

EXPLANATORY STATEMENT

Enhancing Online Safety for Children Act 2015

Enhancing Online Safety (Intimate Images and Other Measures) Legislative Rules **2017**

Issued by the authority of the Minister for Communications

Legislative basis

Section 108 of the *Enhancing Online Safety for Children Act 2015* (the Act) provides that the Minister may, by legislative instrument, make legislative rules prescribing matters required or permitted by the Act to be prescribed by legislative rules, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Paragraph 15(1)(r) of the Act confers any functions specified in legislative rules on the Children's e-Safety Commissioner (the Commissioner).

Purpose of the instrument

The purpose of the Legislative Rules is to confer additional functions upon the Commissioner in relation to the online safety of Australians at risk of having intimate images of them shared without their consent, and older Australians.

Background

The Act establishes the Commissioner as an independent statutory office supported by the Australian Communications and Media Authority. The Commissioner commenced operations on 1 July 2015.

The Commissioner provides a national leadership role in improving online safety for Australian children, including by administering:

- a two-tiered scheme for the rapid removal of cyberbullying material targeted at an Australian child from large social media services; and
- an end-user notice regime, under which the Commissioner has the power to issue a notice requiring a person who posted cyberbullying material targeted at an Australian child to remove the material, refrain from posting cyberbullying material or apologise for posting the material.

Other functions of the Commissioner, as set out in section 15 of the Act, include:

- promoting online safety for children;
- supporting and encouraging the implementation of measures to improve online safety for children;
- supporting, conducting and accrediting educational, promotional and community awareness programs that are relevant to online safety for children;
- making, on behalf of the Commonwealth, grants of financial assistance in relation to online safety for children and conducting and evaluating research about online safety for children; and
- advising and giving the Minister reports about online safety for children.

The Commissioner also administers the Online Content Scheme under Schedules 5 and 7 to the *Broadcasting Services Act 1992*, which regulates illegal and offensive online content in Australia with reference to the National Classification Scheme.

Paragraph 15(1)(r) of the Act was included to provide flexibility to confer additional functions upon the Commissioner where the Commissioner would be well placed to effectively perform the relevant functions.

On 13 December 2015 the Minister for Communications made the *Enhancing Online Safety (Family and Domestic Violence) Legislative Rules 2015* which conferred additional functions upon the Commissioner in relation to the online safety of persons at risk of family or domestic violence.

Australians at risk of having intimate images of them shared without their consent

On 28 June 2016, the Australian Government announced a \$10 million package of measures to provide support for victims of the phenomenon colloquially referred to as ‘revenge porn’, and domestic violence.

This package includes funding for the Commissioner to provide support and online resources to persons who have had intimate images or videos of them shared without their consent.

Digital Literacy for older Australians

On 26 June 2016, the Australian Government announced the ‘Improving Digital Confidence and skills of Senior Australians’ program now called ‘Digital Literacy for Older Australians’. This program aims to improve the skills, confidence, and online safety of seniors using digital technology. Under this program the Commissioner will develop national digital and smart device training material and tools, online safety resources and outreach programs in aged care facilities. The Commissioner will also develop a seniors’ digital portal providing a one-stop shop for information, tools and training materials.

These Legislative Rules will expand the Commissioner’s functions and responsibilities under the Act to enable the Commissioner to implement these new measures.

The specification of additional functions will enable the Commissioner to support and empower Australians at risk of having intimate images or videos of them shared without their consent, and older Australians, and is well aligned with the Commissioner’s existing functions and objectives.

Consultation

In accordance with the consultation requirements of section 17 of the *Legislation Act 2003*, the Office of the Children’s e-Safety Commissioner was consulted in relation to these Legislative Rules.

Regulation impact

The Office of Best Practice Regulation (OBPR) has advised that a Regulation Impact Statement is not required for this instrument. The OBPR reference number is ID 21276.

Details of the accompanying instrument

The instrument is a disallowable instrument for the purposes of the *Legislation Act 2003*.

Details of the accompanying instrument are set out in **Attachment 1**.

Statement of compatibility with human rights

A statement of compatibility with human rights for the purposes of Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is set out in **Attachment 2**.

Attachment 1**Details of the *Enhancing Online Safety (Intimate Images and Other Measures) Legislative Rules 2017*****Section 1 – Name of Legislative Rules**

Section 1 of the Legislative Rules provides that the name of the instrument is the *Enhancing Online Safety (Intimate Images and Other Measures) Legislative Rules 2017*.

Section 2 - Commencement

Section 2 provides that the Legislative Rules commence on the day after they are registered on the Federal Register of Legislation.

Section 3 - Definitions

Section 3 sets out the key definitions used in the Legislative Rules.

The term ‘*Act*’ refers to the *Enhancing Online Safety for Children Act 2015*.

The term ‘*Australian*’ refers to an individual who is ordinarily resident in Australia.

The term ‘*genital or anal region*’ in relation to a person, refers to the person's genital or anal region whether bare or covered by underwear.

The term ‘*intimate image*’ refers to a moving or still image that depicts:

- a person engaged in sexual activity; or
- a person in a manner or context that is sexual; or
- the genital or anal region of a person, or in the case of a female breasts.

The term ‘*older Australian*’ refers an Australian who is 50 years of age or older.

The term ‘*online safety*’ means the capacity of a person to use social media services and electronic services in a safe manner.

The term ‘*specified person*’ refers to the two types of person covered by this Legislative Rule being an Australian at risk of having intimate images of them shared without their consent, and an older Australian.

To aid the reader, a note at the end of section 3 indicates that specified terms have the same meaning as in the Act. These terms are electronic service and social media service.

Section 4 – Conferral of additional functions

Section 4 sets out the additional functions conferred on the Children’s eSafety Commissioner for the purposes of paragraph 15(1)(r) of the Act.

These functions are:

- (1) to promote online safety for specified persons;

- (2) to collect, analyse, interpret and disseminate information relating to online safety for specified persons;
- (3) to support, encourage, conduct, accredit and evaluate educational, promotional, training and community awareness programs that are relevant to online safety for specified persons; to support, encourage, conduct and evaluate research about online safety for specified persons;
- (4) to publish (whether on the internet or otherwise) reports and papers relating to online safety for specified persons;
- (5) to give the Minister reports about online safety for specified persons;
- (6) to advise the Minister about online safety for specified persons; and
- (7) to consult and cooperate with other persons, organisations, and governments on online safety for specified persons.

Attachment 2**Statement of Compatibility with Human Rights**

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Enhancing Online Safety (Intimate Images and Other Measures) Legislative Rules 2017

The *Enhancing Online Safety (Intimate Images and Other Measures) Legislative Rules 2017* (Legislative Rules) are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

The Legislative Rules engage the right to privacy, as discussed below, in a manner that is reasonable, necessary and proportionate to the goal of enhancing online safety for an Australian at risk of having intimate images of them shared without their consent, and older Australians (specified persons).

Overview of the Legislative Rules

The Legislative Rules have been made by the Minister for Communications (the Minister) under subsection 108(1) of the *Enhancing Online Safety for Children Act 2015* (the Act).

The Act establishes the Children's e-Safety Commissioner (the Commissioner) as an independent statutory office supported by the Australian Communications and Media Authority.

The functions of the Commissioner as set out in section 15 of the Act include promoting online safety for children, and supporting and encouraging the implementation of measures to improve online safety for children.

Australians at risk of having intimate images of them shared without their consent

On 28 June 2016, the Australian Government announced a \$10 million package of measures to provide support for victims of the phenomenon colloquially referred to as 'revenge porn', and domestic violence.

This package includes funding for the Commissioner to provide support and online resources to persons who have had intimate images or videos of them shared without their consent.

Digital Literacy for older Australians

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develop a seniors' digital portal providing a one-stop shop for information, tools and training materials.

These Legislative Rules will expand the Commissioner's functions and responsibilities under the Act to enable the Commissioner to implement these new measures.

Human rights implications

The Legislative Rules engage the right to privacy, which is recognised by the Convention on the Rights of the Child (the CROC), the International Covenant on Civil and Political Rights (the ICCPR) and the Convention on the Rights of Persons with Disabilities (the CRPD).

This right, and how it is impacted by the measures in the Legislative Rules which expand certain functions and powers of the Commissioner relating to the online safety of specified persons, is discussed in more detail below.

Privacy

Paragraph 1 of Article 17 of the ICCPR recognises the right to protection against arbitrary or unlawful interference with privacy, family, home or correspondence. Paragraph 2 of Article 17 of the ICCPR recognises the right of everyone to the protection of the law against such interference.

Paragraph 1 of Article 16 of the CROC recognises, among other things, the right of a child not to be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence. Paragraph 2 recognises that children have the right to the protection of the law against such interference or attacks. Similar rights are recognised in Article 22 of the CRPD.

The Legislative Rules engage this right to privacy. Section 80 of the Act authorises the Commissioner to disclose information to any of a variety of authorities listed in that section, if the Commissioner is satisfied that the information will enable or assist the authority to perform or exercise any of its functions or powers. While the Legislative Rules do not amend or broaden the disclosure power under section 80, increasing the general functions of the Commissioner to cover online safety for specified persons means that an additional class of information (namely, information that relates to the online safety of specified persons) could potentially be disclosed under subsection 80(1) to listed authorities (which include the Australian Federal Police, the Director of Public Prosecutions, the Australian Communications and Media Authority (the ACMA), and the National Children's Commissioner).

Each of the instances in which disclosure of information is authorised would, because of the nature of section 80, be reasonable in the circumstances. Accordingly, the Legislative Rules are consistent with the right against arbitrary interferences with privacy.

The Commissioner will continue to be an 'agency' for the purposes of *the Privacy Act 1988* (the Privacy Act), and therefore will be bound by the Privacy Act. Similarly, any body corporate to which the Commissioner delegated functions or powers under

existing section 64 of the Act is bound by the Privacy Act. It is expected that the Commissioner will, as a matter of best practice, undertake privacy impact assessments before making any disclosures under subsection 80(1) and only disclose the type and level of information that it determines is absolutely necessary to enable or assist the relevant authority perform or exercise its powers or functions.

Conclusion

This Legislative Rule is compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011. To the extent to which they may engage the right to privacy, any limitation is reasonable, necessary and proportionate to the goal of enhancing online safety for specified persons. The Legislative Rule does not engage any of the other applicable rights or freedoms.