Electronic Frontier Foundation Oral and Written Submission
Proposed Amendments to Clusters 1 and 2
January 16, 2023

The Electronic Frontier Foundation would like to signal its continued appreciation for the opportunity to provide input into the development of this Convention. We want to thank the Secretariat for promoting inclusive multi-stakeholder participation in the global or regional debate on e-evidence and cybercrime.

Today, our remarks focus on the proposed offenses in Clusters 5 and 7.

For each of these clusters, we restate our previous objection that content crimes are not a proper subject for this treaty, but rather are better addressed in other laws since they do not necessarily require the use of computer systems, and in many cases are already made illegal regardless of the medium.

Should these topics nevertheless remain in the Treaty, we note our concerns with the following:

Cluster 5:

- Given that these provisions are specific to the use of a computer or information and communications technology, they potentially apply numerous deep "stack" of online services commonly used in any online transmission of information. Any law so focused must thus carefully consider how deep into the stack its application is attended and use precise terms to limit imposing liability on those removed from the actual wrongdoing. The law must be precise in its terms both as to what acts violate the law and what acts involved in the provision of computer services are intended to be covered.
    - The term "facilitate," as used in proposed Articles 18(1)(b) and 19(1), is vague and can subject those with attenuated connections to the primary offenders to threats of liability, thus risking the chilling of protected expression, sexual and otherwise.
    - The phrase "participating in … any business," as used in Article 18(1)(g), is similarly vague and could apply to numerous online services.
- The intent elements must be clarified so that it is clear that one does not commit the offense unless they have the specific intent to produce, possess or disseminate child sexual abuse material, rather than merely intend to provide online services.
    - The constructive knowledge standard in Art. 18(10(g), "Participating in or receiving profits from any business that the person knows or has reasons to believe is related to any child sexual abuse or exploitation material," is insufficient, and a t a minimum should have a subjective element, such as "reckless disregard of a known serious risk."
- Article 18(5) acknowledges that some states exclude from their definition of CSAM materials that did not involve the exploitation of an actual child in their creation, such as non-filmed artistic renderings and computer-generated images, and thus permits states

to not apply 18(2)(b) and (c). But 18(2) nevertheless includes “drawings” and “written material” among potentially offending media.

- Article 20(3) contains a provision that eliminates liability if “a person has taken reasonable steps to ascertain that the person is not a child.”
    - It is unclear whether this requires prosecutors to establish the absence of age verification or whether it merely, and insufficiently, create an available affirmative defense that the defendants would have to establish. The latter is insufficient to protect freedom of expression.

Cluster 7

- A primary concern with nonconsensual intimate imagery laws is the risk that a downstream recipient of an image who does not know the victim or the nature in which the image was created has no way of knowing whether the person depicted consented to its dissemination. So it must be clear that any dissemination offense requires knowledge of affirmative non-consent – actual knowledge that the victim did not consent to the initial and/or further dissemination of the image. The language in Article 25(1), “knowing that the person depicted in the image did not give their consent to that conduct, or being reckless as to whether or not that person gave their consent to that conduct,” is unclear. It is unclear what is meant by “that conduct” and affirmative non-consent to dissemination is required.
- The provision of Article 25(3) is important for protection human rights, including the right to disseminate newsworthy information and other matters of public importance. The provision might benefit form specifying some examples of legitimate purposes without limiting the clause’s breadth.

Unless these are addressed,, the Convention’s criminal provisions remain problematic.

Madame Chair, we’ve kindly submitted a detailed analysis in written form, which we hope could be distributed to all Member States or published on the ad hoc website.