



Internet Society Canada Chapter

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Submission to the Department of Canadian Heritage: Consultation on Internet Harms

Who We Are

1. The Internet Society Canada Chapter (ISCC) is a not-for-profit corporation that engages on internet legal and policy issues to advocate for an open, accessible and affordable internet for Canadians. An open internet means one in which ideas and expression can be communicated and received except where limits have been imposed by law. An accessible internet is one where all persons and all interests can freely access websites that span all legal forms of expression. An affordable internet is one by which all Canadians can access internet services at a reasonable price.

Structure of this Submission

2. In this submission we will first give an overview of what ISCC believes to be the most salient points of the legal and administrative framework of the Government's Proposal with respect to the regulation of online harms ("the Proposal"). The submission will then outline what it sees as being the key critiques to be made of the Proposal. Finally, ISCC will include its comments on individual components of the Proposal that it believes merit careful consideration.

The Consultative Process

3. ISCC would like to register its profound disappointment with this ostensible consultative process.
4. First, it is taking place during an electoral period, despite the fact that its subject matter is composed parts of partisan platforms. This suggests it is inappropriate to be consulting when at least one of the parties, if successful in forming a government, has pre-empted genuine consideration of meaningful suggestions for change.

5. ISCC notes that the Guide and Technical Paper offer no alternatives and ask no questions of those wishing to make comments. Indeed, the Technical Paper has the air of drafting instructions. It leads to the conclusion that the purpose of the consultation is not to seek public input but to merely satisfy multiple target opinion groups that the Government is doing something to combat what it considers to be Internet Harms.
6. Neither the Technical paper nor the guide cite any studies or reports that identify the proposed harms as being the ones most urgent of legislative action, nor is it clear how the current content moderation regimes of the social media are failing, or how the Proposal would correct them in a meaningful way. While harm is assumed (and ISCC does not question that there is some harm), there appears to be no examination of alternatives to negate those harms and no research is referenced that would demonstrate that the Proposal would rectify any deficiencies in the existing content moderation regimes.
7. The Technical paper fails to lay out the definitions of the five listed Internet harms, but then promises both that whatever goes into the legislation will be broader than mere criminal law definitions, and then goes on to promise that whatever definitions eventually included in the legislation can be expanded upon by unilateral action of Cabinet. In other words, the central issues on which the Government proposes to legislate are not even available for consultation.. As a brilliant Wendy's advertising campaign once said: "Where's the beef?". What are we really dealing with? What speech is to be subject to the censor's pen? Who is to be silenced? Who is to be protected and at what cost?
8. ISCC is responding to this consultation as if this is meant to be a true consultation. It does so because the harms created by the Proposal would outweigh any good arising from it. The harms of any legislation adopted based on the Proposal will negatively impact Canada and Canadians and also ripple through and poison the global Internet.

Introductory Overview

9. Social media platforms (Facebook, Twitter, TikTok, YouTube, Parler, etc.) provide an electronic space where users can post about matters that are important to their self-expression. Much of the content that is posted relates to personal life – a means to record and tell friends and acquaintances about the flow of individual and family life: the decorated tables marking the feast days, the children's birthdays, anniversaries, vacations, the chronology of a life being lived. Dear and cute grandchild and pet pictures and videos abound.
10. Social media platforms have also become an important element in cultural and commercial expression. Artists now both create works on social media platforms and reach audiences that could never have been accessed in earlier times. Businesses use social media to make their products and services known to a potentially global audience. Promotional how-to videos have enriched the lives of do-it-yourselfers of every stripe. Businesses also use social media intermediaries ("influencers") to promote their products and services to audiences that are resistant or unreachable by standard advertising techniques.

11. Social media are not merely platforms for the sharing of the incidents of personal life, cultural expression or commercial interests. They are also a means of engagement on social and political issues. They are a means of social and political organization and expression on a host of issues of contemporary importance and controversy. Social justice warriors and political reactionaries alike seek out the like-minded, organize around shared ideas and values, and seek through collective efforts to effect or prevent change in the social or political order.
12. It is beyond dispute that individual conduct on social media can pose a challenge to the tenor and sustainability of both polite and democratic discourse. It is true that important voices are lost due to behaviours that would be intolerable in any personal setting: threats of rape, the casual use of abusive language, doxing and multiple other forms of intimidation are rampant in some corners of social media.
13. It is also indisputable that members of certain minorities and affinity groups are singled out for abuse that is vile and threatening: racism, sexism, homophobia, and xenophobia are given voice in ways that intimidate and threaten persons who seek to participate in public discourse.
14. Social media has been and will doubtless continue to be used for both criminal and terrorist recruitment, organizing and planning. Some dark corners of social media are used to facilitate and perpetuate the sexual exploitation of children. The above are all instances of content that the Government styles as Internet Harms –categories that are easily expandable to include further harms.
15. This Proposal, if enacted in legislation, would not and could not lead to a significant reduction in harms or protect vulnerable users of social media.

The Government's Proposals

16. The Proposal identifies five areas of harmful content that are to be subject to a comprehensive regulatory regime. These are:
 1. Child exploitation content (including activities that may not be criminal);
 2. Content that actively encourages terrorism;
 3. Content that encourages or threatens violence;
 4. Hate speech as proposed to be defined under amendments to the *Canadian Human Rights Act* (Bill C-36 of the late Parliament); and,
 5. Non-consensual sharing of intimate images
- . The five identified harms are not defined in the Proposal: they are merely labels attached to broad categories of expression. It is impossible to comment on the particularities of each harm, as none are defined. The reader is left guessing what the Government intends,

and how far-reaching the ultimate definitions may prove to be. Once the Government has left behind the definitional constraints and the procedural protections of the criminal law, *there is no known limit to the mischief that may be done to speech rights in the name of protecting the vulnerable.*

17. It must be observed that the proposed scheme is one of universal application: it operates without respect to Canadian borders. A social media platform on which the harmful content is posted need have no connection to Canada. It need not have facilities in Canada or receive revenues from Canada or have Canadian subscribers. The scheme applies to content that is considered harmful but that has no connection to either Canada or Canadians. Nor must the content have been expressed in a language that is spoken in Canada. Nor need the person whose speech is at issue have any connection to Canada.
18. In short, the Proposal would have Canadian law apply to entities that have no connection to Canada, to speech that has no connection to Canada, and impose remedies for harmful speech for which there is no evidence of harm in Canada. No consideration appears in the Proposal to conflicts between Canadian and foreign domestic law, or what the implications to Canadians might be if foreign governments were to adopt regimes that assumed a similar universal jurisdiction approach.
19. The remedies proposed by the Government effectively create two parallel regimes, both of which are intrusive of the privacy rights of individuals. They are designed to chill speech.
20. The prime remedy for Internet harms, as proposed by the government, is a mandated censorship regime. It would require social media platforms under the supervision of the state, to censor the speech of their users. The platform-censorship regime would be backed by an ongoing governmental surveillance of the censorship practices of the platforms to ensure they meet minimal government standards and what the government determines to be best practices.
21. The second remedy consists of requirements that platforms report to law enforcement and national security agencies content that it may have adjudged harmful under its internal censorship policies.
22. Notably, neither remedial regime addresses Canadian domestic speech as such. Each is to be applied to speech wherever it was expressed and in whichever language the impugned speech was expressed.

The Censorship Regime

23. The Government's proposed response to the challenges posed by the abusive conduct of some social media participants is to impose on social media platforms that are accessible in Canada (as virtually all are in an open Internet) a wide-ranging obligation to censor the

content, including lawful content posted by their users (which the Proposal euphemistically refers to as content moderation).

24. The Proposal lists five categories of harm, and while those harms are based on criminal law definitions and concepts, the Proposal suggests that they should be moulded to a regulatory context (by which is meant broadened from its narrower criminal law meaning). The Cabinet (Governor in Council) is to be given the power to further define specific terms that constitute elements of the harmful content, so the statutory definition of those Internet Harms would be subject to alteration over time and susceptible of change without further consideration by Parliament.

Platform-Internal Censorship

25. The censorship regime is to apply to social media platforms. However, the Proposal does not define what constitutes social media and in reality the various forms of social media vary enormously from one another. And, it should be noted, Internet services evolve rapidly in ways that may render the approach sketched out in the Proposal meaningless. It is unclear whether the Proposal would capture platforms such as the New York Times or Global TV. There are serious doubts that YouTube is a social media platform. Simply giving Cabinet the power to expand and redefine to whom the proposed legislation is to apply is not the same as having a principled approach to the regulation of social media.
26. The censorship regime requires that social media platforms take all reasonable measures (including automated artificial intelligence systems) to identify harmful content and render that content inaccessible to persons in Canada within 24 hours. The manner of rendering impugned speech inaccessible is to be prescribed by Cabinet.
27. Social media platforms are to ensure that their private censorship regimes do not result in differential treatment of any group on a ground prohibited by human rights legislation or as may be further prescribed by Cabinet. How this is to be done if the systems used by the platforms are objective is left to the imagination. The Proposal suggests that harmful speech by members of groups protected by human rights legislation is to be judged by a different standard from those of members of groups that are not singled out for human rights protections. How the platforms are to make such decisions are not explained in the Proposal. It is fair to ask how a social media post would know that otherwise harmful content originates from a member of a protected class? This aspect of the Proposal is fundamentally and deeply illiberal in concept, and would be so in implementation.
28. If objectionable content evades the platform-internal censorship regime, that speech may be subject of a complaint from a member of the public (not restricted to complaints from Canadians). Once the content has been flagged by a complainant, the platform must, within 24 hours, decide whether to render the content inaccessible to persons in Canada.
29. The decision whether to censor the content must be conveyed to the complainant and (though this is not clearly spelled out) to the person who posted the content. They are to

have an easy-to-use opportunity to have the decision promptly reviewed and reconsidered. The Proposal does not mention providing an opportunity for an exchange of competing views by the complainant and the content poster. It is hard to contemplate a serious back-and-forth within a 24 hour timeframe.

30. A platform is to establish clear (as prescribed by the Digital Safety Commissioner) censorship (content moderation) guidelines that are to be publicly available.

Digital Recourse Council

31. When the platform's internal review mechanisms are exhausted, the complainant or the person who posted the content can appeal the platform's decision to a Digital Recourse Council, composed of 3 to 5 persons appointed Cabinet. Its members are to be subject matter experts reflective of the Canadian population but particularly inclusive of women, Indigenous Peoples, members of racialized communities, religious minorities, LGBTQ2 and gender diverse communities, and persons with disabilities.
32. The Council is to issue decisions on whether the content is harmful. If it is found harmful, the Council orders the content be rendered inaccessible to persons in Canada. If it is not found harmful, it will be for the platform to decide whether to suppress the content based on its internal policies.
33. There is no appeal of a decision of the Council. A person who disagrees with a Council decision would have to seek judicial review.
34. The Council is to provide a copy of the inaccessibility order to the Digital Safety Commissioner, who has the power to ensure that the order is implemented as directed.

Digital Safety Commissioner

35. The Digital Safety Commissioner, to be appointed by Cabinet, is basically responsible for ensuring that the platform-internal censorship regimes are functioning, up-to-date, and achieving the desired results (suppression of harmful content). The Commissioner can make regulations applicable to the internal censorship regimes, applying different standards of stringency to platforms based on factors such as size, revenue and business model. The Commissioner can conduct inspections without the necessity of a warrant (given the unsatisfactory definition of to whom the legislation would apply, this could be a serious intrusion on captured businesses). He will have the power to conduct audits, and to launch incident investigations. The Commissioner will have the power, with judicial authorization, to search private dwellings.
36. Where a platform fails to meet its censorship obligations, the platform may negotiate with the Commissioner a compliance agreement that ensures that it corrects any deficiencies in its censorship processes that are of concern to the Commissioner.

37. As an alternative, where an agreement is not reached, the Commissioner can issue compliance orders to platforms that fail to meet prescribed standards. A platform can appeal a compliance order to the Personal Information and Data Protection Tribunal (the “Tribunal”) – a creature of the proposed *Digital Charter Implementation Act* – Bill C-11 of the late Parliament).
38. Both compliance agreements and compliance orders are legally binding, and breaches can be the subject of either administrative law or criminal law sanctions.
39. The Commissioner can recommend that an administrative monetary penalty (“AMP”) be imposed on non-compliant platforms. The actual decision to impose an AMP is to be that of the Tribunal, which is to have the power to levy AMPs of up to \$10,000,000 or 3% of the platform’s *gross* global revenue (whichever is the greater).
40. Where the Commissioner decides not to recommend the imposition of an AMP, a complainant will have the right to appeal that decision to the Tribunal, which may decide to impose an AMP – overriding the position taken by the Commissioner. The Proposal does not lay out an obligation on the Commissioner to notify complainants of the results of their investigation. Presumably some such obligation will be included in any forthcoming obligation.
41. It is proposed that breaching either a compliance agreement or a the terms of a compliance order will be offences and punishable by maximum fines of \$25,000,000 or 5% of gross world revenues.

Advisory Council

42. It is proposed that there be an Advisory Council, whose members would be appointed at the pleasure of the Minister.
43. The Advisory Council would not advise the Minister, but rather advise the Commissioner and the Council. The description in the Proposal is too sketchy to ascertain what the Advisory Council might be expected to offer to the Commissioner – who is a law enforcement officer, or to the Council – which is surely expected to bring its independent expertise to bear in making its determinations.

Digital Safety Commission

44. It is proposed that a Digital Safety Commission be established. There is very little explanation of what it’s function is to be apart from supporting the Commissioner and the Council.
45. The Commission is to be headed by a Cabinet appointee, so accountability issues immediately arise. Is the Commission to control the budget and staff of the Commissioner and the Council? Who makes decisions as to the allocation of resources?

What if the Commissioner and the Council are competing for the same resources? The Proposal has no answers to any of these questions.

46. The Proposal is that the Commissioner will make regulations as to charges the regulated entities must pay to cover the costs of the Commissioner, the Council, and the Commission. No estimate is given as to the cost of proposed scheme, nor is it suggested how the burden will be distributed among the various classes of regulated entities.

The Law Enforcement and National Security Regime

47. The Government's Proposal is undecided on the approach it seeks to take with respect to law enforcement and national security obligations, which complicates the analysis of this aspect of the Proposal. The Proposal suggests two alternatives:
1. Social media platforms will be obligated to *notify* the RCMP where the platform has reasonable grounds to suspect that content that it considers to encompass one of the five harms reflects an imminent risk of harm to any person or property (Cabinet is to be given the power to elaborate by regulation); or
 2. A platform be will required to *report* to law enforcement information in respect of speech that may constitute a criminal offence (both to be prescribed by Cabinet in regulations) that fall within the five categories of harmful content.
48. It is unclear why these measures are posed as alternatives.
49. The details of the content of the notifications or reports, their format, and guidance on what constitutes the threshold for these obligations would, again, be left for Cabinet to prescribe by regulation.
50. It is also proposed that a platform be obligated to report to CSIS information concerning persons who have posted content that the platform has rendered inaccessible due to its judgment that the post had terrorist content or content that incites violence.
51. It is further proposed that a platform be required to retain data and information that are relevant to reports or notifications it has made, the specific requirements of which are to be prescribed by Cabinet.
52. In addition, a platform is to preserve data and information about *potentially* illegal content that falls within any of the five categories of harm. Given that all the five harms are based on (if expanded from) criminal law offences, it is hard to see how a platform could fail to retain data and information respecting every instance where it has rendered content inaccessible to persons in Canada.
53. Under the Proposal, a platform would not be permitted to disclose that it has issued a report or a notification or disclose the contents of the report or notification if the

disclosure *could* prejudice a criminal investigation – even if a criminal investigation has not begun. The working assumption would have to be that any disclosure would prejudice a criminal investigation, so persons whose personal details have been reported to law enforcement would have no means of counteracting a false implication of wrongful conduct.

54. The Proposal would also oblige the platform to take all reasonable measures to ensure that its reports or notifications do not result in the differential treatment of any group based on prohibited ground of discrimination under the *Canadian Human Rights Act* or the regulations. It is difficult to understand how, if the criteria used in assessing harmful content is objective, this provision would be either necessary or just.
55. It would be for the Digital Safety Commissioner to oversee the implementation of the proposed law enforcement and national security obligations by social media platforms.

ISCC Response

ISCC Principal Critiques

56. In the following pages, ISCC will provide a more detailed critique of the various aspects of the Proposal. ISCC's principal critiques are the following:
 1. The regime as proposed is almost entirely unenforceable, applying as it does to entities who conduct no operational functions in Canada. Parliament should not enact so elaborate and expensive a scheme when its unenforceability renders the legislation purely symbolic or – worse – a charade. While major platforms may voluntarily comply with the prescriptions of the regime, the true outliers who deliberately voice harmful content will remain outside the reach of Canadian law.
 2. Virtually the whole of the proposed legislative scheme would have purely extraterritorial effect. It is hard to understand how Parliament can assume universal jurisdiction over content posted on the Internet that has no link to Canada apart from the fact that Canadians may access that content.
 3. The proposed legislative scheme is contrary to the guarantees of free speech enshrined in the *Canadian Charter of Rights and Freedoms* as it applies to lawful speech. The Charter protects not only the expressive rights of Canadians but the right of Canadians to access the expression of others. The Proposal, on its face, violates those rights.
 4. The timeframes for platform censorship decisions are so compressed as to compromise the quality and thoughtfulness of platform-internal decisional processes. The objective on any legislation dealing with harmful speech should be to ensure that the right decision is made – not just any decision.

5. The powers that the Proposal would confer on Cabinet are an affront to our Parliamentary system. As proposed, Cabinet would have both the power to unilaterally mould the definitions of harms and to extend the entities to which the legislation would apply. The proposed power to direct the Digital Safety Commissioner in their enforcement activities are and should be rejected out of hand. The powers that the Proposal arrogates to Cabinet are ones that should only be enacted through Parliament.
6. The proposed harms are too diverse to be treated within the same regime. To have this variety of content being judged by the members of a single Council – no matter how well qualified its members may be – is unfair to the seriousness of the task at hand and the need for the application of expertise to intrinsically complex decision making.

The Enforceability of the Regime

57. Virtually all social media platforms that are routinely accessed by large numbers of Canadians are foreign based. They do not typically conduct their core communications functions in Canada. They may have limited physical premises and employees in Canada: mostly for marketing and sales. Most of them do not charge subscription fees for access to their platforms, so there are no Canadian user revenue streams to the platforms. The cost of recouping the additional costs of the proposed regime will fall on Canadian businesses who advertise on social media platforms. Doing business in Canada becomes more expensive – a drag on Canadian entrepreneurs.
58. In terms of the enforcement of the regime over foreign based entities, it would appear that compliance with Canada's internet harms regime will be voluntary: there no principle of comity or conflict of laws that would require a foreign court to recognize Canadian issued inaccessibility or compliance orders, support the payment of fees to sustain the Canadian internet harms administrative apparatus, enforce payment of any administrative monetary penalty imposed by the Personal Information and Data Protection Tribunal, or require a platform to pay fine levied in a criminal prosecution.
59. In short, the proposed Internet harms legislation would be a kind of legal Potemkin village. It would look like a stringent and elaborate regime that provides remedies for a persons who are aggrieved by their mistreatment and abuse from harmful content on social media. However, behind the façade of a comprehensive and binding legal regime, only voluntary adherence by social media platforms will give any effect to the regime. The powers will be illusory because they are unenforceable.

60. Failure to comply with the legislation, or to obey orders issued by the Digital Safety Commissioner or the Digital Recourse Council, or, indeed, to pay administrative monetary penalties imposed by the Digital Privacy and Data Protection Tribunal may cause a platform reputational harm (or not!) but the legal consequences will be nugatory.
61. ISCC believes that Canadian legislation should address the behaviours of Canadians on social media platforms, and seek to create remedies that can be enforced within the Canadian legal system.

Extraterritorial Application

62. The Proposal would have social media platforms, wherever located, apply Canadian internet harms legislation to all content – wherever and by whomever created, and in whatever language it is posted. The Proposal would have the legislation apply to harmful content that is accessible to persons in Canada. It is not restricted to persons posting content in Canada, or Canadians posting content on a platform, or content that is connected to Canada in some obvious way – such as by singling out a Canadian in content that constitutes an Internet harm.
63. There are approximately 1,800,000 Chinese born Canadians. Many maintain family, cultural and business ties to China. Western social media platforms are forbidden from operating in China. China has a number of domestic social media platforms having millions of subscribers. Canadians can access those platforms. Those platforms would fall within the scope of the regulated entities under the Proposal. Does anyone truly believe that WeChat or Sina Weibo will pay fees to sustain the Canadian regulatory regime or heed an inaccessibility order issued by the Digital Recourse Council? The answers to those question are self-evident and illustrate the extreme ambition and the true scope of the Proposal's overreach..
64. The major social media platforms are not located in Canada. They may not have any facilities in Canada. The computers on which they store data will, in most cases, be located outside Canada. Apart from the laws of their jurisdiction of incorporation or organization, they may subject to the laws of a number of jurisdictions for a variety of purposes, including privacy, data security, criminal law, and laws respecting the protection of personal and institutional reputations. The Proposal would have these platforms conform in the minutest detail to the prescriptions of Canadian law. It would apply Canadian law to censor content posted by persons who have no connection to Canada and whose content does not concern persons located in Canada.
65. If a Brazilian posts on Facebook, in Brazilian Portuguese, content that is potentially hateful about Amazonian indigenous peoples, the Proposal would require that the platform make that material inaccessible to Canadians. It would require the platform to notify the Brazilian contributor that it has censored the content and that the decision can

be appealed to the Digital Recourse Council (which, it can be assumed, will operate only in French and English). If the platform fails in that duty, the Digital Safety Commissioner can investigate that omission and, if the platform does not enter into a Compliance Agreement, issue a Compliance Order requiring the platform to remedy the omission. If the platform does not comply, the Digital Safety Commissioner may recommend to the Tribunal that an administrative monetary penalty be imposed, or seek to prosecute the platform for offences that carry fines of up to \$25,000,000 or up to 5% of gross global revenues – whichever is the greater.

66. The law enforcement and national security reporting/notification requirements would create requirements that would prove impossible to fulfill. Under the Proposal, every post in every language, wherever in the world it has been given expression, whose content might, if said in Canada constitute a Canadian offence, would be subject to mandatory reporting/notification requirements. Canadian law enforcement and national security agencies could be overwhelmed with notifications respecting content that has no material connection to Canada. It could lead to Canadian law enforcement missing important threats to Canadian interests due to the flood of notifications concerning extraterritorial conduct that will be received from social media platforms. Again, the Proposal does not address the implications of other jurisdictions imposing comparable obligations resulting in the compilation of the personal information of Canadian in foreign police and national security databases. The Proposal is bereft of any consideration of the implications of the Canadian regime for similar conduct by other nation states.
67. In some cases, the mere reporting of personal information to Canadian law enforcement or national security authorities may violate the privacy laws of jurisdictions – such as Europe – that may have a greater connection to the alleged harm and jurisdiction over the person whose information is to be reported to Canadian authorities.
68. At the same time, the platform would be required to keep information and data respecting the person posting the content for a period prescribed by Canadian law. This is extreme overreach. It surely violates the privacy interests of large numbers of foreign citizens whose only crime will have been to have come close to expressing words that could be an offence if expressed in Canada.
69. A further consideration is that some content that may appear hateful, or suggest an imminent risk of violence or harm to property may come from persons attempting to throw off oppressive governments. Do we really want to be responsible for what happens to oppositional figures if our preservation requirements lead to their personal information falling into the hands of the secret police?
70. A certain humility is necessary when Canada attempts to take on the role of policing all harmful speech – everywhere – in the name of protecting the sensibilities of Canadians.
71. Any legislation on Internet harms should be restricted to content that has some meaningful connection to Canada and Canadians.

72. ISCC recommends that any Canadian legislation to deal with harmful content on the Internet should be developed in cooperation with other democratic states. Only concerted international action can be expected to have prospects of success in suppressing truly harmful content on the Internet.

Censorship Regime

73. While it is laudable that the Government seeks to protect vulnerable persons and groups from harmful content, the state imposition of an obligation upon private sector actors to permanently screen and censor the expression of private citizens is wholly unprecedented.
74. At present, social media firms tend to have some form of content standards – all of which cover the same ground (and much more!) as those targeted in the Proposal. What is new is the decision by the Government to assume direction of the content moderation programs of the platforms.
75. The Proposal would seem to render the platforms agents of the state to the extent to which they act in obedience (as they will legally required to do) to the strictures of the law and its administrative apparatus. It is an open question as to whether the Canadian government may render itself liable for the results of good faith measures taken by the platforms to comply with the various elements of the censorship regime – including over-zealous application of the identified harms to legal content.
76. The regime carries very significant resource implications. Its implementation will require private sector actors to create, redesign, or at least reconfigure, automated artificial intelligence systems for the Canadian market. It will also impose an obligation to engage sufficient human resources to review, assess and respond to flagged content. Given the scale of social media, this obligation would be immense. It is estimated that 720,000 hours of video are uploaded to YouTube alone daily. The regime unavoidably creates incentives for anyone, anywhere in the world, who is personally offended by any content to flag it for review. It will not matter is the content meets the harms criteria that government will set. (That criteria will be replete with regulatory language and opaque to individual users and platform moderators alike.) Complaints, valid, pernicious, deliberately false, or spurious, can be expected to proliferate. And this regime would require social media to examine, assess and respond to each and every one within 24 hours. Those costs could only be passed directly or indirectly on to Canadian users. Why should users in other countries pay for such extravagance?
77. The censorship regime is designed to favour censorship over freedom of speech.
78. No platform will want to face mandatory compliance orders or administrative fines that may exceed its profits. Nor will it want to expend the resources needed to defend the speech of its users, even if it sincerely believes the impugned speech is not harmful. It

will want not to be chastised or held up to public disapprobation for failing to render borderline posts inaccessible. It will face a plethora of sanctions if it fails to suppress speech that is flagged as objectionable. If in doubt, a platform will suppress rather than defend impugned speech. In consequence the regime will censor huge quantities of lawful speech that does not meet the harms threshold. The expressive freedoms of Canadians – both to communicate content and to receive it – will be limited by foreign entities acting under the direction of the Canadian government.

79. The regime is stacked against individual Canadians in other ways. As a result of the natural reluctance of platforms to undergo the time and expense of defending user content, the cost of defending flagged speech will fall on individuals who posted the content. They will have to convince the Digital Recourse Council that it the content is not harmful within the complex definitions that are likely to emerge with the legislative scheme. The complaint-driven system will be overwhelmed. Individuals attempting to defend their content will face an agency struggling to keep up with caseload. Decision time will stretch, and decision-making will be hasty. The posters of content will pay the price in terms of the delay in hearing and the quality of decision-making that the system will permit.
80. At present, the major social media have guidelines that would capture and eliminate the types of harm that are the focus of the Proposal. The enforcement of the existing guidelines is delegated to computers equipped with AI software and human intervention, often, but not always, by junior in-house or out-sourced staff.
81. The algorithms employed by social media platforms already lead to absurdities. For instance, Facebook computers are taught that comparisons between people and animals are harmful. A person posting that “I am as blind as a bat” or saying “You are a silly goose” are apt to find their account suspended for shorter or longer periods of time. Recently, an article critical of the claims of the alleged medical benefits of ivermectin in treating Covid 19 was suppressed because AI could not distinguish between praise and criticism of the medication.
82. AI software has a limited grasp of the English (or French) idiom and a total lack of humour. Satire or a joke will alike face the disapprobation of the unschooled and humourless. Anomalous and unjust results are certain to follow.
83. The jurisprudence around the five types of harmful content is deep and nuanced. A reading of the Supreme Court of Canada’s jurisprudence on hate speech alone leads to no easy application, particularly in the context of a 24 hour take-down requirement. Postings of any complexity, requiring a close reading of the text and some understanding of the context and subject matter, are unlikely to receive the consideration or understanding that they deserve. Again, with the deck stacked in favour of rigid adherence to prescribed standards, there will inevitably be overly generous interpretation of the guidelines – leading to the take-down of posts that may be of real value to matters of public

controversy and importance. In short, the Proposal reveals a design that ensures a safety-first approach by platforms.

84. The speed of decision requirement denies the application of solid judgment to the decision of whether flagged content meets the harms test. It neglects the value of sharply conflicting views on matters of public importance. The sanctions that a platform faces in terms of additional regulatory burdens, compliance orders, audits and inspections, and, ultimately, administrative monetary penalties all incentivize a platform to toe the line of least resistance. The true effect of the Proposal will be the suppression of offensive, provocative and contentious speech as opposed to harmful speech.
85. The complaint regime, despite the ability of the Commissioner and the Council to reject frivolous complaints, can easily be gamed by trolls and bullies, who will be able to overwhelm both the platform-internal processes and the regime of complaints to the Commissioner and appeals to the Council. The ease of complaint will bury the redress mechanisms, and both social justice trolls and trolls of the reaction will be able to manipulate the complaint system to stymie timely and effective rectification of the erroneous application of the harms tests.
86. The Proposal, if enacted into law, would violate the Charter rights of Canadians and render social media platforms agent of the Canadian state in the violation of those rights. The scheme as a whole is aimed at the suppression of speech and cannot be justified in a free and democratic society.

Who is Regulated?

87. The Proposal suggests that an online Communications Service Provider (OCS) be defined as:

a service that is accessible to persons in Canada, the primary purpose of which is to enable users of the service to communicate with other users of the service, over the internet. It should exclude services that enable persons to engage only in private communication.
88. It is unclear how this would apply to private forums or chat rooms on the Internet. Would it apply to password protected discussions fora on the Internet? Would it apply to message boards provided to students on university campuses or employees in the context of their employment? Would it apply to the comments sections of newspapers and online publications? What about private chat groups on social media? Are messages posted on Facebook that accessible only by friends captured or intended to be captured? The Proposal gives no hint as to the answers to these obvious and fundamental questions.

Expansion of Regulated Entities

89. The Proposal builds in the potential for incremental broadening in the scope of entities to which the obligations to limit speech would apply. and the standards to which platforms are expected to adhere.
90. It is unclear to whom the legislation will apply. It is clear that it is intended apply to social media platforms (although those are not defined in the Proposal) and not to private communications, and exempt ordinary telecommunications carrier services. However, the Proposal suggests that Cabinet would have the power, by regulation, to bring into the scope of the legislation communications services that fall outside the scope of social media. This is completely wrong.
91. The harms that the Proposal addresses are caused by the *public* communication of harmful content. How then can one justify that Cabinet could, through regulation, extend the legislation to services that offer only *private* communications? This is an extraordinary extension of state control over private expression. It is repulsive to the fundamental concept of free speech. It undermines Parliamentary oversight of governmental action.

Expansion of Internet Harms

92. The Proposal sets out a commitment to redefine and hence expand of the categories of speech that are to be considered harmful. The five categories of harmful content that the Proposal seeks to regulate are all derived from criminal law – in which their content is (with great difficulty and uncertainty) understood and applied.
93. In the first instance, the Government proposes to modify categories of harm to a regulatory environment. How this is to be done remains unclear. The certain result of redefining the harms in regulatory terms is to expand the scope of the harms from their narrower criminal law origins. This removes an important constraint on the government's ability to limit the right to freedom of speech and expands the scope of speech that is to be considered harmful.
94. Second, regardless of the definitions to be encapsulated in the implementing legislation, the Proposal would give Cabinet the power, by regulation, to further define specific terms used in the definition of harmful content. In short, the Cabinet, without the approval of Parliament, could mould the basis of the regulatory regime to suit its political purposes.
95. The Proposal would enable an increase in the scope of harmful content to cover speech that is lawful but objectionable. This is the whole rationale behind the proposal. It would render lawful speech subject to government prescribed censorship. ISCC adamantly opposes this intrusion into lawful speech.

96. No government, of whatever political stripe, should be given the power to redefine a censorship regime to meet its political objectives without Parliamentary scrutiny. This regime is not about the regulation of agricultural products – it is about limiting the freedom of speech. The idea of extending the application of the regime by Cabinet must be rejected.
97. Third, the regime may be further extended, or its application made stricter, through the proposed power of direction that Cabinet may exercise over the Digital Safety Commissioner.
98. The Commissioner’s function is primarily one of law enforcement (though it possesses a limited regulation making power). It is an extraordinary innovation to have a law enforcement officer subject to direction by Cabinet. Even if Cabinet would not be able to intervene in individual cases, it is unacceptable that it should be able to give direction to an officer whose prime duty is to enforce the law.
99. The Proposal contains no procedural protections against an arbitrary exercise of the power of direction. There is, for instance, no requirement that a direction be submitted to Parliament for committee study. The proposed power of direction should be rejected.

The Law Enforcement and National Security Regime

100. We are left guessing as to what the Government is in fact proposing with respect to the obligations that are to be imposed on social media platforms. To be obliged to notify the RCMP when content seems to constitute a risk of imminent harm is one thing. It is another thing altogether to be required to report to various law enforcement authorities anytime a post seems to *potentially* violate criminal law.
101. As the Proposal would broaden the content to be suppressed beyond the criminal law test, it is difficult to understand how content moderators could be expected to know the difference between the regulatory definition of harm and the appropriate criminal law threshold for the underlying offence. Faced with this dilemma, it can be expected that platforms will over-report potentially illegal content to law enforcement and CSIS, and those agencies will both come into possession of an overwhelming amount of information concerning private citizens – most of whom will have no connection to Canada – while the platforms will be required under Canadian law to preserve information and data for Canadian law enforcement authorities who have no prospect of initiating criminal investigations or prosecutions in Canada.
102. The proposed requirements respecting the preservation of data and information are particularly sweeping. A platform would be required to preserve data underlying a report or notification that it is required to make. In addition, and separate from that, a platform is to be required to preserve data and information pertinent to “*potentially illegal content* falling within the five (5) categories of regulated harmful content” (emphasis added). As all the categories of harmful content are based on underlying

criminal offences, it seems clear that *any* content that has been rendered inaccessible to persons in Canada is *potentially illegal*, and thus must be preserved for a period prescribed by Cabinet.

103. Cabinet would, under the proposal, be given the power to specify the threshold for what constitutes potentially illegal content. Even were it to do so, it is impossible to think that any guidance from Cabinet would significantly reduce the scope of information and data to be preserved, or relieve a platform from its obligations in a way that would reduce a safety-first approach to data preservation. This represents a significant burden on the resources of the platforms, but more importantly a trove of information and data that could serve as a target for hackers or activists that could be used to compromise the reputation and privacy of individuals whose posted content was, for whatever reason and however unjustly, rendered inaccessible to persons in Canada.
104. Again, the pretence to universal jurisdiction claimed by the Proposal will work against the interests of Canadians. The swamping of law enforcement and national security agencies with notifications may actually harm ongoing investigations and overwhelm law enforcement and national security resources.

Categories of Harm are too Diverse

105. ISCC agrees that the identified categories pose real harms to society at large, to individuals within identifiable social or minority groups, and to healthy public discourse. However, each harm is very distinct from the others and all demand very different knowledge, experience and understanding to come to grips with. Terrorist recruiting and incitement does not look like rape threats or revenge porn: it cannot be expected that the Digital Recourse Council, as proposed, will be able to effectively deal with such disparate content or harms. The seriousness of the harms merits that each very distinct type of content be considered separately and with the relevant expertise applied.
106. ISCC recommends that distinct legislation be considered for each type of harm and their adjudication be based on subject matter expertise rather than by persons whose primary qualification is their affinity for the persons most commonly victimized by harmful content.

The Administrative Regime

107. The Proposal seeks to create a comprehensive administrative regime involving the creation of new administrative bodies and enhancing the jurisdiction of existing ones. It proposes the creation of unique administrative law remedies. It also proposes to constrain the choice as to who may be appointed to exercise those powers.

108. ISCC believes that the cost and weight of the proposed scheme of administration far outweighs any benefit that may be found in the reduction of harmful content.
109. ISCC also believes that the costs of compliance with the proposed regime will stifle any attempt to create domestic social media platforms: this could destroy Canadian creation and Canadian entrepreneurship – and is most likely to have greatest impact in French Canada where unique cultural factors may offer an opening for a genuinely domestic platform.
110. ISCC notes with concern the proposal that both the Council and the Advisory Board would, by legislation, emphasize the appointment of persons reflective of groups who are protected by human rights legislation. It may be that such groups are more singled out for abuse than others today – but that is not likely always to be true. It is also critical that if a Council is ultimately created, it should be seen as impartial and not merely to reflect the views of minority communities – as important as those views may be.

Other Concerns

Constitutionality

111. The constitutional underpinnings of the Proposal need to be examined in depth. There is no head of power that gives Parliament, outside of broadcasting and the criminal law, to control speech.

Impact on Advocacy

112. The regime, if implemented as proposed, may well hamper the ability of victims of child sexual exploitation or revenge pornography to address the substance of their victimhood and educate the public about the facts of these abuses. In effect, the regime could deny real victims a voice.

News Reporting and Academic Research

113. In seeking to suppress harmful content, the proposed regime could negatively impact the ability of Canadian reporters and academics to access content that is necessary to their work and stifle their ability to express their findings to Canadians. The world is an unattractive place at times, but truth and reality should be addressed head-on. The proposed censorship could have serious unintended negative impacts on news gathering and scholarship.

Site Blocking

114. It is part of the Proposal that, in exceptional circumstances, the Commissioner could seek an order from the Federal Court to block specific sites. Experience has shown that such orders are ineffective. They do lead to over-blocking. They lead to a perpetual

game of whack-a-mole as objectionable sites relocate and Internet service providers are constantly playing catch up. As well intentioned as site blocking as a remedy may be, the harms they cause and their expense – especially to small operators – suggest that it is not an effective remedy and should not be adopted.

Harm to Internet Infrastructure

115. The Proposal to render content inaccessible from Canada is not one that accords with the open Internet and is not compatible with the current structure of the Internet. In effect, the Proposal requires the creation of kill switches to block content from being accessed “by persons in Canada”. This latter phrase, which recurs throughout the proposal, would suggest that platforms will have to reconfigure their systems such that Canadians could not reach content by means of virtual private networks or proxy servers. This requires a major investment in blocking work-arounds and restricting Canadian access to the global Internet. The Proposal seems to verge on proposing a great Canadian firewall. ISCC believes this would be both expensive and ineffective. If effective, it would be injurious to Canadian users of the Internet.

Conclusion

116. ISCC asks the Government to drop the Proposal in its entirety. If the Proposal were to be adopted anything like its present form it would represent a serious infringement on the free speech rights of Canadians as guaranteed by the Charter. It would be unenforceable against most of the entities to which it is directed – thus undermining the credibility of the regime and of Canada’s system of laws. The extraterritorial application of the proposed regime will conflict with the laws of other nations, and harm the privacy and reputational interests of citizens of other countries. The adoption of the scheme would negatively impact the functioning of the Internet in Canada.

117. The scheme is unworthy of consideration by Parliament. Its implementation would diminish the rights of Canadians while failing in its purpose of protecting Canadians from Internet harms. The Proposal should be withdrawn.