in an attempt to bring an end the ability to use social media to organise and promote terrorism and violent extremism’. Australia signed the summit pledge, known as the Christchurch Call. Internationally, there is momentum to effectively tackle illegal content online while still acknowledging an individual’s freedom of speech and the universality of the internet.

United Kingdom

The United Kingdom (UK) has released for consultation an Online harms white paper proposing plans for a ‘world-leading package of online safety measures that also supports innovation and a thriving digital economy.’

Amongst other things, the UK paper is considering a new statutory duty of care to make companies take more responsibility for the safety of their users and tackle harm caused by content or activity on their services.
Cybersafety

Cybersafety is the term used to describe initiatives and resources to help an individual manage their online behaviour and information. A number of Commonwealth offences to punish and deter offensive online behaviour exist, and there are offences at the state level that address cyber harassment, cyberstalking and cyberbullying, which carry prison sentences. The focus for Australian Parliaments has been on education initiatives that enhance an individual’s capacity to monitor their online presence and risks, including cyberbullying and image-based harm.

In December 2018, the Government announced a $17 million online safety package, to include new resources for parents and carers, an online safety research program and the development of an Online Safety Charter for digital platforms.

Following a consultation period in early 2019, the Government intends to progress the Online Safety Charter to outline the Government’s expectations for industry in relation to protecting children online. The Draft Online Safety Charter states that the Charter will be underpinned by two fundamental principles:

- standards of behaviour online should reflect the standards that apply offline, and
- content that is harmful to users, particularly children, should be appropriately restricted.

The Australian Government’s support of other initiatives to combat bullying and cyberbullying include the National Day of Action against Bullying and Violence.

Further reading

Department of Communications and the Arts, Reviews of the Enhancing Online Safety Act 2015 and the Online Content Scheme, Discussion Paper, June 2018, Canberra.

United Kingdom, Online harms white paper, Consultation Paper, April 2019, London.