

**Decision and
Reasons for Decision**

Applicant: X Corp.
Respondent: eSafety Commissioner
Tribunal Number: 2024/2582

Applicant: Christopher Elston
Respondent: eSafety Commissioner
Tribunal Number: 2024/2583

Tribunal: Deputy President O'Donovan
Place: Melbourne
Date: 1 July 2025

Decision: The Tribunal sets aside the decision under review and in substitution decides to refuse to give a removal notice.

Deputy President D O'Donovan

Statement made on 01 July 2025 at 4:52pm

Catchwords

Online Safety – cyber-abuse material targeted at an Australian adult – post on X that misgendered a transgender man – suggested transgender persons belong in psychiatric ward – evidence that can be considered by the eSafety Commissioner – whether ordinary reasonable person test narrows material available to decision maker – whether likely is a real chance or probable – whether post intended to have effect of causing serious harm – ordinary reasonable person would not conclude that likely post intended to cause serious harm to particular individual – absence of evidence of intention that post would be drawn to relevant individuals attention

Legislation

Online Safety Act 2021 (Cth) ss 5 7, 36, 37, 46, 88, 220A

Cases

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27
ASIC v Cassimatis [No 8] (2016) 336 ALR 209
Australian Competition and Consumer Commission v Pacific National Pty Ltd and Others [2020] FCAFC 77
Bazzi v Dutton (2022) 289 FCR 1
Bouhey v The Queen (1986) 161 CLR 10
Faruqi v Hanson [2024] FCA 1264
Harvey v Minister for Primary Industry and Resources (2024) 278 CLR 116
Lacey v Attorney-General of Queensland [2011] HCA 10
News Ltd v South Sydney District Football Club Ltd (2003) 215 CLR 563
Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees Union (1979) 42 FLR 331
Vallance v R (1961) 108 CLR 56
Zheng v Cai [2009] HCA 52

Secondary Materials

Explanatory Memorandum, *Online Safety Bill 2021* (Cth)

Statement of Reasons

INTRODUCTION

1. The applications before this tribunal have their origin in a social media post insulting Teddy Cook, a transgender man. The post, which among other things refers to Teddy Cook as a woman, has been blocked in Australia as a result of action by the online safety regulator. The person who posted the material and the platform on which it was posted have both challenged the decision of the regulator to issue a removal notice. The broad question to be answered is whether the post meets the statutory definition of cyber-abuse material

targeted at an Australian adult. The more focussed question is whether I can be satisfied that the necessary intention to cause serious harm to the subject of the post has been established. Based on the evidence before me, I am not satisfied that it has. Consequently, the decision of the eSafety Commissioner to issue a removal notice is set aside. My reasons for that conclusion follow.

2. The *Online Safety Act 2021* (Cth) ('OLS Act') makes provision for complaints to be made to the eSafety Commissioner ('Commissioner') about material that is posted to a social media service.¹ The Commissioner can investigate any complaint made.² If the Commissioner is satisfied that the material is 'cyber-abuse material targeted at an Australian adult', the Commissioner may give a removal notice to the social media service on which the material is posted.³ If the social media service complies with the notice this results in the geo-blocking of the material so that it cannot be accessed by Australian internet users (or at least internet users who can be identified as accessing the internet from Australia). Decisions to give removal notices are subject to review in the Administrative Review Tribunal ('Tribunal'). Review by this Tribunal is *de novo* merits review, which means that I do not consider whether there are defects in the Commissioner's decision, but decide for myself on the evidence before me, whether the power to issue a removal notice can and should be exercised.

BACKGROUND

3. There are two applications for review before the Tribunal. Both concern the same removal notice given by a delegate of the Commissioner to X Corp. The Commissioner's delegate gave the notice after finding that a post relating to Australian adult Teddy Cook was cyber-abuse.
4. Teddy Cook made the complaint that led to the removal notice being given. Mr Cook is a transgender person who identifies as male but was a biological female at birth.

¹ *Online Safety Act 2021* (Cth) s 36.

² *Ibid*, s 37.

³ subject to other requirements being satisfied that are identified later.

5. The first application for review to have the Commissioner's decision reviewed was made by X Corp. The second was made by Christopher Elston. X Corp. owns the social media service previously known as Twitter, but which is now known as 'X'. X Corp. is the applicant in application 2024/2582. Mr Elston is the activist who made the post the subject of complaint. He is the applicant in application 2024/2583.
6. Both applicants seek review on the basis that the material the subject of the complaint does not meet the statutory thresholds for the giving of a removal notice. The Commissioner contends that it does.
7. An image of the post (with one photo different from the original) is annexed to these reasons and marked Attachment A. The post was written by Mr Elston. It was uploaded to X along with a link to an article published in the online newspaper the Daily Mail. The post was accompanied by three photos - one of the World Health Organisation (WHO) logo, one of a man having sex with a dog and one of Teddy Cook. These photos were pulled from the Daily Mail article onto the X post by the platform's algorithm. The photos did not appear as a consequence of any specific decision by Mr Elston to select the images. In the photo of Teddy Cook included in the post, his appearance is male. In the article Teddy Cook is referred to by male pronouns throughout. The article describes him as 'a professional queer, man of trans experience' and a 'female to male trans Australian activist'.
8. The original post published by Mr Elston on X included the following text:

This woman (yes, she's female) is part of a panel of 20 'experts' hired by the @WHO to draft their policy on caring for 'trans people'.

People who belong in psychiatric wards are writing the guidelines for people who belong in psychiatric wards. <https://t.co/lfvYuvw3J1>
9. The Daily Mail article related to an advisory committee appointed by the World Health Organisation ('WHO') to advise on issues of transgender and non-binary persons' health. The article published biographical details about some of the committee members. One of the members was Mr Cook. The bulk of the article related to him. The news article was published under the headline: *'Kinky secrets of UN trans expert REVEALED: Australian activist plugs bondage, bestiality, nudism, drugs, and tax-funded sex-change ops – so why is he giving health advice for the world body?'* Following the publication of the news article and the posting of links to it and comments about it by a number of X users with significant followings, the article drew significant attention from social media users. As Mr Cook

described it - 'twitter exploded'. When it did, Mr Cook made a complaint to the Commissioner.

10. Mr Cook's complaint to the Commissioner initially identified the Daily Mail article and a number of posts on X, including Mr Elston's, as the cyber-abuse material he wanted addressed. However, ultimately it was only Mr Elston's post that became the subject of a removal notice.
11. On 22 March 2024 the removal notice was given. The reasons given by the delegate for the decision to give a removal notice in relation to Mr Elston's post included the following:

The caption of the post misgenders the Complainant and reiterates that this point is deliberate, which is likely intended to invalidate and mock the Complainant's gender identity. The Material also contains a statement that implicitly equates gender identity with a psychiatric condition. This statement is deliberately degrading and suggests that all transgender people – and in this case the complainant in particular – have something that is 'wrong' about their psychology owing to their gender identity.

Further, the use of inverted commas around the term 'trans people' strongly suggests that the end user is promoting the idea that the Complainant's gender identity is itself false.

The end-user's X account has approximately 395,000 followers meaning the end-user is likely to have possessed insight into the significant reach the Material may have had and the harm this would cause the Complainant. The Material has been viewed over 377,000 times and reposted almost 6,000 times in less than a fortnight. It has been re-posted by high-profile X users and the comments to the post attempt to fundamentally invalidate the identity of the complainant.

Due to the combination of the above reasons, an ordinary reasonable person would conclude that it is likely that the Material was intended to have an effect of causing 'serious harm' to the Complainant. This harm includes serious psychological harm and serious distress that goes beyond mere ordinary emotional reactions such as those of only distress, grief, fear or anger.

An ordinary reasonable person in the position of the Australian adult would regard the Material as being, in all the circumstances, offensive based on the following:

- The Material exceed the standards of morality, decency and propriety generally accepted by reasonable adults. Although, it is understood that society permits a degree of online disagreement, particularly where it relates to political or topical concerns, the Material singles out the Complainant to personify the poster's contempt for transgender identity. In addition, the Material equates transgender identity with a psychiatric condition. The Material therefore does not meet these standards;
- The Material does not have any apparent literary, artistic or educational merit;
- The Material is in the character of a social media post, and is not of medical, legal or scientific character; and

I consider that while an ordinary reasonable person would consider the Material offensive regardless of whether the Complainant was a transgender man or not, the offensiveness is heightened by the position of the Complainant as a transgender man.

12. As far as can be discerned from the T-Documents, at the time the decision was made by the delegate of the Commissioner, the only material available to the delegate consisted of the post itself, the Daily Mail article, Mr Cook's complaint and the other posts complained about.⁴
13. After the removal notice was served, Mr Elston's post was geo-blocked by X. Mr Elston and X Corp. both sought review of the Commissioner's decision.
14. Following the commencement of the application, a significant amount of evidence was filed by all the parties. It includes the opinions of psychiatrists on the likely effects of the post on a person who is transgender (but not about the effect on Mr Cook), background information on the operation of social network platforms generally and X in particular, information about the gender identity debate more broadly, the specific political opinions of Mr Elston and his intention in making the post, and specific evidence about how the gender identity debate is playing out in Australian Federal politics.
15. How much of this material is relevant to the questions the Tribunal must answer depends on precisely defining the statutory requirements that must be met before a removal notice can be given. The closing submissions advanced by the parties focussed on the scope of material to which I could lawfully have regard when assessing whether the post constituted 'cyber-abuse targeted at an Australian adult'. The views of the parties varied considerably on the range of material that it was appropriate for me to consider and for what purpose. Consequently, before I make findings on any factual issue that might be regarded as controversial, it is first necessary to reach conclusions about the proper construction of the statute.⁵ The construction exercise will allow me to identify both the threshold that must be met before a post can be the subject of the removal notice and what evidence can be considered when determining whether the threshold has been met. The issues are intertwined to a degree.

⁴ However, it would appear from the reasons given that the delegate also had access to the comments to the post, as they are said to 'attempt to fundamentally invalidate the identity of the complainant'. I have not been provided with the comments to the post.

⁵ I should also note at this point that the factual summary given in the introduction already includes information that the respondent submitted should not be considered when determining whether the material meets the description of 'cyber-abuse targeted at an Australian adult'.

16. Once the construction issues are resolved it is then possible to proceed to a determination of the relevant facts.

STATUTORY CONSTRUCTION

17. The OLS Act defines the concept of 'cyber-abuse targeted at an Australian adult' in section 7. It relevantly provides as follows:

- (1) For the purposes of this Act, if material satisfies the following conditions:
 - (a) the material is provided on:
 - (i) a social media service...
 - (ii)
 - (i)
 - (b) an ordinary reasonable person would conclude that it is likely that the material was intended to have an effect of causing serious harm to a particular Australian adult;
 - (c) an ordinary reasonable person in the position of the Australian adult would regard the material as being, in all the circumstances, menacing, harassing or offensive;
 - (d) such other conditions (if any) as are set out in the legislative rules;
- then
- (e) the material is **cyber-abuse material targeted at the Australian adult**; and
 - (f) *the Australian adult is the **target** of the material.*

18. There are two key elements to the concept which must be satisfied before material can be classified as such:

- (a) an ordinary reasonable person would conclude that it is likely that the material was intended to have an effect of causing serious harm to a particular Australian adult ('Intention Element'); and
- (b) an ordinary reasonable person in the position of the Australian adult would regard the material as being, in all the circumstances, menacing, harassing or offensive ('Offense Element').

19. Serious harm is a defined term in the OLS Act - 'serious harm' means serious physical harm or serious harm to a person's mental health, whether temporary or permanent.⁶
20. 'Serious harm to a person's mental health' includes:
- (a) serious psychological harm; and
 - (b) serious distress;
- but does not include mere ordinary emotional reactions such as those of only distress, grief, fear or anger.⁷
21. It is worth noting at this point that cyber-bullying and cyber-abuse are specific forms of harm which the internet can facilitate. Material which a person comes across and finds seriously distressing cannot be the subject of a removal notice just because it is distressing or even seriously distressing. For the Commissioner's power to be engaged, there needs to be an intention (a concept I consider later in these reasons) to cause serious harm, which can include psychological harm. The presence of the Intention Element is what converts section 7 from a provision that would otherwise provide for a broadly available censorship tool based on emotional responses to posted material, to a provision that protects people from a much narrower form of conduct where causing serious harm to a particular person was, in the relevant sense, intended.⁸
22. How the Intention Element should be approached became the key point of dispute between the parties. As noted above, the dispute operated at two levels. First, what evidence could be taken into account when considering the Intention Element. Second, what threshold needs to be met when the relevant evidence is considered.
23. Most of the issues that arose were the result of the use of the concept of the 'ordinary reasonable person'. That concept plays a particular role in other legal contexts. Whether it plays the same or even a similar role in the context of the OLS Act was the subject of dispute. To resolve the dispute, it is necessary to look first at the text of the Intention

⁶ *Online Safety Act 2021* (Cth) s 5.

⁷ *Ibid.*

⁸ Noting that the concept of intention requires close examination in this context

Element within the context of the OLS Act. Identifying with some precision the mischief at which the provision is directed is important, as is the statutory context in which removal notices are given. Only when that has been done is it possible to determine what material should be considered when the Tribunal is determining whether the Intention Element is satisfied.

24. Having determined what material is relevant to a consideration of the Intention Element, it is then necessary to determine the thresholds that must be met before conduct constitutes cyber-abuse.
25. To assist in answering these questions, the passage which follows seeks to:
 - (a) Identify material relevant to determining the mischief to which the cyber-abuse provisions are directed;
 - (b) Consider to what extent the Parliament had in mind that in-depth examination of the context in which posts have been made occur before findings of cyber-abuse were made and removal notices issued. This assists in understanding how the 'ordinary reasonable person' test should be applied;
 - (c) Shed light on how Parliament sought to balance freedom of expression with the protective elements in the cyber-abuse provisions;
 - (d) Consider to what extent the concept of cyber-abuse covers what are known as 'pile-ons' or 'volumetric attacks' where the sheer number of hostile posts or hostile comments is a cause of psychological harm.

The legislation and its context

26. In any statutory construction exercise it is important to start with the text of the provision. As the High Court has noted repeatedly, the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of the legislation is the surest guide to legislative intention. Having said that, it is important to read the text having regard to its context and purpose. Context

includes the general purpose and policy of a provision and in particular the mischief it is seeking to remedy.⁹

27. In this case, the text itself is less helpful than would normally be the case. The question the statute poses is ‘would an ordinary reasonable person conclude that it is likely that the material was intended to have an effect of causing serious harm?’ The unstated related question is – having regard to what? What can the ordinary reasonable person look at in answering that question. At least two options suggest themselves - just the material itself, or other additional evidence about the circumstances? To answer the unstated question, it is necessary to consider the text in its particular statutory context.
28. In this case, the text of the provision uses terms and phrases that have been deployed in other legal contexts. Whether the meaning of the provision should be informed by the decisions of Courts in other contexts depends on a consideration of how similar or different the context of the OLS Act is. For that reason, it is important to focus some early attention on context.¹⁰
29. Context and purpose can be discerned from the scope and structure of the Act and the Parliamentary materials which set out the history of the passage of the relevant bills. The following matters are relevant.

General Context

30. The object of the OLS Act is to improve online safety for Australians and to promote online safety for Australians. It does this in three ways.
31. First, by providing a mechanism whereby the Commissioner can issue removal notices to a platform in relation to the following specific types of conduct:
 - (a) Cyber-bullying material targeted at an Australian child;
 - (b) Cyber-abuse material targeted at an Australian adult; and

⁹ *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 47 [47]

¹⁰ *Harvey v Minister for Primary Industry and Resources* (2024) 278 CLR 116, 157-8 [106] and [111] (Edelmann J).

- (c) Non-consensual sharing of intimate images.
32. Second, by providing a mechanism whereby the Commissioner can issue a removal notice to a platform requiring the removal of material that would be refused classification by the Classification Board or classified as X 18+.
33. Third, by creating the basic online safety expectations that set minimum expectations for the content that should and should not be hosted on a platform and providing a means by which non-compliance with those expectations can be reported on by the Commissioner with a view to promoting greater compliance by regulated platforms. The OLS Act mandates that the following be included in the basic online safety expectations:
- the expectation that the provider of the service will take reasonable steps to minimise the extent to which the following material is provided on the service:
- ...
- (ii) cyber-abuse material targeted at an Australian adult;¹¹

Context for Interpreting the Intention Element

The mischief targeted by the provisions

34. The OLS Act replaced the *Enhancing Online Safety Act 2015* (Cth) ('EOS Act'). The explanatory memorandum ('EM') for the *Online Safety Bill 2021* (Cth) provides that the cyber-abuse amendments expanded protections that had previously only been available to children. In introducing those protections, the explanatory memorandum notes that the threshold for protecting adults is higher than the threshold for protecting children. At page 30,¹² the explanatory memorandum states:
- Recognising the growing harm caused by serious adult cyber-abuse, a new take-down and penalty scheme would be created to encompass cyber-abuse directed at Australian adults. The scheme would establish a higher threshold for what constitutes cyber-abuse than the threshold which applies under the children's cyber-bullying take-down scheme...
35. When enacted, the relevant concerns of the Parliament as identified in the EM and the second reading speech were to:

¹¹ *Online Safety Act 2021* (Cth) s 46(1)(c).

¹² In the context of a discussion of regulatory options and in relation to the option ultimately adopted.

- articulate a core set of basic online safety expectations to improve and promote online safety for Australians;
 - create a new complaints-based, removal notice scheme for cyber-abuse being perpetrated against an Australian adult; and
 - broaden the cyber-bullying scheme to capture harms occurring on services other than social media.¹³
36. In relation to the cyber-bullying material targeted at an Australian child, the Bill is said to establish 'a scheme for the rapid removal of cyber-bullying material'. The Commissioner has the power to require a provider of the social media service to remove cyber-bullying material targeted at an Australian child within 24 hours. The Commissioner can also give an end-user notice to a person who posts cyber-bullying material, requiring the person to take all reasonable steps to ensure the removal of the material, refrain from posting further material targeted at the child, or apologise to the child for posting the material.¹⁴
37. In relation to cyber-abuse targeted at an Australian adult, there is no power in relation to the person posting the material.
38. The OLS Act implemented recommendations from an independent review of the EOS Act conducted by Ms Lynelle Briggs ('the 2018 Review').¹⁵ In that review, the following was said about the need to extend the antibullying regime provided for children to adults.

I found in this review that the tight limitation on the eSafety Commissioner's role with respect to adults flies in the face of the experience of many people (especially women with high profiles, like journalists and politicians, Aboriginal and Torres Strait Islander women, Islamic spokespeople, and the families of murder and rape victims) with online harassment, vitriol, and predator trolling. A number of these women have approached the eSafety Commissioner for assistance.

"[In the words of Dunja Mitjatovic] 'Female journalists and bloggers throughout the globe are being inundated with threats of murder, rape, physical violence and graphic imagery via email, commenting sections and across all social media...Male journalists are also targeted with online abuse, however, the severity, in terms of the sheer amount and content of abuse....is much more for female journalists.'.....

¹³ Explanatory Memorandum, *Online Safety Bill 2021* (Cth), 1.

¹⁴ Ibid 3-4

¹⁵ Ibid, 11.

These dangers do not stay online. Following extreme online harassment campaigns, we have had Women in Media members punched in the street and followed home. A couple of our members have had rape and death threats against them and their daughters.”

Such behaviour is totally unacceptable, and action needs to be taken to prevent it.

International experience suggests that it is no longer sensible to distinguish between the needs of children and adults for protection against online abuse. Online bullying and harassment can happen at all ages, and can escalate to physical violence. Accordingly, I recommend that the eSafety Commissioner’s remit should be extended to cover all adults experiencing cyber-bullying so that all children and all adults experiencing online abuse problems of a serious nature are within her remit, and that the Government provide additional resources and increased staffing resources (and ASL) to support the extended function.

39. This is the problem which the ‘cyber-abuse targeted at an Australian adult’ provisions were introduced to deal with.¹⁶ The behaviour of concern is not upsetting or distressing comments made generally, but behaviour where individuals are targeted by others.

40. The EM describes what is proposed in the following terms:

Cyber-abuse scheme for adults

Recognising the growing harm caused by serious adult cyber-abuse, a new take-down and penalty scheme would be created to encompass cyber-abuse directed at Australian adults. The scheme would establish a higher threshold for what constitutes cyber-abuse than the threshold which applies under the children’s cyber-bullying take-down scheme. The services to which the scheme applies, and the 24 hour period to respond to take-down notices, would be consistent with the cyber-bullying and image-based abuse schemes.

The depth of investigation before decisions are made

41. The history behind the development of the regime for reviewing decisions made by the Commissioner provides some assistance in resolving the range of evidence that could be considered when the Intention Element of the provisions is being assessed.

42. When the Bill was introduced, it did not include any provision for internal review of the Commissioner’s decision. However, when the Bill was referred to the Senate’s Environment and Communications Legislation Committee, submissions were made commenting on the lack of input from end-users and posters whose material is taken down by the Commissioner. One submission noted:

Within the Online Content Scheme, there is no process outlined for users to be notified that their material may be removed, no notice period offered to them, and no opportunity for them to be given a hearing to speak or write back in relation to the complaint. The expedited 24 hour time frame removes any opportunity for the Commissioner to develop or communicate

¹⁶ Ibid, 22.

considered reasons. That the office of the Commissioner is indemnified from liability for civil damages to those suffering the consequences of inappropriate or even illegal notices issued by the Commissioner is cause for further concern.¹⁷

43. Following the referral to that committee, s 220A was inserted into the Bill. It required the creation of a scheme for the undertaking of internal review of certain decisions (including a decision to issue a removal notice on the basis that it constituted cyber-abuse targeted at an Australian adult). The explanation for this addition was included in a supplementary explanatory memorandum. It was as follows:

Decisions made under the Online Safety Bill may impact on persons, including providers of a social media service, relevant electronic service, designated internet service and end-users of those services, as well as providers of a hosting service, internet carriage service or bodies or associations representing sections of the online industry. It is the expectation of the Parliament that there be due process and natural justice in how decisions are made by the Commissioner unless the Act states the contrary intention.

Internal and external reviews of decisions are tools to demonstrate that decisions are made in accordance with due process and natural justice. The Bill provides for the establishment of an internal review scheme for those individuals or organisations impacted by decisions of the Commissioner under the Bill. The AAT also serves an important function in conducting independent merit reviews of administrative decisions made under Commonwealth laws.

44. This history along with the text of the OLS Act, indicates that the legislation as passed allows for rapid decision making by the Commissioner to deal with material that appears, on its face, to be within a category that the Act specified could be the subject of a removal notice. However, once action has been taken, the insertion of s 220A confirms that Parliament accepted that there needed to be an opportunity for those affected by the action to have an opportunity to address whether the material was actually within the prohibited statutory category. External review by the Tribunal was provided for with the same end in mind.
45. This structure is important when considering whether findings on the Intention Element should be made on an impressionistic basis after considering a limited range of material, or whether findings should be made after careful consideration, having regard to any evidence obtained as part of any investigation or review process. The history and structure of the provisions suggest that while impressionistic decision-making may be authorised in the first instance, early decisions made on limited information can and should be re-visited both

¹⁷ Senate Environment and Communications Legislation Committee, Online Safety Bill 2021 [Provisions] and Online Safety (Transitional Provisions and Consequential Amendments) Bill 2021 [Provisions] March 2021, [2.15].

internally and externally as more information becomes available, including as a result of input from the affected end-user.

Balancing freedom of expression

46. In considering the human rights impact of the bill, the EM noted:

For adult cyber-abuse, the provisions do not prohibit an end-user posting the material, but rather require that material be removed from a service provider's platform following a complaint being made to the provider. The threshold for material to be cyber-abuse targeted at an Australian adult is higher than that for cyber-bullying targeting a child. This is in recognition of the higher levels of resilience expected of Australian adults. For adults, it is only when the material crosses a threshold well beyond reasonable commentary or expression of opinion and into the realm of intentional, serious harm, and being menacing, harassing or offensive, that the Bill provides a mechanism for that material to be taken down from a platform. The provisions, therefore, are reasonable and proportionate to achieve the objective of promoting online safety for Australians. The right to freedom of expression is further protected under the Bill in that end-users who are subject to notices regarding the removal of cyber-bullying material, adult cyber-abuse material and intimate image material, can appeal those decisions to the Administrative Appeals Tribunal, and have them reviewed by that Tribunal on their merits.

Volumetric abuse

47. There was also some debate between the parties about the relevance of the liking and comments connected with Mr Elston's post. The argument skirted around the issue of whether the volume (or potential volume) of attacks on Mr Cook were relevant to whether the Intention Element was satisfied. To consider that question, the following material provides relevant context. This is taken from the EM to the Bill:

The right to protection from exploitation, violence and abuse is primarily contained in Article 20(2) of the ICCPR and other related conventions. The ICCPR and related conventions requires Australia to take measures to protect persons from exploitation, violence and abuse. This right is engaged as the image-based abuse scheme, adult cyber-abuse scheme and cyberbullying schemes in the Bill are directed to protecting people from serious harm that can result from the non-consensual sharing of an intimate image, or abusive or bullying behaviour. Exploitative acts can be involved in the non-consensual sharing of intimate images that often causes significant harm and distress to the person depicted in the image. Similarly, victims of cyber-abuse can be the subject of volumetric attacks (or 'pile ons') across multiple platforms, where a person is named in, tagged, or linked to an abusive post, which others like, share, re-post with additional commentary, or link to via other services. The volume of material can proliferate rapidly across platforms, resulting in hundreds or thousands of related posts focused on a single individual. In severe cases, these attacks can lead to the 'doxing' of personal information and in-person violence. The purpose of the Bill is to deter people from engaging in this behaviour, and to provide the Commissioner with an appropriate enforcement mechanism to address it, through conferring powers on the Commissioner to issue removal notices, remedial directions and civil penalties for non-compliance. The Bill promotes the right to protection from exploitation, violence and abuse as it provides mechanisms for persons to complain and have harmful content targeted against them removed. Accordingly, the Bill is consistent with the right to protection from

exploitation, violence and abuse, as the measures contained in the Bill are directed towards the protection of persons from exploitation, violence and abuse.

48. While this passage might suggest that participation in a volumetric attack is the kind of conduct that the cyber-abuse provisions are directed at, other parts of the EM are not consistent with that analysis. A distinction between cyber-abuse on the one hand and volumetric attacks on the other is drawn later in the EM. When it discusses the Basic Online Safety Expectations regime, the EM discusses the specific types of behaviour regulated by the Act, including cyber-abuse targeted at an Australian adult, and other harmful material. The category of 'other harmful material' is discussed in the following terms:

'Other harmful material' is intended to capture emerging forms of harmful material and behaviours. This may include, for example, high volume, cross-platform attacks (also known as 'volumetric' or 'pile-on' attacks). This is a circumstance where a person is named in, tagged, or otherwise linked to an abusive post, which others like, share, re-post with additional commentary, and link to via other services. Individual pieces of material in an attack may not reach the threshold for cyber-bullying or cyber-abuse, however, as the volume of material can proliferate rapidly across platforms, with hundreds or thousands of related posts focused on a single individual... Service providers are best placed to identify these emerging forms of harmful end-user conduct or material, and so the flexibility of this regime means that providers can choose the best way to address them on their service in the most responsive way.

49. In guidance material published by the Commissioner (which is not relevant to the interpretation of the OLS Act), protecting users of a platform from volumetric attack is identified as one way of taking reasonable steps to ensure that a person can use the platform in a safe manner, consistent with the Basic Online Safety Expectations.¹⁸
50. Consequently, there is a distinction to be drawn between volumetric attacks and cyber-abuse material. However, that does not mean that the two cannot relate. In my assessment, if it were likely that a person in making a post sought to trigger a volumetric attack, that may assist in establishing the Intention Element for cyber-abuse. Equally, if a person was knowingly participating in a volumetric attack, that may also assist in establishing the Intention Element.

51. The EM also relevantly provides:

Clause 7 – Cyber-abuse material targeted at an Australian adult

¹⁸ 'eSafety Commissioner', 'Basic Online Safety Expectations (Web Page)' <<https://www.esafety.gov.au/industry/basic-online-safety-expectations>>.

This clause sets out the criteria for determining whether material submitted as part of a complaint to the Commissioner under clause 36 is cyber-abuse material targeted at an Australian adult. There are 4 limbs that must be satisfied before material meets the test for cyber-abuse material targeted at an Australian adult. These are set out in subclause 7(1):

- the material has been provided on a social media service, relevant electronic service or a designated internet service (paragraph (a)); applying an objective test, determining whether an ordinary reasonable person would conclude that it is likely that the material was intended to have an effect of causing serious harm to a particular adult (paragraph (b));
- applying an objective test, determining whether an ordinary reasonable person in the position of the Australian adult would regard the material as being, in all the circumstances, menacing, harassing or offensive (paragraph (c)); and
- such other conditions (if any) are met, as set out in the legislative rules (paragraph (d)).

Subclause 7(1) applies an objective test in paragraph (b) to determine whether an ordinary reasonable person would conclude that it is likely that the material was intended to have an effect of causing serious harm to a particular Australian adult. Serious harm is defined in clause 5 as meaning serious physical harm or serious harm to a person's mental health, whether temporary or permanent. Serious harm to a person's mental health is also defined as including serious harm or serious distress. It is not intended that mere ordinary emotional reactions or distress within the limits of what is acceptable as incidental to social interaction or to life in the community be captured by this definition. The requirement that it is likely that the material was intended to have an effect of causing serious harm to 'a particular Australian adult' in paragraph (b), is designed to exclude material of a general nature, such as material targeted at a broad class of people. Subclause 7(1) also applies an objective test in paragraph (c) to determine whether an ordinary reasonable person in the position of the Australian adult would regard the material as being, in all of the circumstances, menacing, harassing or offensive. In other words, it is intended that, whilst the circumstances of a particular adult would be relevant to how that person would regard the material, it would be how an ordinary reasonable person in those circumstances would regard the material that is relevant. The test to determine if material is offensive is in clause 8 below. In determining whether material is 'cyber-abuse material targeted at an Australian adult', the Commissioner may consider the context in which the abuse occurs, for example whether a person has been targeted because of their cultural background, gender, sexual orientation, disability, mental health condition or family or domestic violence situations. The intention is also for the Commissioner to consider the ordinary meaning of 'menacing' and 'harassing'. The definition is not intended to capture 'reputational harm' caused by defamatory material, for example negative online reviews of businesses. However, defamatory material may be determined to be 'cyber-abuse material targeted at an Australian adult' where an intent to cause serious mental or physical harm to a person can be established.

Paragraph 7(1)(d) enables other conditions to be included in the test of 'cyber-abuse material targeted at an Australian adult' by the legislative rules (see clause 240) should it become apparent during the course of administering the legislation that further conditions should be specified. If all the conditions in paragraphs (a) to (d) are satisfied, then subclause 7(1) provides that the material in question is 'cyber-abuse material targeted at an Australian adult' and the Australian adult is the target of the material.

Subclause 7(2) provides that an effect mentioned in paragraph 7(1)(b) may be a direct result of material being accessed by, or delivered to, the Australian adult or an indirect result of the material being accessed by, or delivered to, one or more other persons. This subclause is intended to capture indirect effects of cyber-abuse material which are not directly accessed by the Australian adult, but which still have an effect of causing serious harm to an Australian adult.

52. The EM also cites examples where the subject of the abuse was not personally known to the abuser.¹⁹

Submissions on the significance of the ‘ordinary reasonable person’ test

53. The preceding section simply lays out statutory context that provides some assistance in the interpretation of the Intention Element. It is now necessary to identify more specifically the contested issues between the parties about what material was relevant to a proper determination of the Intention Element and what threshold must be met before a removal notice could be issued.

Evidence relevant to intention

54. Each party urged on me a different approach to the Intention Element and in particular what evidence I could consider as a consequence of applying an ‘ordinary reasonable person’ lens when assessing whether the ‘material was intended to have an effect of causing serious harm’.
55. The view advanced by the Commissioner was that the requirements of the Intention Element are best understood by reference to how the concept is applied in other areas of the law including its role in defamation. The Commissioner contended that by adopting the device of the ordinary reasonable person in the OLS Act, the Parliament was limiting what the decision maker could know and the range of material that could be considered when determining the Intention Element, as well as how the material should be assessed. By relying on the ‘ordinary reasonable person’ concept, and the phrasing concerning the effect ‘that *the material* was intended to have’, the Parliament was making the assessment of intention a more impressionistic assessment based on the posted material, rather than the result of consideration of all the available evidence relevant to the poster’s intention, and a considered examination of all of that evidence.
56. The practical consequence of this choice by the Parliament, it was said, is that when the Commissioner or the Tribunal is considering the Intention Element, they are limited in the material that can be considered. What can be known by the decision maker (including the

¹⁹ Explanatory Memorandum, *Online Safety Bill 2021* (Cth), 15.

Tribunal) about Mr Elston, is limited to what can be gleaned from his profile on X and the material constituting the post.²⁰ His subsequent evidence about his intention and motivations is irrelevant to determining whether the Intention Element is satisfied. Similarly, any knowledge of Teddy Cook is limited to what is in the post and the associated article.²¹ The post and the linked article and the workings of the platform more generally provide the material from which conclusions about the Intention Element must be drawn. The task is to consider whether or not, based on that information, an ordinary and reasonable person would conclude that it is likely that the material was intended to have an effect of causing serious harm to a particular Australian adult. Considering evidence outside that limited pool exceeds what the Parliament allows the decision maker to do,²² and goes beyond the objective test laid down in the statute.

57. The Commissioner also submitted that the lens of the ordinary reasonable person had other consequences for how this limited set of materials should be read. Consistent with the law of defamation, the post would not be read closely by the ordinary reasonable person. There should not be any close analysis of the post or parsing of its terms.²³ That is not how an ordinary reasonable person would read it. The ordinary reasonable person would have no expert knowledge but would have some broad understandings about how X as a platform works, including the significance of the power to generate likes, comments and re-posts supportive of the original post. Authorities from the defamation field were cited as supportive of this approach. A number of other features of the ordinary reasonable person were identified. For example, the ordinary reasonable person would be aware that material on X can bully individuals. The ordinary reasonable person would understand public discourse around sexuality and gender can be polarising as well as emotionally charged. The ordinary reasonable person would appreciate that to call a transgender man a woman would be to act contrary to that transgender man's wishes. While there was some evidence available to the Tribunal on these matters, the Commissioner submitted that they were really questions which the Tribunal could take as givens in the same way that a court would take judicial notice of notorious facts. Thus, the role for evidence in this case was limited. The post and associated material readily available to a reader on X was of central importance and the

²⁰ Transcript of Proceedings, *X Corp. v eSafety Commissioner; Elston v eSafety Commissioner* (ART2024/2582 and ART2024/2583, Deputy President O'Donovan, 31 March 2025-4 April 2025) 232 ('Transcript').

²¹ Respondent's Outline of Closing Submissions [2(11)].

²² Transcript, 230.

²³ See *Bazzi v Dutton* (2022) 289 FCR 1, [29].

remainder of the process involved assessing that material in a social context that an ordinary reasonable person would understand. Where evidence was needed at all, it was to fill in small gaps in the social context or the functioning of the platform.

58. It is notable that this approach would require the question of whether material is cyber-abuse targeted at an Australian adult to be determined by reference to material that may not include even the complaint itself.²⁴
59. X Corp. did not accept that this was the proper approach. X Corp. accepted that the concept of the ordinary reasonable person imported an objective assessment of what was intended but submitted that it did not carry with it such significant limitations on the material to which regard could be had. Further, the phrasing of the Intention Element in s 7 did not have the consequence that evidence that assisted in discerning what Mr Elston's intention was, was irrelevant to the inquiry. X Corp. did however submit that there were limitations on the material that could be considered by a decision-maker. X Corp. submitted that the decision-maker was entitled to have regard to evidence concerning immediate context as at the time of the post, but not more.
60. X Corp. rejected any limitation based on principles derived from the law of defamation. X Corp. contended that in the defamation context, the role of the ordinary reasonable person was to stand in as a proxy for a broad class of people whose opinion of a person may be affected by a publication. By using this tool, the law was attempting to determine whether a broad range of people who read the material in a particular context would understand the material as conveying a particular meaning and draw adverse conclusions about the subject's character. X Corp. contended that the role of the ordinary reasonable person in the Intention Element was different. The construct provides a more objective vantage point for considering the question of the intention of the poster.²⁵
61. In endeavouring to determine the intention of the poster, X Corp. contended that the ordinary reasonable person could know all of the immediate context at the time of the post, so their knowledge was not limited to the post and associated material. The facts which could be known to the ordinary reasonable person when making their assessment, included

²⁴ This conclusion follows from the exchange at p 231 of the transcript

²⁵ Transcript 270 to 271

facts about the subject of the post or the poster, what their relationship was at the time of the post, but not evidence about what happened after. As a practical matter, that meant that the Tribunal could hear and consider evidence about the relationship between the poster and the subject of the post (regardless of when that evidence came into existence). In the present case, the critical fact relied upon by X Corp. which could not be known if only the post and associated material was consulted, was that Mr Elston did not know Mr Cook or know of Mr Cook until he read the Daily Mail article. On X Corp.'s analysis, evidence of this fact could and should be considered when discerning intention. However, there was factual evidence that X Corp. submitted should not be considered. For example, the fact that Mr Elston's post got a significant number of likes was not a fact that I could have regard to,²⁶ and should not be considered by the ordinary reasonable person when discerning intention. X Corp. also denied the relevance of Mr Elston's evidence that he 'had no ill will towards Teddy Cook personally', as it was too subjective.²⁷

62. Mr Elston's position on this issue was different again. It was submitted on Mr Elston's behalf that neither of the approaches urged by the other parties were appropriate. It was contended on his behalf that the scheme regulating cyber-abuse targeted at an Australian adult was a complaint-based scheme. In response to a complaint, an investigation could be undertaken. The Commissioner had significant powers to obtain and compel the production of documents and to examine a person and compel them to answer questions. Further, the Commissioner's decisions were subject to merits review in the Tribunal. All of this suggested that a wide range of material could be acquired and treated as available to the ordinary reasonable person when asked to decide whether the material posted 'was intended to have an effect of causing serious harm'. On this view of the statutory power, evidence obtained before or after the post, during the course of the investigation and concerning matters that occurred after the post was made, could be treated as available to the ordinary reasonable person when they drew their conclusion on the Intention Element. This expanded considerably the material that could be regarded as relevant. On this approach, Mr Elston's evidence about his intention was relevant to consider, but not necessarily conclusive of what an ordinary reasonable person would conclude about his intention.

²⁶ Transcript, 257 line 40.

²⁷ Transcript, 263 line 27

63. To support this submission, Mr Elston relied upon the structure of the complaints mechanism within the OLS Act and the powers available to the Commissioner including the following:

Process for making and dealing with complaints

64. Section 36 provides for complaints about cyber-abuse material in the following terms:

36 Complaints about cyber-abuse material

Complaint made by an Australian adult

(1) If an Australian adult has reason to believe that the adult was or is the target of cyber-abuse material that has been, or is being, provided on:

- (a) a particular social media service; or
- (b) a particular relevant electronic service; or
- (c) a particular designated internet service;

the adult may make a complaint to the Commissioner about the matter.

Complaint made on behalf of an Australian adult

(2) If:

(a) a person (the **responsible person**) has reason to believe that cyber-abuse material targeted at an Australian adult has been, or is being, provided on:

- (i) a particular social media service; or
- (ii) a particular relevant electronic service; or
- (iii) a particular designated internet service; and

(b) the adult has authorised the responsible person to make a complaint about the matter;

the responsible person may, on behalf of the adult, make a complaint to the Commissioner about the matter.

Complaint about material that was provided on a service

(3) If:

(a) a complaint made by a person under this section concerns material that has been, or is being, provided on:

- (i) a social media service; or
- (ii) a relevant electronic service; or
- (iii) a designated internet service; and

(b) the person wants the Commissioner to give the provider of the service a removal notice under section 88 requiring the provider to remove the material from the service;

the complaint under this section must be accompanied by evidence that the material was the subject of a complaint that was previously made to the provider of the service.

(4) For the purposes of subsection (3), evidence must be in a form required by the Commissioner.

(5) If:

- (a) a social media service; or
- (b) a relevant electronic service; or
- (c) a designated internet service;

issues a receipt or complaint number to a complainant as part of its ordinary business processes, the Commissioner may require evidence to be in the form of the receipt or complaint number.

(6) If:

- (a) a social media service; or
- (b) a relevant electronic service; or
- (c) a designated internet service;

does not issue a receipt or complaint number to a complainant as part of its ordinary business processes, the Commissioner may require evidence to be:

- (d) in the form of a screen shot; or
- (e) in the form of a statutory declaration; or
- (f) in such other form as the Commissioner specifies.
- (7) Subsections (5) and (6) do not limit subsection (4).
- (8) *A requirement under subsection (4), (5) or (6) is not a legislative instrument.*

65. Section 37 provides for investigation of complaints in the following terms:

37 Investigation of complaints

- (1) The Commissioner may investigate a complaint made under section 36.
- (2) An investigation under this section is to be conducted as the Commissioner thinks fit.
- (3) The Commissioner may, for the purposes of an investigation, obtain information from such persons, and make such inquiries, as the Commissioner thinks fit.
- (4) Subsections (1), (2) and (3) have effect subject to Part 14 (which confers certain investigative powers on the Commissioner).

Termination of investigation

- (5) The Commissioner may terminate an investigation under this section.

66. Part 14 sets out the investigative powers of the Commissioner. Section 198 applies the part to investigations under s 37. Section 199 and following provides for notices to be given and examinations under oath or affirmation to take place. Section 203 allows the Commissioner to require production of documents. Criminal and civil penalties can apply for non-compliance with those provisions.

67. Section 220A requires the Commissioner to formulate an internal review scheme.

The proper approach to assessing the Intention Element

68. I am satisfied that the approach advanced by the Commissioner that draws heavily from the law of defamation²⁸ and the application of similar concepts in other statutory contexts²⁹ is not correct. I do not accept that the concept of the ordinary and reasonable person introduces both limitations on the material to which regard can be had when considering the issue of a removal notice while permitting a range of specific features of the X platform and public discourse to be taken into account. I accept that this is the approach taken in the law of defamation and in other statutory contexts where it is necessary to consider how an ordinary person would react to certain material in a certain context, but how an ordinary reasonable person would discern intention in this statutory context is, in my assessment, quite different.
69. When the Intention Element is examined closely, the task the Parliament has set for the ordinary reasonable person is not to provide a reaction to the material that was posted, but to discern the likely intention of the person who posted it.
70. As X Corp. submits, in the defamation context, the role of the ordinary reasonable person is to get an appreciation of how a publication would be understood in the context in which it is consumed by a broad range of people. The concept pushes to the background how the publication might be understood by the individual judge or juror who is determining whether it is defamatory. The perspective of the ordinary reasonable person and its purpose is well explained in the Victorian Defamation bench book used for instructing juries:

The 'ordinary, reasonable [reader/listener/viewer]' is a person who:

- is of fair average intelligence, experience and education
- does not have a perverse mind
- is not unusually suspicious or naïve
- is not avid for a scandal – that is, does not go out of their way to try to find scandal or gossip
- does not live in an ivory tower but can and does read between the lines using their general knowledge and experience of worldly affairs
- reads, views or hears the publication casually, engages in a degree of loose thinking, and may readily draw derogatory implications

²⁸ *Bazzi v Dutton* [2022] FCAFC 84.

²⁹ *Monis v R* [2013] HCA 4.

- will attempt to strike a balance between the most extreme meaning and the most innocent meaning that the words or images could have.

34. Let me explain some of the above characteristics further. The hypothetical, ordinary reasonable person is not assumed to be especially smart, or academically gifted, or well-educated and well read. Like everybody, the hypothetical person looking for meaning can and does read between the lines in light of his or her general knowledge and experience. Your common experience as jurors may tell you that the literal words are not always the same as the meaning communicated. Meanings are conveyed in many ways. You will recognise saying one thing and meaning another.

35. The hypothetical person is not a lawyer thinking carefully about legally permissible meanings. The capacity of the hypothetical person for implication of intended meaning is much greater than that of a lawyer. That is what reading between the lines means; it is looking not literally at what the text is, but what else is communicated by implication from what the text says or how the words are delivered.

36. So the hypothetical ordinary reasonable person is a person who can and does draw implications, who can and does read between the lines, who can be a bit of a loose thinker and does not think about the implication of meaning in a technical legal way but just in the way of an ordinary person.

37. The particular circumstances of the [television or radio broadcast, social media post, newspaper article, book or press conference] can also contribute to how a hypothetical ordinary reasonable person may assess the words [heard/read]. Bearing in mind that the hypothetical, ordinary reasonable person often forms a general impression of what they read or heard, rather than closely scrutinising and analysing it. The more sensational the matter, the less likely an ordinary reasonable person would read it with care and accuracy, especially if a publication uses vague, imprecise words or places emphasis on certain words by using conspicuous headlines or captions.

38. The mode of publication is also important. A person reading a book or newspaper article will be able to re-read it before forming a view about what it means, whereas they might not be able to do that in transient mediums like a television program or a radio broadcast, or a fast-moving, conversational social media exchange.

39. You must assume that the ordinary, reasonable [reader/listener/viewer] will have [read the whole post or article/heard the whole broadcast/seen the whole program]. If some parts of the article say something defamatory of the plaintiff but are contradicted in a later part, you must look at the whole article. These contradictory statements must be considered together within the context of the whole matter. Contrary statements do not automatically negate the effect of any defamatory statements.

32. Instead of thinking about your own personal reaction to the words, the law requires you to think about what this person, the 'hypothetical ordinary reasonable person' would think the words meant.

71. Restricting the consideration of the ordinary reasonable person to the defamatory material is useful in the defamation context because the concern is with the general reputation of a person across a broad population and the effect of the published material on it. If only a limited class of unusually sensitive or unusually well-informed people would discern a defamatory meaning from a publication, then the person has not been defamed. The defamatory meaning needs to be conveyed to ordinary and reasonable people for it to be actionable. In most circumstances, the only material the ordinary members of the general public would have access to, to consider whether material defamed a person is the material

itself. Importantly, in defamation, the publisher's intention is irrelevant to the question and is not a question ever addressed in the analysis.³⁰

72. The context into which the assessment of the ordinary and reasonable person has been introduced in the OLS Act is quite different. When a person is assessing cyber-abuse material for the purposes of issuing a removal notice, the assessment is not done in a context of the reader perusing a post while casually consuming media, with the goal of understanding what impression others might be left with. The assessment is undertaken in a context where there has been a complaint to a regulator where the regulator is trying to determine whether a person is being improperly targeted by someone who is likely to have an intention of causing serious harm to that person.
73. The concern that arises in relation to cyber-bullying and cyber-abuse is not limited to its impact in the virtual world. The purpose of the provisions is to ensure the physical and mental safety of users of the platform. That is why the regulator can take steps in both the real world and the virtual world in response to a complaint. Additional information can be obtained from protagonists, and once obtained the regulator has power to disclose information about the cyber-abuse that has been the subject of complaint. In the context of cyber-bullying of children, this includes disclosure to teachers or school principals. In relation to cyber-abuse targeted at an Australian adult, this includes authority to disclose to the Australian Federal Police and Australian State and Territory law enforcement bodies. The regulator has the power to refer a matter to the Australian Federal Police.
74. The existence of the investigative powers available to the Commissioner and the complaint-based nature of the power provide a powerful basis for concluding that the Commissioner and the Tribunal should be feeding all of the available evidence into the assessment of what the 'ordinary reasonable person' would conclude was likely before determining whether the Intention Element is satisfied. To read the inclusion of the concept of the 'ordinary and reasonable' person as a basis for limiting the decision maker to a very abstract consideration of a limited class of material, largely divorced from its real-world context, when determining what was intended, is not supported by text of the provision when read in the context of the OLS Act as a whole. The extensive powers of investigation that the Parliament

³⁰ Evans v John Fairfax & Sons Ltd (1993) 112 FLR 74, 87.

has conferred are directed at obtaining information relevant to the exercise of statutory powers, including for the purpose of deciding whether the Intention Element is satisfied before a removal notice is issued. To limit the material considered in this statutory context would require significant textual underpinning. In my assessment, the text defining cyber-abuse targeted at an Australian adult does not provide that support.

75. On its face, s 7 has the appearance of being just a definition of a concept. However, s 7 also operates as the primary trigger for regulatory action. Classification of the material as cyber-abuse is central to the decision on the part of the regulator to take action. If the Commissioner were obliged to simply consider the post plus any material an ordinary reasonable person reading the post would have access to, then the broader apparatus specifically made available by the Parliament for the regulator for use when a complaint concerning cyber-abuse material is lodged, could never be deployed to answer the central questions raised by any complaint – are the Intention and Offense elements satisfied and the power to act triggered. To read the section defining cyber-abuse targeted at an Australian adult as imposing a limitation on the utility of any investigation of the relevant facts surrounding the making of the post is not consistent with the scope and purpose of the OLS Act.
76. The Commissioner advanced the proposition that s 7 should not be interpreted as having regard to the Commissioner's powers of investigation because the concept of cyber-abuse targeted at an Australian adult also played a role in both the basic online standards regime as well as the removal notice regime. In these circumstances, the powers of investigation do not shed light on the approach to be taken to the 'ordinary reasonable person' concept.
77. I do not accept that submission. The fact that the concept has two roles in the OLS Act is not a reason for ignoring the significance of the statutory concept in one of those contexts. The complaint system and the investigative powers the Commissioner has are intimately connected to the issuing of notices to remove material that falls into particular defined categories. The Parliament was concerned to give end-users an opportunity to address claims about their conduct both on internal review and by providing review in the Tribunal. To read the ordinary reasonable person lens as a basis for disregarding evidence submitted by either the complainant or the end-user or discovered by the Commissioner during an investigation is not consistent with the fair, high quality decision-making the Parliament made provision for.

78. When a complaint is initially made, it is reasonable to assume that the Parliament expects prompt action on the part of the regulator.³¹ In urgent circumstances, a decision maker could find the Intention Element satisfied for the purposes of making a quick decision based just on the complaint and any other material readily available at that point. But the fact that it might be appropriate for the Commissioner to proceed to make a quick decision based on limited material at the first stage of a decision-making process, does not suggest that it is compulsory to proceed in that way in the decision-making stages that follow. The introduction of the concept of the 'ordinary reasonable person' is too slender a basis for finding that ongoing wilful blindness to the facts as they emerge is what the concept requires.
79. The insertion of s 220A, which requires the Commissioner to have an internal review process in order to ensure that procedural fairness is accorded to the end-user, suggests that if the end-user provides more contextual information, that information should be considered. Similarly, if more information comes to light as a consequence of the exercise of any of the Commissioner's investigative powers or the Tribunal's process, the text and structure of the Act support the conclusion that all of the material subsequently available should be considered.³²
80. It would be inconsistent with this structure to insist that despite the fact that the regulator has time to consider the post, and, importantly, use compulsory powers to find out more about what is occurring, only a small class of information can be considered when determining whether the Intention Element is satisfied.
81. The interpretation advanced by the Commissioner also has the consequence that information provided with the complaint could not be considered. In many circumstances, including this case, limiting the information that can be considered by the 'ordinary reasonable person' to the post and closely related material, results in critical information not being available. In this case, there is no evidence in any of the material posted and associated with the post, that the post was ever brought to the attention of Mr Cook. The inclusion of the WHO's handle (@WHO) in the post makes it clear that it will find its way to

³¹ Noting that the 24-hour time frame for removal of cyber-abuse material matched the reduced time frame for taking action in relation to cyber bullying that was introduced by the OLS Act.

³² *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, [142] and following.

the WHO, but there is no other handle included in the post that would result in its inclusion in Mr Cook's feed. That Mr Cook was aware of the post is only discoverable by reference to the complaint submitted to the Commissioner. If a decision maker is restricted to knowing that a post was made to a limited audience, none of whom included Mr Cook, reaching the conclusion that the material was intended to cause serious harm to Mr Cook is going to be difficult. In those circumstances, where there appears to be no evidence to which the decision maker can have regard in order to make a finding that the post came to Mr Cook's attention, let alone was intended to come to his attention, a decision to issue a removal notice could not be sustained. In many cases, it will be the complaint that provides critical context to allow an ordinary reasonable person to conclude that serious harm was intended.

82. The Commissioner sought to get around this problem by submitting that the ordinary reasonable person device permits me to effectively take judicial notice of the fact that the post would come to Mr Cook's attention.³³ In my assessment, the text of the provision does not suggest a process so divorced from the evidence.
83. It would not be consistent with the text, purpose and structure of the OLS Act, to limit the information considered by the Commissioner or the Tribunal to the information that an ordinary reasonable person could or would access when reading the post. There is nothing in the text of the provision which compels such a conclusion, and much in the structure of the Act that tells against such an approach.

X Corp.'s approach - Basic information limitation

84. X Corp. in closing submissions made it clear that it considered that the Tribunal was free to have regard to a reasonably broad class of material when considering the Intention Element. X Corp. contended, and I accept, that there will be many circumstances where if regard is had only to the post and related material, that material will be misunderstood as benign due to lack of context. The example given in closing submissions was a good one. A post which simply states 'I'll see you in Melbourne tonight, darling' on its face looks benign, but if it is known that the poster is a domestic abuser and the target is hiding in Melbourne, then the post takes on a very different meaning. Given that the intention of the

³³Transcript 243 line 20

poster can only be understood if context is obtained from other sources, this example emphasises the danger in limiting the material to which the regulator (and the Tribunal) can have regard.

85. X Corp. however submitted that the Tribunal did not have free reign to consider any material made available to it for the purposes of assessing what the ordinary reasonable person would conclude on the question of intention. X Corp. submitted that there were limitations on the material to which I could have regard. Those limitations were outlined in paragraph 61 above and would prevent consideration of the consequences of the post, subjective evidence as to intention and matters beyond 'basic facts and context'.³⁴
86. I do not accept that the limitations proposed by X Corp. are appropriate. In my assessment, once the Rubicon has been crossed and it is accepted that material other than the post and material immediately accessible on the platform can be considered, then there are few limitations grounded in the statute for limiting the information considered.
87. Evidence about what happened after the post was posted could be relevant if it sheds light on the likely intention of the poster. Similarly, evidence about prior behaviour of third parties in response to certain posts could be relevant, even if it was only discoverable by the regulator using compulsory powers. So long as evidence sheds light on the statutory question, then it can and should be considered. It would be inappropriate in advance of a particular factual scenario being presented to the decision-maker to say that there are whole categories of evidence that cannot be considered because the statutory test in all circumstances renders the material irrelevant.

All information that could shed light on objective intention

88. As should be clear from the analysis above, I accept the submission advanced on behalf of Mr Elston that I can have regard to any evidence regardless of when or how it was acquired, provided it sheds light on the issues presented by the statutory test in general and the Intention Element in particular.

³⁴ Transcript p 302 30-40

89. This is not to say that the introduction of the concept of the 'ordinary and reasonable' person as the lens through which the poster's intention must be assessed has no effect. It certainly alters the way in which evidence concerning the subjective intention of the poster must be treated. It moves the assessment away from a specific factual inquiry concerning the actual thought process of the poster and what effect they intended to achieve by the post. I must undertake a more abstract inquiry about what an independent person (who isn't me) would think was the poster's intention having regard to the available evidence. Provided evidence is relevant to that question, then it can and should be considered.
90. Having satisfied myself that in answering the questions posed by the Intention Element there is no limitation on the evidence that is relevant to the issue, it is necessary to turn to some other contentious elements in the statutory formulation.

Construction of the Intention Element

Ordinary reasonable person

91. Having dismissed the proposition that the use of the 'ordinary reasonable person' concept was adopted for the purpose of constraining the material to which regard can be had when assessing the intention of the poster, it is necessary to consider more closely the effect of the inclusion of the ordinary reasonable person as the ultimate arbiter of the intention of the post. To do this, it is necessary to give some closer to consideration to the concept of intention and the role that it can play in different legal contexts.

Actual intention not the question

92. The Commissioner advanced the proposition that because the text focussed on the effect *the material* was intended to have, this carried the implication that what was to be discerned was not the intention of the poster, but the more abstract notion of the 'intention of the post'. An analogy was drawn between abstract intentions known to the law which do not purport to reflect an intention formed in the mind of any person – for example parliamentary intention, or the intention imputed to the parties to a contract by exclusive reference to the document recording the agreement. In those circumstances the concept of 'intention' doesn't refer to a thought process that either did or could exist in someone's mind, but a more abstract notion of what the document should be read as conveying regardless of whether any actual person ever had or could have had that intention. One practical

consequence of interpreting the statute in this way is that it renders evidence about the actual intention of the person who posted the material irrelevant because that is not what the ordinary reasonable person is trying to discern is likely. It puts focus squarely on the content of the post rather than information that can be garnered from other sources.

93. I do not accept that the concept of ‘intention’ in this statutory context is as abstract as the Commissioner contends.
94. I am satisfied that the phrase referring to the effect ‘the material was intended’ to have, refers to a state of mind that, following examination of the circumstances, would be imputed to someone by an ordinary reasonable person. It is not a finding that the intention did exist but is a finding that an ordinary reasonable person who considered the evidence would conclude that it existed. This concept requires elaboration.
95. The interposition of the ‘ordinary reasonable person’ as the determiner of the intended effect of the post, affects the inquiry the Commissioner and the Tribunal must undertake. First, the interposition has the consequence that the Intention Element does not require the decision maker to make a finding about any effect the person who posted the material actually intended it to have. Instead, the focus is on what an ordinary reasonable person would conclude was the person’s intention based on the available evidence.
96. This shift away from the actual intention formed within the mind of the poster by the interposition of what the ordinary reasonable person would conclude does not turn the concept of intention into a pure legal abstraction completely divorced from any understanding of how humans behave when they intend something. It does however move the concept away from a search for Mr Elston’s state of mind as an objective fact. . As was discussed in *Vallance v R*³⁵, in some legal contexts, a factual question that must be determined is whether a person took an action intending to achieve a particular result. A finding that a person intended that result is a finding of an objective fact. As Windeyer J put it:

The state of another man’s mind or of his digestion is an objective fact.

³⁵ (1961) 108 CLR 56, [83].

97. However, Windeyer J went on to explain that despite the fact that an intention is something that is formed within the mind of a person and whether or not that thought process occurred is peculiarly within their knowledge, that does not mean that the evidence that they give that they lacked the necessary intention is conclusive. An inference about their intention can be drawn from other facts.
98. This type of inquiry is common in criminal proceedings where, for example it may be in issue whether or not a person intended to kill someone or whether they did so accidentally. When a search for a person's intention is undertaken, the actual thought processes of the person are the subject of the inquiry. The thought process is not observable, but that does not make it any less a question of fact as to whether the intention was formed.
99. This occurs in commercial contexts also. In *News Ltd v South Sydney District Football Club Ltd* (2003) 215 CLR 563 there is extensive discussion of whether a statutory reference to purpose in the *Trade Practices Act* was a reference to the actual purpose formed in the mind of the participants to the agreement, or the objective or notional purpose discerned from the terms of the agreement. The Court was satisfied that in that statutory context the search for purpose was the subjective purpose - what was in the minds of those engaging in the relevant conduct.
100. It is however possible for Parliament to devise tests where the actual thought process of the subject of the regulation is irrelevant notwithstanding that a reference is made to concepts that would commonly be regarded as thought processes. For example, section 177D of the *Income Tax Assessment Act 1936* deals with a person's 'purpose' for entering into a scheme which results in them obtaining a tax benefit. Having a purpose for doing something, like intention, in normal parlance involves the formation of a particular state of mind. In section 177D however, it is clear from the statutory language that the question being asked is what an observer would conclude was a person's purpose if regard were had to a limited number of specified matters. Because the statutory test is structured in this way, evidence about the actual purpose of the taxpayer is irrelevant.
101. In the case of Parliamentary intention, it is accepted that for statutory interpretation purposes legislative intention is not a 'collective mental state'. 'Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are

known to parliamentary drafters and the courts.³⁶ It is not the combined intention of the specific individuals who comprise the Parliament that is sought. Judicial findings of legislative intention are 'an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws'.³⁷ Legislative intention is an output of that process,³⁸ not a quest to establish the existence or otherwise of a state of mind.

102. As can be seen, when questions of purpose or intention in taking certain steps are involved, depending on the framing of the legal test, the focus in some contexts can be on what the evidence establishes the person's actual intention was, while in others there is more focus on what intention should be imputed to a person based on the application of legal technique. In some contexts, the word 'intention' refers to a pure abstraction. The phrase 'Parliamentary intention' does not refer to something that exists independent of the legal process. It is a something discernible only by the application of a legal method. A person's intention on the other hand does have an existence outside legal processes and refers to a real state of mind that had actual existence.
103. For the purposes of determining the Intention Element in the OLS Act, the Parliament has used a formulation that creates a search for something that falls in between a pure abstraction and an actual state of mind formed. What is required is not a finding of the poster's actual intention, but a finding about what an ordinary and reasonable person would conclude was the poster's intention based on the evidence available. In considering what was intended, the ordinary reasonable person is entitled to apply common sense about how people behave when they intend something. As explained earlier, the test does not seek to restrict the materials on which the conclusion is reached or to narrow what could be relevant to answering that question. The primary effect of inserting the ordinary reasonable person as the arbiter of intention, is to relegate evidence of subjective intention given by the poster to just one relevant matter in a more holistic assessment of the evidence relevant to the question of what was intended. The OLS Act has not introduced a concept of notional intention that bears no relationship to a human thought process. Determining the Intention Element requires the Commissioner or the Tribunal to ask what a person - who is not them,

³⁶ *Lacey v Attorney-General of Queensland* [2011] HCA 10 at [43]

³⁷ *Zheng v Cai* [2009] HCA 52 [28]

³⁸ [Episode 43 - interpretation NOW!](#)

but is ordinary and reasonable – would conclude about the intention of the poster having regard to the available evidence. The Tribunal’s task is to consider whether a person of that kind would conclude that it was likely that the material posted was intended to cause serious harm to an Australian adult.

104. The Commissioner suggested that, by using the slightly vague formulation focussing on the effect that ‘*the material* was intended to have’ the Parliament has taken attention away from the actual person who posted the material and their intention. This would render any evidence from the poster about their intention largely or completely irrelevant to the statutory question.
105. While I accept that by inserting the ordinary reasonable person as the arbiter of intention, the test moves the analysis away from determining what the poster’s intention was as a pure matter of fact, the phrase referring to the effect the ‘*material* was intended to have’ does not push the test to any further abstraction. The phrase should be understood as a shorthand way of referring to ‘the effect that the person who posted the material’ intended it to have. To paraphrase, the view that the ordinary reasonable person must form is that ‘the material was intended by the poster to have an effect of causing serious harm’. In expressing it that way, I am not reading words into the statute, merely articulating the meaning already conveyed implicitly by the words chosen by Parliament.

Standard of satisfaction

106. The next construction question to be addressed is the significance of the use of the word ‘likely’ in the phrase ‘an ordinary reasonable person would conclude that it is likely that the material was intended to have an effect of causing serious harm to a particular Australian adult’. The Commissioner submits that the word likely in this statutory context as in many others, refers to a ‘real chance’ that serious harm was intended rather than ‘more probable than not’. It is worth noting at the outset that the Macquarie Dictionary definition of ‘likely’ includes in its first two primary meanings the words ‘probably’, ‘seeming like truth, fact or certainty’ and ‘probable’. However, there are many statutory contexts where the word ‘likely’ has been given the meaning of ‘real chance’.
107. In the area of competition law, Deane J in *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees Union* (1979) 42 FLR 331 (‘Tillmans’) expressed the view that ‘likely’ in the context of s 45D(1) of the *Trade Practices Act* meant a real chance or possibility that

conduct engaged in would cause loss or damage to a business. That interpretation was favoured in circumstances where the formulation was 'would have or would be likely to have'. This context was said to justify reading 'likely' as having a different meaning to the one it normally bears. The position advanced by Deane J was considered by the Full Court of the Federal Court in *Australian Competition and Consumer Commission v Pacific National Pty Ltd and Others* [2020] FCAFC 77. The Full Court concluded:

...if the meaning of the word 'likely' was being considered for the first time, we would have been inclined to adopt the meaning probable, but there is insufficient reason to change course at this point in time....Nevertheless, substituting synonyms such as 'real chance' for the statutory word 'likely' creates the risk that the synonym may convey a different standard to the statutory language and may introduce a further element of uncertainty.

108. In the *Racial Discrimination Act 1975* (Cth) the phrase 'reasonably likely' has been found to only require a "real" and "not fanciful or remote...chance" of the relevant outcome. In the recent case of *Faruqi v Hanson* [2024] FCA 1264 ('*Faruqi*') Stewart J observed:

The requirement that the act is "reasonably likely" to have the requisite effect is satisfied if there is a "real" and "not fanciful or remote ... chance" of the relevant outcome: *Eatock v Bolt* at [260]. That is to be assessed on the balance of probabilities on which the applicant bears the onus of proof: *Bropho* at [65]; *Eatock v Bolt* at [261].

109. The statutory test considered in *Faruqi* is 'reasonably likely'. The qualification 'reasonably' inevitably modifies the standard. In the OLS Act, the Parliament chose the formulation 'likely' which I am satisfied is different from whether something is 'reasonably likely'.

110. In *Boughey v The Queen* (1986) 161 CLR 10 the High Court considered the meaning of 'likely' in section 157(1) of the *Criminal Code Act 1924* (Tas.). It provided that 'culpable homicide' was murder if committed:

...by means of an unlawful act or omission which the offender knew, or ought to have known, to be likely to cause death in the circumstances, although he had no wish to cause death or bodily harm to any person.

111. In that statutory context the High Court found that the word 'likely' was used with what the court considered to be its ordinary meaning namely, to convey the notion of a substantial – a 'real and not remote' – chance regardless of whether it is less or more than 50 per cent.

112. The Court commented that 'to attribute to the word "likely" a requirement of a specific degree of mathematical probability which the word does not convey either as a matter of ordinary language or in its context in s 157(1) would be to submerge the ordinary meaning of a

commonly used word in a 'circumfluence of synonym, gloss and explanation which is more likely to cause than to resolve ambiguity'.³⁹

113. The Commissioner also relied on *ASIC v Cassimatis [No 8]* (2016) 336 ALR 209 to support the view that 'likely' should not be treated as a synonym for 'probably'.
114. That approach was resisted by the applicants.
115. X Corp. submitted that I could be fortified in the conclusion that 'likely' should be understood as more probable than not, by the use of the word 'would' in paragraph 1(b). The word 'would' conveys the definiteness of the conclusion that the ordinary reasonable person must reach. X Corp. highlighted that there were available alternatives that would keep the proposition posed as a hypothetical, without the need for such a definite finding. Substituting 'might' for 'would' was available if a less definite conclusion was all that the Parliament required.
116. I am persuaded that the interpretation X Corp. advances is correct.
117. First, read as a whole the phrase 'would conclude that it is likely' does convey the need for a more definite conclusion than that something is possible or a 'real chance'.
118. Second, the EM reveals that Parliament was intending to impose a more difficult standard to meet in relation to cyber-abuse targeted at an Australian adult, than had been imposed in relation to cyber-bullying of children. To allow a finding of cyber-abuse where the Intention Element is established only to the level of a 'real chance' is not consistent with a more stringent standard being applied.
119. Third, the statutory context is unusual. It requires a reasonable person to form a considered view about whether an effect of causing serious harm was intended. A finding by the ordinary reasonable person that a person was setting out to cause serious harm to another is a serious, adverse finding with implications for freedom of expression. It is not the kind of finding that should be made when it is only possible that serious harm was intended.

³⁹ *Boughey v The Queen* (1986) 161 CLR 10, [21].

120. In such circumstances, I am satisfied that the ordinary meaning of the word 'likely' should be adopted which is 'probable'. The ordinary reasonable person would have to conclude that it is more likely than not that the material was intended to cause serious harm before the Intention Element is satisfied.

Other elements of the definition

What is the material?

121. There was agreement between the parties that the 'material' was constituted by the post with its link to the Daily Mail article.
122. The material does not include comments in response to the post. This is not to say that the comments and reactions responsive to the post are irrelevant to the analysis of whether the Intention Element is satisfied, but they do not form part of the material that is the subject of the complaint or the removal notice.
123. The material associated with the post remains relevant for assessing the Intention Element. If there was a powerful and predictable reaction to the posting of material that was likely to cause serious harm, then that is highly relevant to the analysis of what could be concluded about the poster's intention. If there was no reason to predict the response, then the reactions are unlikely to shed any light on the intention of the person posting.

What is serious harm?

124. Serious harm is defined in s 5 of the OLS Act to mean serious harm to a person's mental health, whether temporary or permanent.
125. Section 5 also provides that serious harm to a person's mental health includes:

(a) serious psychological harm; and

(b) serious distress;

but does not include mere ordinary emotional reactions such as those of only distress, grief, fear or anger.

126. In this context, it is worth noting that there is no burden on the Commissioner to establish that serious harm was caused to any person by the posting of the material. The threshold depends upon a prediction about what an ordinary reasonable person would conclude was intended. Equally, if serious harm was in fact the result of the post, in many cases that would shed little or no light on whether the Intention Element was satisfied, particularly if that was not a result that could be predicted at the time the post was made.
127. A considerable portion of the hearing was occupied with whether the test for serious psychological harm requires a medical threshold to be passed. The medical evidence put forward on this question was of little assistance. I am satisfied that 'serious distress' is not a medical illness known to the psychiatric profession and consequently the intention of the poster does not need to be the infliction of a psychiatric illness. The post does however need to be designed to do more than upset someone. 'Serious distress' carries with it connotations of a powerful adverse psychological reaction. Dr Gurvinder Kalra, a Consultant Psychiatrist suggested that the phrase carried with it a requirement of significant decline in the individual's functioning in their day-to-day life activities such as self-care, study, work or relationships and/or that distress is accompanied by risky thoughts or ideations (such as that of self-harm or suicide). Those features seem consistent with the level of distress that the Parliament was seeking to identify, although I would add that in the absence of risky thoughts, some persistence in the significant decline in function would be necessary to attract the description of 'serious distress'. It is difficult to say more about the concept than that without resorting to unhelpful synonyms.

Summary of the test

128. It follows from this analysis, that when considering the Intention Element the decision maker must ask whether:
- (a) an ordinary reasonable person, with access to all of the evidence that the decision maker has access to,
 - (b) would conclude that it is likely (in the sense of being more probable than not);
 - (c) that one of the effects that the poster intended to cause when providing the material on the social media service, included the effect of causing serious harm to a particular Australian adult including by inducing serious distress.

FACTUAL FINDINGS

129. The following are my findings of fact. To the extent that any are controversial I have set out my reasons for the conclusion and identified the evidence on which it is based.
130. On or about 27 February 2024 the online newspaper the Daily Mail published an article which referred extensively to Teddy Cook. Mr Cook is a transgender person (born female who identifies as male) and an Australian citizen and resident. The evidence about him that I have access to is limited to what is included in the newspaper article and his complaint to the Commissioner. As previously noted, the Daily Mail article related to an advisory committee appointed by the WHO to advise on issues of transgender and non-binary persons' health. The article published biographical details about some of the committee members including Mr Cook, but Mr Cook was the subject of the bulk of the article. The news article was published under the headline *'Kinky secrets of UN trans expert REVEALED: Australian activist plugs bondage, bestiality, nudism, drugs, and tax-funded sex-change ops – so why is he giving health advice for the world body?'*
131. The article was read by Christopher Elston.
132. Mr Elston is a Canadian citizen who lives in Canada. He can fairly be described as an activist. His activism began in 2019 when he became aware of the increasing numbers of children in Canada and in other Western countries who were experiencing distress about their sex, and who were being given puberty blocking drugs. In July 2020, he saw news reports of a woman in the UK who put up a sign that said 'I ♥ JK Rowling' which was taken down after one day by the Scottish train authority following Twitter complaints. In September 2020, Mr Elston decided to pay for a billboard on the side of a street in Vancouver that said 'I ♥ JK Rowling'. While JK Rowling is most famous as the author of the Harry Potter series of books, she has also become a controversial figure as a result of her public opposition to transgender rights, particularly when they come into conflict with women's safety. He followed up his sign in Vancouver with dozens more throughout the USA. His goal in doing so was 'to start conversations and raise awareness about the dangers of childhood transition.'

133. The sign in Vancouver was promptly taken down, and sign companies in Canada refuse to put up his signs 'because they don't want the political pressure'.⁴⁰
134. As a result, Mr Elston started designing his own signs and started wearing them and having conversations in downtown Vancouver. He quit his job as a financial advisor and is more or less a full-time activist. He wears signs with slogans like:
- Children cannot consent to puberty blockers
 - "Dad"/dad/noun A human male who protects his kids from gender ideology
 - Gender ideology does not belong in schools
 - Children are never born in the wrong body.
135. He travels internationally speaking publicly and wearing his billboards. He is opposed to gender transitions for children and the claims about gender that sit behind the arguments of its supporters and promoters.
136. He is known on the internet as 'Billboard Chris'.
137. He owns and operates the website at the URL: <https://billboardchris.com/>. He also creates online content that is accessible on X, Instagram and Youtube. He has 426,000 followers on X, 35,400 followers on Instagram and 10,800 subscribers on Youtube. He records conversations that he has on the street and posts some of them to social media.
138. On some occasions, he has experienced strong negative reactions to his activism. He has been assaulted more than 30 times and had his arm broken when attacked in Montreal. He has been punched, spat on and had property stolen or damaged. He appreciates as a result of his experiences, that people can get extremely upset to the point of lashing out just as a consequence of seeing his signs.
139. He keeps his 'followers up to date on all breaking news'.

⁴⁰ Transcript, 73.

140. He does not believe that a man can transition to being a woman or vice versa. He summarises his position as follows:

Because I believe that sex is immutable, I am personally convicted that I will not use incorrect pronouns to describe any person, including trans-identifying people who identify as the opposite sex. I will use their preferred names, but I only use sex-based pronouns, because I don't think it is loving, progressive, or ethical to lie to a person and affirm that they are something that they are not.

I believe that calling a man a woman (and vice versa) is not only untrue, but also has implications for the rights and safety of women and children.

141. I am satisfied that it is his universal practice to refer to a transgender person by the pronouns that correspond to their biological sex at birth. I am also satisfied that when he classifies a person as either a man or a woman, he determines which classification to use by reference to their biological sex at birth, rather than the gender related characteristics that they currently express. I am satisfied that he believes doing otherwise has implications for the rights and safety of women and children. I am satisfied that he knows that his practice in this regard is offensive to people who identify as transgender.
142. Mr Elston read the Daily Mail article described above on 28 February 2024. Prior to reading the article, he had never heard of Mr Cook. At the time he read the article it included a number of photos. One photo depicted Mr Cook wearing some type of harness and another depicted a large black dog penetrating a man from behind. The Daily Mail article stated that the photos had been posted on one of Mr Cook's social media accounts. Some of the published pictures included an Instagram handle.⁴¹
143. Soon after reading the article, Mr Elston re-posted the article on his X account @BillboardChris with the caption:
- This woman (yes, she's female) is part of a panel of 20 'experts' hired by the @WHO to draft their policy on caring for 'transpeople.' People who belong in psychiatric wards are writing the guidelines for people who belong in psychiatric wards'
144. Only one X handle was included in the post, that of the WHO.
145. The effect of the use of a handle on the X platform is that the person will be notified about the post and it may be displayed on their feed and the feed of their followers.

⁴¹ Exhibit XC-4, 8.

146. Mr Elston gave the following evidence relevant to determining what he intended in publishing the post:

The reason I posted the Relevant Post is because I am concerned about the potential ramifications of having someone who had, according to the Daily Mail article, interest in bestiality, bondage, porn, queer theory, mutilation, and taxpayer-funded sex changes, being appointed to the World Health Organisation (WHO) to advise on the international policies and guidelines on trans healthcare. My understanding from reading the Daily Mail article is that Teddy Cook does not have any medical qualifications or certifications that would make Teddy Cook a qualified medical expert. She is just an activist.

It is my personal belief that people who have serious mental health issues, such as gender dysphoria, should not be responsible for drafting health care policy for other people struggling with serious mental health issues. I saw the Daily Mail article as an opportunity to spread awareness about who is responsible for making recommendations to the largest public health organisation in the world.

After seeing the Daily Mail article, I composed the Relevant Post to criticise Teddy Cook's appointment to the WHO advisory board.

I did not post the Relevant Post with the intention to cause Teddy Cook any harm or embarrassment. I posted the Relevant Post to raise awareness about who the WHO was appointing to advise on the serious medical treatment of trans-identified individuals, who frequently have numerous mental health comorbidities. Gender dysphoria is a mental disorder currently listed in the DSM-V. Paraphilic disorders are also listed in the DSM-V, such as zoophilia, which Teddy Cook had promoted on her social media.

Psychiatric disorders and suicidality, which often accompany mental illnesses such as gender dysphoria, are often treated on psychiatric wards. My post was not saying that all people identifying as trans belong on a psychiatric ward. It was a criticism that people with psychiatric conditions are drafting policy for people with psychiatric conditions, because that is exactly what is happening.

My post was also a criticism of a political individual, Teddy Cook, who had just been assigned to a very important position at the World Health Organization. Public individuals in political positions are certainly open to critique.

I posted the Relevant Post and then carried on with my day. I did not think about it again until I was provided a copy of the removal notice.

147. I approach this evidence with some caution. In particular the statement 'My post was not saying that all people identifying as trans belong in a psychiatric ward. It was a criticism that people with psychiatric conditions are drafting policy for people with psychiatric conditions'.
148. That is not what the post says. This evidence, along with a number of Mr Elston's answers in cross-examination sought to soften the more literal meaning that the post conveys that transgender people belong in psychiatric wards. Despite his evidence I am satisfied that an ordinary reasonable person would read the post as saying that transgender people, including Mr Cook, belong in a psychiatric ward.

149. People following Mr Elston on X would have had his comment included in their feed along with a link to the Daily Mail article. There is no evidence before me that suggests that at the time Mr Elston uploaded his post to X, Mr Cook was following him on X.
150. There is no evidence that Mr Elston sought to distribute his post beyond people who were already following him. His contribution did not appear as a comment on the Daily Mail website.
151. Mr Cook became aware that the Daily Mail article was about to be published on 28 February 2024, when the journalist contacted him seeking comment.
152. The email from the journalist said the following:

Hello Teddy

I hope you're doing well today.

I'm writing again for DailyMail.com about WHO's trans health panel, in particular panellist Teddy Cook.

It covers social media posts and research about everything from bondage to bestiality, nudism, drugs, and tax-funded sex change ops.

If you'd like to comment for the article, please reach out soonest.

Deadline: upon receipt/as soon as practicable

Outlet: DailyMail.com

Let me know, thanks and best! James

153. The following day, when the article was published Mr Cook lodged a complaint with the eSafety Commissioner. The Commissioner has an online form that Mr Cook completed. In the 'What is Happening?' section of the online form, Mr Cook wrote the following:

Hello – this article was published yesterday by the Daily Mail using images without my consent, including a disgusting image of bestiality that I've never seen before in my life but has been linked to me.

The article is here: <https://www.dao.u.au/cp/il/news/article-13119521/Sex-secrets-trans-kinky-Australian-bondage-bestiality-nudism-drugs-sex-change.html>

Twitter has exploded about this article, with Katherine Deves sharing it and individuals like Kit Kowalski continuing to share videos and imagery of me without my consent, with commentary that is truly so transphobic and homophobic. My family and friends are really distressed, and I would like the twitter photo to be removed at the very least.

154. In the 'Where is it happening?' section Mr Cook responded as follows:

Where has the cyber-abuse been happening? (on what platform)

Provider Name

Twitter

Have you reported to the provider?

Yes

When did you report?

28/02/2024

Is the material still online?

Yes

Please provide URLs where we can see the material

<https://twitter.com/jamesrein/status/1762518052707438857>

https://twitter.com/deves_katherine/status/1762592151106707484

https://twitter.com/Billboard_Chri/status/1762620001696244063

<https://twitter.com/MrMennoTweets/status/1762829545596444962>

<https://twitter.com/Lpwa;sloLot/status/1762064796344868937>

Your username

[redacted]

Please provide username(s) of the person posting the material (one per line)

Jamesreinl, deves_katherine, BillboardChris, MrMennoTweets, KowalskiKit

155. There is no evidence available to me about how the applicant became aware of the post by Mr Elston.

156. Staff for the Commissioner responded on 1 March 2024 and advised that the Daily Mail article and the X posts had been reviewed resulting in the following action:

We have sent an informal request to X regarding the post shared by @BillboardChris for them to review and consider appropriate action under their policies. We will let you know once we receive an update from them.

From what we can see, the X post by @jamesreinl has already been removed. Unfortunately, the remaining material that you reported to us, including the Daily Mail article, does not meet the criteria under the Act for us to seek removal action.

We recommend that you consider reporting the Daily Mail article to the Australian Press Council. You can also consider reporting the X posts directly to X. We have included information on how to make these reports below.

157. On the evidence available to the Tribunal it appears that Mr Menno also misgendered Mr Cook, which suggests that it is not that aspect of Mr Elston's post that initially prompted action by the Commissioner's staff.

158. On 8 March 2024, Commission staff updated Mr Cook concerning his complaint:

We received a response from X regarding the post shared by @BillboardChris (<https://twitter.com/BillboardChris/status/1762620001696244063>).<https://twitter.com/BillboardChris/status/1762620001696244063>). Unfortunately, X did not take any action against the post as they did not find it to be in violation of the X rules.

We are considering our formal powers under the Online Safety Act 2021 to seek removal of the post...

159. Mr Cook responded as follows:

Thanks so much for your response, it's so appreciated.

Attached are screen shots of my report. I haven't heard anything from X yet either. I can see that the bestiality pic (which is a photo I took in 2013 of an artwork at MONA in Hobart), has been changed to me in a back brace.

Take care and thanks again.

160. On 22 March 2024 a delegate of the Commissioner made a decision to issue a removal notice for the reasons extracted at paragraph 11 above. Review of that decision has now been sought.

161. After the post was removed, Mr Elston posted a further 31 times in relation to Mr Cook. Posts concerning Mr Cook by Mr Elston had a total of 18,206 reposts, 84,415 likes, 2774 replies, and 6,661,954 views.

EXPERT EVIDENCE

162. A large volume of what was described as expert evidence was filed in the proceedings and the oral evidence of these experts occupied a significant amount of hearing time. It fell into five broad categories:

- (a) Evidence about the sociological functioning of the internet generally and evidence about the functioning of the X platform in particular;
- (b) Medical evidence about the effect on a trans person of misgendering;

- (c) Non-medical evidence about digital harms caused by posts;
 - (d) Medical evidence about the threshold for 'serious distress' and other aspects of the definition of 'serious harm to a person's mental health';
 - (e) Evidence about what could be broadly described as transgender issues and the public debate in relation to them.
163. Because the Commissioner took the approach that the range of material that could be considered when determining whether the Intention Element was satisfied was limited, there was less focus in submissions on how the available evidence should be deployed when considering whether the necessary components of the Intention Element were satisfied.

Evidence about the X Platform and the Internet

164. In my assessment, the evidence about the functioning of the internet and the functionality of the X platform provided some useful factual information that shed light on the question of intention. Associate Professor Timothy Graham explained aspects of it in his report which are relevant and useful. Some of what follows will be self-evident to regular users of the platform, but it is useful to record as the detail about how the platform works gives some insight into what posters may intend.
165. The most important function available to X account holders is the ability to post. When Twitter first started up posts initially were limited to 140 characters. Then the limit was moved to 280 characters. X Premium subscribers, of which Mr Elston is one, can upload posts of up to 10,000 characters.
166. People who are interested in posts generated by a person can become a follower. When a person is a follower and the person they are following posts, they are either alerted to the post, or, the post is included in the followers feed.
167. Mr Elston posts content. It is available to his followers. His followers can interact with the post by sharing the post with their followers. This is done by re-posting. Users can also 'like'

a post. At the time Mr Elston posted the material, if a person 'liked' a post, the fact that they had done so became publicly known.⁴²

168. X uses likes and reposts to determine which content is attracting interest. Significant attention can result in X identifying the post as a trending topic which can attract further attention. When a person posts, other users can post comments on the post. This involves placing comments underneath the post which become visible to anyone accessing the post who decides to review the comments.
169. Associate Professor Graham noted that 'savvy users can exploit algorithmic media environments to spread hate speech...'.⁴³ He noted that the comments section of a post can be used for a range of purposes including to express agreement 'or to criticise and/or abuse the author; known as a 'pile-on'.
170. Associate Professor Graham notes that 'political activists use [X] to galvanise support, spread preferred messaging, and call people to action...Power users such as activists and influencers with large followership attract more views and more participation, simply by virtue of their content being displayed on more peoples' feeds (because those accounts are followers of the power user). This political commentary has a more 'mass communication' logic, as the message is transmitted from one to many.'⁴⁴
171. Associate Professor Graham also provided the following information about online abuse:

Online abuse can be coordinated and targeted at an individual, known as digital hostility, and can lead to serious harm including suicide. A multitude of studies highlighted the pervasive problem of harassment of public figures on Twitter, particularly female journalists. We also know that posts and replies on the platform are used not only as a way for individuals to express their opinion but also to coordinate together to harass and/or abuse individuals, by flooding their comment threads with hateful and uncivil messages, or by posting and mentioning their name and/or username handle repeatedly and in a synchronised fashion to overwhelm and intimidate them.⁴⁵ [references omitted]
172. He also identified a form of abuse called 'brigading', which involved coordinated and organised efforts to overwhelm and intimidate targets through repeated, high-volume

⁴² This function has since been altered by X.

⁴³ Exhibit ES-2, 4.

⁴⁴ Ibid, 9.

⁴⁵ Ibid.

messaging and actions on social media (e.g. reposting and @mentioning or by getting pejorative hashtags or keywords about targets to reach the top trending list).⁴⁶

173. Associate Professor Graham also noted that ‘we cannot determine the intent of the poster based on analysis of the content of the post or any other data on the platform. However, we can gain a better understanding of the *potential* motivations and *possible* intent by undertaking an exploratory analysis of the characteristics of the account profile’⁴⁷ which he then proceeded to do.
174. In light of the concession made at the beginning of the analysis that any firm conclusions about Mr Elston’s intent cannot be drawn, it is difficult to draw any assistance from the remainder of Associate Professor Graham’s report. Even if that were not the case, the report’s conclusions which include that Mr Elston was seeking to trigger a pile-on by including the @WHO handle, are unconvincing. None of Mr Elston’s conduct appears to match the coordinated conduct identified by Associate Professor Graham as indicative of a person planning to generate offensive traffic to a particular user.

Medical evidence concerning serious distress

175. As I have already noted the medical evidence concerning what would constitute ‘serious distress’ was not helpful. The experts attempted to use medical expertise to address the question of whether the statutory phrase ‘serious distress’ required the existence of a diagnosable psychological condition. The meaning of the phrase ‘serious distress’ is for the Tribunal to determine, and not a matter of expert opinion.

Medical evidence concerning the effect of post and misgendering in particular

176. The expert medical evidence on the effect of misgendering needs to be approached with some caution. Stated broadly the question the evidence addresses is whether misgendering (or other aspects of the post) could cause, or was likely to cause, serious distress to a transgender person. While this might be a helpful foundation upon which further evidence can build, it is not the statutory question that the Tribunal must address. The question to be

⁴⁶ Ibid.

⁴⁷ Ibid, 12.

determined is whether an ordinary reasonable person would draw a conclusion that the poster intended to cause serious harm, which includes serious distress.⁴⁸ Some subjective knowledge on the part of Mr Elston is required.

177. There is no evidence of that kind before the Tribunal. The position taken by the Commissioner was that the ordinary reasonable person would appreciate that to call a transgender man a woman would be to act contrary to the transgender man's wishes. So much can be accepted. However, it does not lay much of a foundation for concluding that Mr Elston intended to cause Mr Cook serious harm simply because he went against his wishes.
178. In terms of Mr Elston's subjective knowledge, the highest the evidence rose was his concession in cross-examination that in the course of his activism he has seen his signs evoke 'a variety of responses...sometimes my signs elicit negative responses from people which can include verbal abuse or physical abuse.'⁴⁹ He was also aware that suicidal ideation among transgender persons who have undergone sex reassignment surgeries was significantly higher than the general population.⁵⁰
179. In these circumstances, the medical evidence that misgendering could cause serious distress provides only limited assistance. The assistance is diminished further because there was little agreement between the expert psychiatrists.
180. Dr Amos described the literature on the psychological impact of online misgendering on transgender adults as sparse. When he applied a model known as 'Testa's model of minority stress' he concluded:

- (a) The impact of cyber-bullying (a phrase he is using to cover both cyber-abuse and cyber-bullying as defined in the OLS Act) on an individual depends on their existing characteristics including resilience, existing mental illnesses, social supports, and social media habits; and

⁴⁸ This is a rough paraphrase of the test to allow focus on the element of the test relevant to the discussion.

⁴⁹ Transcript, 79.

⁵⁰ Transcript, 84.

- (b) The impact of cyber-bullying depends on the frequency, persistence, and severity of the bullying actions, such that a single action is much less likely than a frequent, persistent pattern of cyber-bullying to cause serious psychological harm or serious distress; and serious psychological harm or serious distress are more likely with severe and/or frequent events;
- (c) Thus, the research suggests that a single social media post is unlikely to cause serious psychological harm or serious distress over and above ordinary emotional reactions. A single post with extreme material such as specific and credible threats or video with violent, sexual, or other disturbing content might interact with pre-existing specific stressors such as mental illness to produce serious psychological harm or serious distress. Similarly, multiple posts over a sustained period of time would increase the likelihood of serious psychological harm or serious distress.
181. Dr Kalra's view described a range of symptoms consistent with serious distress.⁵¹ He was of the view that distress due to misgendering 'could take the form of any of the symptoms discussed and can lead to suicidal ideations'. When Dr Kalra applied Testa's Gender Minority Stress framework, he concluded that the interplay between stress factors and resilience factors is quite complex, unique for each individual and unpredictable at best.
182. Dr Kalra concluded about the effect of the post:
- I would argue that if the said transgender person was part of a/the WHO expert panel to draft policy on caring for trans people, the post then is an attack on their work as an expert in the field and is likely to result in serious distress and/or serious injury for the said individual.
183. The views of the experts were so far apart that it was difficult to form any firm conclusions by reference to it.

Non-medical reports on potential harms from posts

184. The Commissioner also relied on a report by Professor Cover. Professor Cover provided useful information about the ways in which platforms increase the prominence of hostile material. However, much of his report was concerned with whether certain behaviour was

⁵¹ Exhibit ES-3, 4.

harmful. Professor Cover had no medical qualifications and had never obtained a qualification in psychology or held an academic position in a psychology. It was unclear in what sense his opinions were expert opinions.

185. Further, the questions addressed to Professor Cover did not use the same terminology as is found in the OLS Act. In particular, Professor Cover adopted the language of 'digital harm' which was not restricted to 'serious harm' as defined in the OLS Act.
186. Apart from the information concerning the operation of platforms, I was not assisted by the report of Professor Cover.

Evidence about transgender issues and the public debate in relation to them

187. I considered the report of Professor Parkinson and the witness statement of Senator Antic which provided background to the transgender debate in Australia more broadly. Neither statement provided assistance on the application of the statutory test to the particular facts of this case.

APPLICATION OF LEGAL TEST TO THE FACTS

188. The material that must be considered is the single post referred to at paragraph 8 above. It was posted to a social media service on 28 February 2024. I am satisfied that an ordinary reasonable person in Mr Cook's position would regard the material posted as offensive. I am satisfied that a transperson who identifies as a man, would regard being referred to as a woman as offensive and would regard being referred to as an appropriate subject for in-patient psychiatric treatment as offensive. I am satisfied that the ordinary reasonable person reading the post would conclude that the phrase 'people who belong in a psychiatric ward are now writing guidelines...' refers to Mr Cook along with the other transgender members of the WHO committee referred to in the Daily Mail article. The requirements of paragraph 7(1)(b) are satisfied. The only issue of real dispute is whether the Intention Element is satisfied.
189. The Commissioner contends that the ordinary reasonable person would conclude that the material was intended to have an effect of causing serious harm to Teddy Cook.

190. The Commissioner notes that the post was critical of Mr Cook in a deeply personal way, denying and deriding his transgender identity, impugning his mental health, mocking his appearance and diminishing his employment and expertise. Further, the post was likely to direct other criticism towards Mr Cook including from Mr Elston's followers and that can increase distress. The post facilitated vitriol towards Mr Cook by spreading personal information from his name to his appearance to his place of work.
191. I accept the characterisation of the post set out in the first sentence. Read in isolation, the post looks to be an attempt to wound Mr Cook and upset him and cause him distress, perhaps even serious distress. If an ordinary reasonable person was only aware of the post, then it may be open to find that the poster's intention was likely to be to cause serious harm to Mr Cook. However, when the broader context is known and understood, it is difficult to read the post as intended to harm Mr Cook, or intended to have others direct criticism towards Mr Cook or designed to facilitate vitriol by spreading personal information about him.
192. In applying the facts to the Intention Element it is important to keep in mind that in regulating cyber-abuse of an Australian adult, the Parliament was not seeking to control or regulate debate on controversial issues, nor to manage or set minimum standards of courtesy as to how such debates should be conducted. The provisions extended anti-bullying protections from children to Australian adults. They were designed to protect individuals from specific online attacks that can reasonably be understood as having the intention⁵² of causing serious harm to them in particular.
193. When all of the evidence is considered, I am not satisfied that an ordinary reasonable person would conclude that it was likely that Mr Elston intended the post to have an effect of causing serious harm to Mr Cook – in the sense of serious distress, physical harm or harm to his mental health. I don't doubt that Mr Elston was indifferent to whether his post had that effect, but that is not sufficient to establish intention. An ordinary reasonable person would not conclude that it is likely that the infliction of serious harm was an effect he intended.

⁵² An intention that can be one of many.

194. The factors which favour this conclusion are as follows.
195. First, Mr Elston denies that he intended to cause serious harm, or any harm, to Mr Cook. This denial is credible in light of what else is known about Mr Elston. As previously discussed, Mr Elston's denial of a subjective intention to harm is relevant to the question of what the ordinary reasonable person might conclude but is by no means conclusive. If Mr Elston had admitted he intended to cause serious harm, then his stated, subjective intention would take on greater significance.
196. Second, Mr Elston did not know of Mr Cook prior to publication of the Daily Mail article and prior to the publication of his post. This rules out any personal motivator for trying to harm Mr Cook and significantly reduces the likelihood that the post is intended to harm Mr Cook in particular rather than make the broader political point that Mr Elston has identified.⁵³ Mr Elston provides an explanation as to why he made the post that is consistent with him doing so for reasons that do not include causing Mr Cook harm. He misgendered Mr Cook because it is his universal practice to refer to people who identify as trans by pronouns and descriptors that correspond to their biological sex at birth. He does this to reflect his belief that doing otherwise involves an untrue statement and because doing otherwise has implications for the rights and safety of women and children.
197. Third, Mr Elston did not take steps to draw the post to the attention of Mr Cook. The post looks to be the kind of post that Mr Elston's followers appreciate, but not one that Mr Elston specifically intended would be drawn to Mr Cook's attention. For the post to do any harm it needed to be read by Mr Cook. While I am satisfied that Mr Elston was indifferent to whether the post did come to Mr Cook's attention and indifferent to whether or not it distressed him, there is no evidence to support the conclusion that the post was made with the intention of it being brought to Mr Cook's attention.

⁵³ In noting the absence of any prior relationship between Teddy Cook and Mr Elston, this does not mean that the poster and the subject need to have a pre-existing relationship for cyber-abuse to occur. A person could form a desire to harm someone just from reading material on-line about them. A person may have a general hostility to their ideological opponents that gives them a desire to harm them and which manifests in a single post. But in this case, there is nothing about Mr Elston's conduct that would suggest to an impartial observer that following his reading of the Daily Mail article he formed an intention to harm Mr Cook by the publication of his post.

198. If it had been Mr Elston's intention to abuse Mr Cook and thereby cause him serious harm, there are a number of ways in which he could have increased the likelihood of his attack being brought to his attention. The first would have been to engage with the comments section of the news article. The second would have been to take steps to find and use Mr Cook's X handle. The third would be to post on Instagram and include what appears to be Mr Cook's Instagram handle from the photos published in the Daily Mail in any post. Any of these steps would have demonstrated a desire to ensure Mr Cook read the post. These steps would reveal an intention to draw the offensive remarks to his attention. He took none of these steps. In the absence of any steps being taken to bring the post to Mr Cook's attention, it is difficult to discern any intention to cause him serious harm when the post was only published to Mr Elston's followers.
199. The Commissioner's position is that I should find that when the post was made it was inevitable that the post would come to Mr Cook's attention.⁵⁴ I am not aware of any basis on which I could conclude that, and the Commissioner did not refer me to any relevant evidence. In the absence of a finding to that effect, it is difficult for a reasonable person to find that Mr Elston intended to cause Mr Cook serious harm by making the post.
200. It is notable that Mr Elston only included the handle for the WHO in his post and there is nothing in the body of the post that attempts to facilitate the contacting of Mr Cook by Mr Elston's followers. Mr Cook's name is not used in the body of the post.
201. The inclusion of the @WHO handle is consistent with Mr Elston's expressed view that he was concerned about the ramifications of having Mr Cook appointed to advise the WHO and is not consistent with an intention on Mr Elston's part to harm Mr Cook in the relevant sense. I accept that one of Mr Elston's goals in posting was to encourage the WTO to reconsider the appointment of Mr Cook to the panel that advises the WHO on transgender health. But forming an intention to harm a person's career is not what is prohibited by the cyber-abuse provisions. Intending to harm a person's physical or mental health is the prohibited intention.

⁵⁴ Transcript, 243.

202. Fourth, the post and its context does not suggest that in making the post Mr Elston was seeking to trigger a pile on. To the extent that Mr Elston's post revealed anything about Mr Cook, his work or his identity, it was the result of reproducing information that was already in the public domain following the Daily Mail article. Associate Professor Graham in his report noted that:

Online abuse can be coordinated and targeted at an individual, known as digital hostility, and can lead to serious harm including suicide. A multitude of studies highlighted the pervasive problem of harassment of public figures on Twitter, particularly female journalists. We also know that posts and replies on the platform are used not only as a way for individuals to express their opinion but also to coordinate together to harass and/or abuse individuals by flooding their comment threads with hateful and uncivil messages or by posting and mentioning their name and/or username handle repeatedly and in a synchronised fashion to overwhelm and intimidate them. [references omitted]

203. Other conduct mentioned by Associate Professor Graham as used to engage in coordinated and organised efforts to overwhelm and intimidate targets through repeated, high-volume messaging and actions on social media include reposting and @mentioning or by getting pejorative hashtags or keywords about targets to reach the top trending list. Mr Elston made a single post. He did not seek out and re-post other posts hostile to Mr Cook. He did not use Mr Cook's name in the post itself or any hashtag or @mention of Mr Cook.
204. Mr Elston did not initiate the focus on Mr Cook. The reason Mr Cook is the subject of a post is the result of the article published by the Daily Mail not from any specific desire to single out Mr Cook on the part of Mr Elston.
205. To the extent that there was any 'pile-on', and I would not classify what occurred as one, it was initiated by the Daily Mail and not by Mr Elston.
206. Consequently, the intention to cause serious harm must be discerned from a single post as there is no other behaviour that is supportive of a conclusion that the post was designed to trigger something more widespread.
207. The post, although phrased offensively, is consistent with views Mr Elston has expressed elsewhere in circumstances where the expression of the view had no malicious intent. For example, his statement placed on billboards that he is prepared to wear in public 'children are never born in the wrong body' expresses the same idea about the immutability of biology that he expresses, albeit much more provocatively, in the post.

When the evidence is considered as a whole I am not satisfied that an ordinary reasonable person would conclude that by making the post Mr Elston intended to cause Mr Cook serious harm. In the absence of any evidence that Mr Elston intended that Mr Cook would receive and read the post, and in light of the broader explanation as to why Mr Elston made the post, I am satisfied that an ordinary reasonable person would not conclude that that it is likely that the post was intended to have an effect of causing serious harm to Mr Cook.

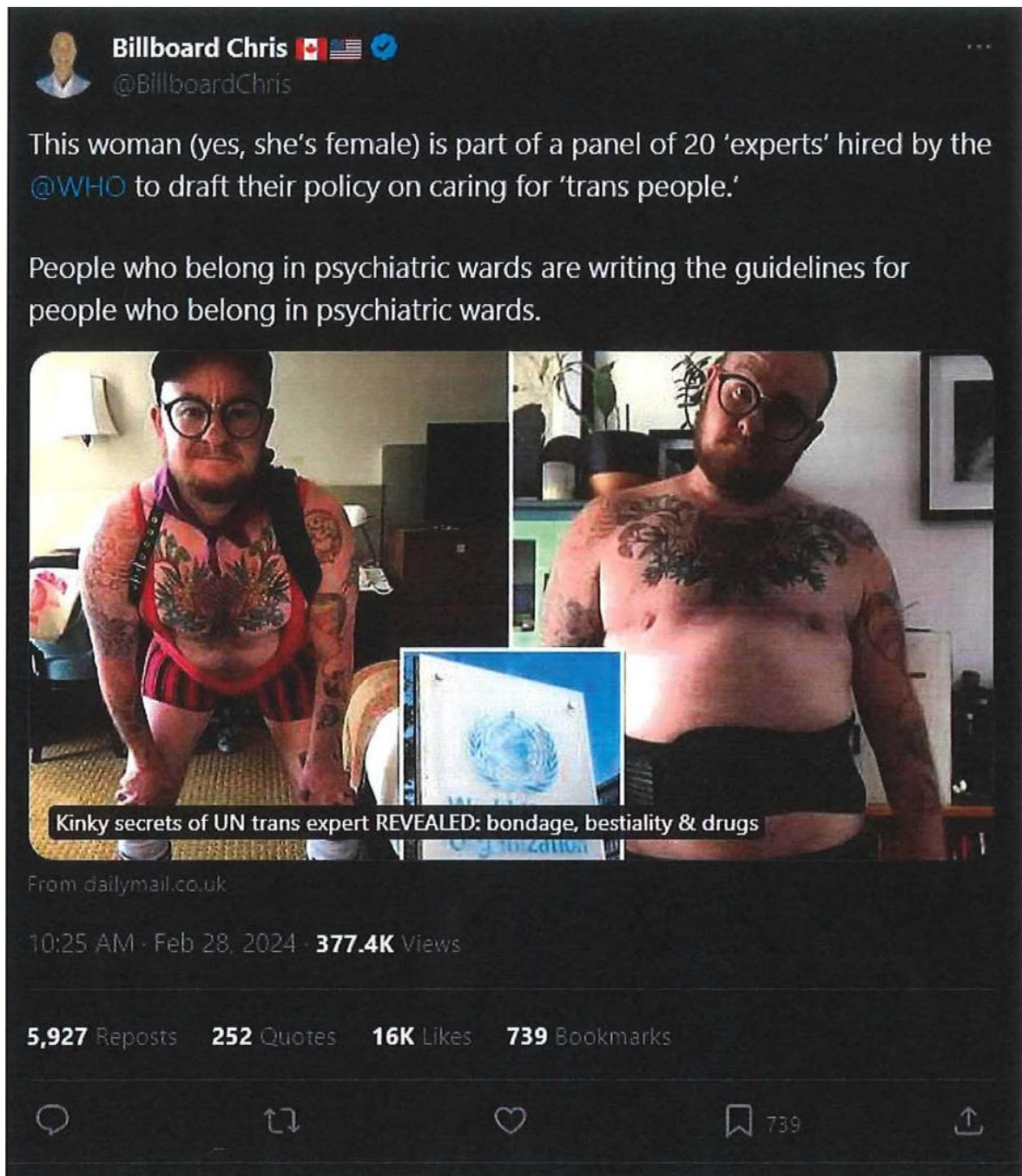
208. Consequently the Intention Element is not made out and the statutory preconditions for issuing a removal notice are not satisfied.

DECISION

209. The decision to issue a removal notice is set aside. A decision to refuse to issue a removal notice is substituted.

Dates of hearing:	31 March 2025 to 4 April 2025
Counsel for X Corp.:	Emrys Nekvapil SC and Matthew Albert
Solicitors for X Corp.:	Thompson Greer
Counsel for Mr Elston:	Stephen Moloney, Owen Wolahan and Nina Vallins
Solicitors for Mr Elston:	Human Rights Law Alliance
Counsel for the Respondent:	Christopher Tran and Olivia Cameron
Solicitors for the Respondent:	Australian Government Solicitor

ATTACHMENT A: IMAGE OF THE RELEVANT POST



ATTACHMENT B: EXHIBIT REGISTER

Exhibit No	Document	Date Exhibited
CE-1	Statement of Mr Christopher Elston dated 28 June 2024	1 April 2025
XC-1	Statement of Senator Alexander Antic dated 4 July 2024	1 April 2025
CE-2	Report of Dr Andrew Amos dated 22 June 2024	1 April 2025
XC-2	Report of Dr Jill Reddan dated 20 June 2024	1 April 2025
XC-3	Report of Professor Chris Berg dated 28 March 2025 and Annexure	1 April 2025
CE-3	Report of Professor Patrick Parkinson dated 28 June 2024 (TB 113-193)	2 April 2025
ES-1	Report of Professor Rob Cover dated 30 August 2024 as modified following rulings	2 April 2025
ES-2	Report of Associate Professor Timothy Graham dated 2 September 2024 as modified following rulings	2 April 2025
ES-3	Report of Dr Gurvinder Kalra dated 4 September 2024	3 April 2025
ES-4	Extract of APA DSM-5	4 April 2025

ES-5	Article 'Development of the Gender Minority Stress and Resilience Measure'	4 April 2025
ES-6	Article 'Him, her, them, or neither: Misgendering and degendering of transgender individuals'	4 April 2025
ES-7	Article 'A Minority Stress Perspective on Transgender Individuals' Experiences With Misgendering'	4 April 2025
T-DOCS (2024/2582)	T-Documents (2024/2582)	4 April 2025
T-DOCS (2024/2583)	T-Documents (2025/2583)	4 April 2025
XC-4	Witness Statement of Justin Quill dated 1 July 2024 and Annexure	4 April 2025
XC-5	Witness Statement of Justin Quill dated 14 October 2024 and Annexure	4 April 2025