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Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

REFERENCE:
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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, pursuant to Human Rights Council resolutions 34/18 and 40/16.

In this connection, we would like to offer the following comments on the **Criminal Code Amendment (Sharing of Abhorrent Violent Material) Law 2019** ("the Law"), which raises serious concerns regarding freedom of expression. Given the extremely short timeframe between the introduction of the Bill and the date of its expedited adoption, please excuse both the brevity of these comments and the expedited publication of them.

According to the information received:

Legislative Timeline

On 30 March 2019, the Attorney-General for Australia announced the Government's plan to introduce legislation to "prevent the weaponising of social media platforms and to protect Australians from the live-streaming of violent crimes, such as the Christchurch terror attack."

On 3 April 2019, the Bill was introduced in Parliament and read for the first time. The Senate passed the Bill on the same day.

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Her Excellency
Ms. Marise Payne
Minister for Foreign Affairs

The Bill was passed by Parliament on 4 April 2019.

Definition of "abhorrent violent material"

Under section 474.31, "abhorrent violent material" refers to any material that "records or streams abhorrent violent conduct" and is produced by a person or persons engaging in, conspiring to engage in, aiding or assisting in, or attempting to engage in such conduct. It further defines "abhorrent violent conduct" as engaging in a terrorist act, murder, attempted murder, torture, rape or kidnapping. The Law provides that "it is immaterial whether the abhorrent violent conduct was engaged in within or outside Australia."

Offenses related to "abhorrent violent material"

Under section 474.33 of the Law, internet, content and hosting service providers are obliged to report to the Australian Federal Police the existence of "abhorrent violent material" that records or streams relevant conduct occurring in Australia. The failure to report such material "within a reasonable time after becoming aware" of it constitutes an offense.

Offences committed under section 474.33 are punishable by fines of up to $168,000 AUD for an individual or $840,000 AUD for a corporation.

Under section 474.34, content and hosting service providers commit an offence if they fail to "expeditiously" remove "abhorrent violent material" that is "reasonably capable of being accessed within Australia."

Offences committed under section 474.34 are punishable by up to 3 years' imprisonment, fines of up to $2,100,000 AUD or both for an individual, and fines of up to 10% of the provider's annual turnover for a corporation.

Role of the eSafety Commissioner

Under sections 474.35 and 474.36, the eSafety Commissioner is authorized to issue a notice to content or hosting service providers that their services were used to access or host "abhorrent violent material," if the Commissioner has "reasonable grounds" for such a finding.

In a prosecution of the service provider, the notice triggers the presumption that the provider was "reckless" in hosting or providing access to "abhorrent violent material." The evidentiary burden shifts to the provider to "adduc[e] or poin[t] to evidence that suggests a reasonable possibility" otherwise.

Defenses

Section 474.37 recognizes various defenses to the failure to "expeditiously" remove "abhorrent violent material" under Section 474.34.

Such failure is not an offence if accessibility is, among other things, necessary to assist in investigations of violations of domestic or foreign law; necessary to conduct "scientific, medical, academic or historical research"; relates to "a news report, or a current affairs report that ... is in the public interest; and ... made by a person working in a professional capacity as a journalist;" or relates to "an artistic work."

We fully understand the concerns expressed by the members of Your Excellency's Government that led to the presentation and subsequent adoption of the Law. However, we have serious concerns that the approach, particularly the haste of presentation and adoption of the legislation and key elements of the Law itself, unduly interferes with Australia's obligations under international human rights law. Before explaining our specific concerns with the Law, we wish to provide what we believe to be key State obligations under article 19 of the International Covenant on Civil and Political Rights ("the Covenant"), ratified by Australia on 13 August 1980.

Article 19(1) of the Covenant guarantees the right to freedom of opinion without interference. Article 19(2), read together with article 2 of the Covenant, provides for State Parties' obligations to respect and ensure "the right to freedom of expression," which includes the "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

Under article 19(3), restrictions on the right to freedom of expression must be "provided by law", and necessary "for respect of the rights or reputations of others" or "for the protection of national security or of public order (*ordre public*), or of public health and morals". State obligations with respect to restrictions on online expression are the same as those offline (A/68/167, A/HRC/26/13, CCPR/C/GC/34).

Article 19(3) imposes a three-part test for permissible restrictions on freedom of expression:

First, restrictions must be "provided by law." The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has noted in the past his concern that restrictions on freedom of expression should be subject to regular legislative process, including the participation of the interested persons through public comment processes and public hearings (A/HRC/29/32). In evaluating the provided by law standard, the Human Rights Committee has noted that any restriction "must be made accessible to the public" and "formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly" (CCPR/C/GC/34). Moreover, it "must not confer unfettered discretion for the restriction of freedom of

expression on those charged with its execution" (CCPR/C/GC/34). The United Nations Special Rapporteur on the Protection and Promotion of Human Rights and Fundamental Freedoms while Countering Terrorism has underscored the dangers that follow from rush legislative process in the contexts of exigency or in response to extreme violence (A/HRC/37/52).

Second, restrictions must only be imposed to protect legitimate aims, which are limited to those specified under article 19(3), that is "for respect of the rights or reputations of others" or "for the protection of national security or of public order (ordre public), or of public health and morals". The term "rights…of others" under article 19(3)(a) includes "human rights as recognized in the Covenant and more generally in international human rights law" (CCPR/C/GC/34).

Third, restrictions must be necessary to protect one or more of those legitimate aims. The requirement of necessity implies an assessment of the proportionality of restrictions, with the aim of ensuring that restrictions "target a specific objective and do not unduly intrude upon the rights of targeted persons" (A/70/361). The ensuing interference with third parties' rights must also be limited and justified in the interest supported by the intrusion. Finally, the restriction must be "the least intrusive instrument among those which might achieve the desired result" (CCPR/C/GC/34).

To comply with the criteria of article 19(3), the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression have explained that "States should only seek to restrict content pursuant to an order by an independent and impartial judicial authority, and in accordance with due process and standards of legality, necessity and legitimacy." States should also "refrain from imposing disproportionate sanctions, whether heavy fines or imprisonment, on Internet intermediaries, given their significant chilling effect on freedom of expression" (A/HRC/38/35).

The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has also urged States to "refrain from adopting models of [online content] regulation where government agencies, rather than judicial authorities, become the arbiters of lawful expression. They should avoid delegating responsibility to companies as adjudicators of content, which empowers corporate judgment over human rights values to the detriment of users." (*Id.*) Instead, "[s]mart regulation, not heavy-handed viewpoint-based regulation, should be the norm, focused on ensuring company transparency and remediation to enable the public to make choices about how and whether to engage in online forums." (*Id.*)

To begin with, we are especially concerned that the unusually compressed timeline for debating and passing the Law failed to provide your government or members of Parliament with sufficient opportunity to consult with civil society and the public on the complex issues it raises. We are mindful that depictions of egregious violence on the internet provoke legitimate concerns about public order and safety and that, for a variety of reasons, the prevention of the dissemination of such images would be in the public

interest. However, it is precisely the gravity of these matters and their potential impact on freedom of expression that demand a thorough and comprehensive review of the appropriate legislative or other regulatory response. Limitations on the legislative process in these circumstances may amount to an unreasonable restriction on "the right and the opportunity" of citizens to "take part in the conduct of public affairs, directly or through freely chosen representatives," as provided under article 25 of the ICCPR.

Ambiguities in the Law demonstrate why public consultation and debate are warranted. For instance, the obligations to "expeditiously" remove content and report it to law enforcement within a "reasonable" time raise questions about how quickly service providers are expected to flag and identify offending content and take appropriate action. Short timelines pose highly negative implications to the practical realization of protection for freedom of expression and interlinked rights in real time. We are concerned that accelerated time lines will not allow Internet platforms sufficient time to examine requests in detail, and may in practice mean that providers will consistently produce an abundance of caution, for concern of financial fines and other consequences. The relationship between the notices issued by the eSafety Commissioner and these obligations is also unclear: Does the time period for calculating whether offending content has been "expeditiously" removed or reported within a "reasonable" time begin at the point of upload, or upon the issuance of these notices? If the Commissioner does not issue a notice until after the offending content was removed or reported, how would this affect the prosecution's assessment of whether a service provider has complied with its obligations under sections 474.33 and 474.34? These are precisely the sorts of questions that may be clarified through regular legislative process and a call for public comment.

Underlying provisions of the Criminal Code exacerbate the legal uncertainty that service providers and their users may face. For example, under section 100.1 of the Criminal Code, a "terrorist act" is defined as, *inter alia*, an act of causing serious physical harm to a person or a person's death with "the intention of advancing a political, religious or ideological cause," and in order to "coerc[e], or influenc[e] by intimidation, the government" or to intimidate the public. Assessing whether a live streaming or recording captures a "terrorist act" based on these criteria raises legal, policy and factual questions that may not be accurately resolved for days or weeks, let alone within the span of a live stream. Your Excellency's Government appears to recognize that context matters: what seems to be "abhorrent violent material" may, on closer analysis, be reporting on atrocities or artistic work; accordingly, Section 474.37 of the Law recognizes these as valid defenses. However, the time and effort required to make such nuanced assessments of context and preserve protected exercises of freedom of expression are at odds with the proposed obligation on service providers to "expeditiously" remove content. Given these conflicting considerations, the threat of criminal sanctions is likely to tip the scales in favor of disproportionate restrictions on freedom of expression, which may undermine rather than protect the public interest.

Restrictions on the right to freedom of expression must pursue a legitimate aim and be necessary in a democratic society. This requirement also implies an assessment of the proportionality of the relevant measures, with the aim of ensuring that restrictions

"target a specific objective and do not unduly intrude upon the rights of targeted persons" (A/HRC/29/32, para 35). The restrictions must be "the least intrusive instrument among those which might achieve their protective function and proportionate to the interest to be protected." (UN Human Rights Committee, General Comment No. 34, article 19). Finally, permissible restrictions regarding online content are the same as those applicable offline (A/HRC/17/27, para. 69).

If the expectation is that service providers should rely on automated content filtering and related technologies to implement these obligations, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has found that overreliance on these tools may "come at a cost to human rights." (A/73/348) The weight of scientific research definitively indicates that "[a]rtificial intelligence-driven content moderation has several limitations, including the challenge of assessing context and taking into account widespread variation of language cues, meaning and linguistic and cultural particularities." (*Id.*) Furthermore, "artificial intelligence applications are often grounded in datasets that incorporate discriminatory assumptions," and may result in content removals that reflect "biased or discriminatory concepts." (*Id.*) Despite these limitations, however, the Law may compel service providers to implement these technologies or adopt unduly restrictive approaches to content moderation out of an abundance of caution, even if both risk penalizing legitimate or lawful online expression.

We are also concerned that the defenses under Section 474.37 may be unduly restrictive. For example, the live streaming of "abhorrent violent material" is permissible for journalistic purposes, but only if it is made by a person "working in a professional capacity as a journalist." The Human Rights Committee has recognized, however, that the practice of journalism is carried out by full-time professionals "as well as bloggers and others who engage in forms of self-publication in print, on the Internet or elsewhere" (CCPR/C/GC/34). Protections for journalism should therefore be based "on the function of collection and dissemination and not merely the specific profession of 'journalist'" (A/70/361). We are concerned that the Law's restrictive definition of journalists will disproportionately impair the public's right to access vital reporting on disturbing and serious incidents of violence.

We urge your government to, withdraw the Law and to provide additional time for legislative and public consideration of the issues contained in the Law, and evaluate the Law to ensure its consistency with international human rights standards. As it is our responsibility, under the mandate provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful if you could provide any additional information and/or comment(s) you may have on the above-mentioned issues. In particular, we would be grateful if you can indicate how the Law (and any changes made to the Bill since the date of this communication) is compatible with Your Excellency's Government's obligations under article 19 of the Covenant.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting website today. They will also

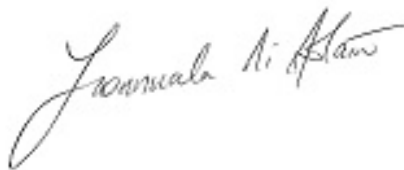
subsequently be made available in the usual report to be presented to the Human Rights Council.

We may publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that we have been in contact with your Excellency's Government's to clarify the issue/s in question.

We would also like to inform your Excellency's Government that this communication will be made available to the public and posted on the website page for the mandate of the Special Rapporteur on the right to freedom of expression: (http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/LegislationAndPolicy.aspx) and on the website page of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (https://www.ohchr.org/EN/Issues/Terrorism/Pages/SRTerrorismIndex.aspx). Given the extremely brief timeline the Government has provided for public consideration, this communication will be made available to the public and posted on the website shortly after the transmittal of this communication.

Please accept, Excellency, the assurances of our highest consideration.

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression



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