

**TO: eSafety Commissioner**  
via [submissions@esafety.gov.au](mailto:submissions@esafety.gov.au) and [avroadmap@esafety.gov.au](mailto:avroadmap@esafety.gov.au)

Friday, 10 September 2021

## **Submission to age verification call for evidence and restricted access system call for submissions**

The Eros Association is Australia's industry association for adults-only retail, wholesale, media and entertainment, with over 25 years of experience in dealing with industry-specific issues. Eros supports a responsible and non-discriminatory legal framework for adults-only businesses. Eros also supports positive sexual expression.

We welcome the opportunity to provide comments in response to the age verification call for evidence and the restricted access system call for submissions.

We understand that the eSafety Commissioner is revising the Restricted Access Systems Declaration and has been asked to develop an implementation roadmap for a mandatory age verification regime relating to online pornography as part of the Government's response to the House of Representatives Standing Committee on Social Policy and Legal Affairs report, 'Protecting the Age of Innocence' (hereafter 'the PAI Report'). Further, the Commissioner has been asked to do so in collaboration with industry, as noted in the PAI Report.<sup>1</sup>

We strongly believe there should be collaboration and consultation between industry and government when considering models for age verification and restricted access.

### **Australia's adult media industry**

Consuming adult media is a healthy and normal part of human sexuality and does not deserve the moral condemnation it has received from uninformed critics of the industry.

---

<sup>1</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, *Protecting the Age of Innocence: Report of the Inquiry into Age Verification for Online Wagering and Online Pornography* (2020) [3.133-3.138].

It is important that this Commissioner does not rely on stereotypes regarding the Australian adult industry. A survey of Australian adult media producers undertaken by the Eros Association found that most producers in Australia are female and operate as producer-performers. Half of all producers identified as belonging to the LGBTIQ+ community.<sup>2</sup> There is thus a real risk that regulation will disproportionately affect women and LGBTIQ+ people.

Although not covered by our survey, it is estimated that the majority of Australian adult media producers are subscription-based or pay-for-content services including 'webcammers' broadcasting material online.

Adult media production in Australia is very limited due to state and territory criminal laws prohibiting the production, sale and exhibition of X18+ classified or otherwise sexually explicit media.<sup>3</sup> Broadcasting laws also render sexually explicit media subject to take down notices by the eSafety Commissioner,<sup>4</sup> resulting in most online Australian adult media being hosted overseas.

In July 2019, relevant State and Territory Ministers endorsed a motion by the Australian Government to undertake a review into the Guidelines for the Classification of Films and Guidelines for the Classification of Computer Games to ensure they reflect contemporary Australian community values.<sup>5</sup> To date, there has only been a discussion paper released to gauge community expectations on content classification. This process is still ongoing.

As Australian classification guidelines have a major impact on how online content is regulated, we suggested that reform regarding age verification and restricted access be postponed until the classification guidelines and adult media laws are reviewed.

If reform is to occur, the focus of the reform should be on websites, such as Pornhub, which provide (often copyright-infringing) adult content without requesting payment. This position seems to have support in the PAI Report.<sup>6</sup>

Consideration should also be given to how reforms will impact in-store purchases of pornography, not only online pornography, and social media services and search engines that are captured under the *Online Safety Act 2021*. Guidelines should be developed to address these impacts and to ensure a consistent approach that does not arbitrarily target one segment of the industry.

---

<sup>2</sup> Eros Association, 'Production Standards for Adult Media' <<https://www.eros.org.au/wp-content/uploads/2019/09/Eros-Adult-Standards-combined-1.pdf>>.

<sup>3</sup> Jarryd Bartle, 'Is porn legal in Australia?', *Eros Association* <<https://www.eros.org.au/is-porn-legal-in-australia/>>.

<sup>4</sup> *Online Safety Act 2021* pt 9.

<sup>5</sup> For further information, see <https://www.communications.gov.au/have-your-say/review-australian-classification-regulation>

<sup>6</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, *Protecting the Age of Innocence: Report of the Inquiry into Age Verification for Online Wagering and Online Pornography* (2020) [3.98-3.101].

We do not support methods that will lead to a de facto ban of online pornography. Such an approach risks moving adult content onto the dark web. Adults should be able to access online pornography coupled with appropriate protections for children. As the Commissioner herself has stated, “my role as regulator is to protect all Australians from online harm - it’s not to restrict the sex industry. What happens between consenting adults is not my concern, as long as it’s not harming others, especially children.”<sup>7</sup>

## Age verification methods

Age verification is the process of confirming a user’s age to restrict access to online services and content from those who are not deemed appropriately-aged. All Eros members are obliged to follow the Restricted Access Systems Declaration 2014 that includes the requirement for reasonable steps to confirm that a person accessing the online content is at least 18 years of age. In doing so, Eros members are encouraged to follow the Association of Sites Advocating Child Protection protocol for website labelling.<sup>8</sup> This includes:

- including on the website’s home or index page, a warning notice that the contents of the site are for adults only (and the notice itself excluding any explicit images); and
- labelling the website as “adult”, thus allowing parental blockers to prohibit access to adult content (though Eros acknowledges that some websites are not captured by current parental blockers).

The PAI Report acknowledges age screening or age gating as a method of online verification.<sup>9</sup> This includes age checks through users self-declaring their age, often at the point of access or registration. All Eros members are encouraged to do this in line with the above-mentioned protocol.

Moreover, Eros members who run adult media websites follow a ‘pay-for-content’ business model allowing for a secondary age verification process prohibiting access by minors.

Eros members have not experienced any difficulty (including financial and administrative burdens) complying with the Restricted Access System Declaration 2014, in part because it allows industry the flexibility to develop access-control systems appropriate to their business model. In what follows, we provide an example from one of our members.

---

<sup>7</sup> Lisa Visentin, ‘Sex industry “not my concern”: eSafety Commissioner defends new powers’, *Sydney Morning Herald* (4 March 2021) <<https://www.smh.com.au/politics/federal/sex-industry-not-my-concern-esafety-commissioner-defends-proposed-new-powers-20210302-p5772l.html>>.

<sup>8</sup> Association of Sites Advocating Child Protection, ‘Industry Best Practices - Adult Sites’ <[https://www.asacp.org/index.html?content=best\\_practices#adultsites](https://www.asacp.org/index.html?content=best_practices#adultsites)>.

<sup>9</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, *Protecting the Age of Innocence: Report of the Inquiry into Age Verification for Online Wagering and Online Pornography* (2020) [2.123-2.125].

## **Case study: producer and content creator**

One of our members has an age assurance/verification notice on their site that asks the first time you visit but recognises repeat visitors. The site is hosted in the United States and asks for age from all visitors regardless of location. About 94% of site visitors just browse, and 6% are paid subscribers. Secondary age verification comes during the subscription with a credit card.

Through credit card payments, the site owner can blacklist users who illegally share content to other sites, including sites without age verification. Our member has blacklisted around twelve people, including through banning access through IP addresses, for taking videos from their website and sharing them on other websites without permission as well as those that have sought to cause harm to the website's models. There are also features on the website that make it difficult to download and share videos.

While there are no simple solutions to any online safety issue, technologies such as age verification and age assurance, if used in conjunction with opt-in filtering and other proactive user safety settings, can play a role in limiting children's exposure to adult content. Whilst we acknowledge the requirement for age verification, this needs to be balanced against the privacy rights of consumers, particularly regarding their private and sensitive data.

## **Factors to consider in assessing possible age verification methods**

We suggest that there are a number of factors that should be considered when assessing the effectiveness and impacts of systems, methods and approaches to limiting children's access or exposure to online pornography, including:

- scope;
- technical feasibility;
- privacy, including information privacy, data privacy and surveillance risks;
- avoidance of arbitrary approaches;
- education;
- compliance burden;
- civil liberties;
- resourcing impacts; and
- effectiveness.

Importantly, an age verification and restricted access system must not block access to vital sexuality and sexual health information for young people, restrict adults' access to online pornography, and reduce safe online spaces for sex workers and the sale of adult products.

In what follows, we examine some proposed systems, methods and approaches in terms of their effectiveness, reasonableness and proportionality when it comes to verifying the age of users and restricting children's access to online pornography.

In our view, any proposed system should not be prescriptive about the measures used to limit children's access to online pornography, but rather allow for industry to determine the most effective methods in consultation with the regulator.

### **Other age verification methods: databases, facial recognition and online data**

The PAI Report mentions a number of possible age verification methods, including:

- age checks against government-issued identity documents, including birth certificates, driver licenses, passports and visas;<sup>10</sup> and
- age checks against the Commonwealth electoral roll and listings on the consumer credit bureau.<sup>11</sup>

Our concern is that this may pose technical issues, requiring major updates to data collection fields and databases. It may also pose difficulties for people whose names and other attributes do not match data on identity documents (especially trans and gender diverse people).

The PAI Report also mentions age estimation as a method of online age verification.<sup>12</sup> This would enable age checks through facial recognition software or online data (such as handles, usernames, image tags, hashtag usage, gesture patterns, web history, content interaction, IP address, location data, device serial number, contacts, etc.).

Our concern is that this poses serious privacy issues, including around:

- the collection, retention and disclosure of biometric information;
- the sensitive information that can be extracted or inferred from biometric identifiers;
- possible surveillance and tracking of individuals; and
- the risk of identity fraud.

In our view, the introduction of facial recognition technology as a method of online age verification is not a legitimate or proportionate response to the issue at hand.<sup>13</sup>

### **Other age verification methods: blocks implemented at the ISP level**

Internet Service Providers (ISPs) appear ideally positioned to block content. Eros has no opposition to ISPs providing stronger parental controls for households and allowing the filtering of adult content on an 'opt-in' basis. This is currently a service provided by Telstra. Eros is also interested in working collaboratively with ISPs and regulators in order to strengthen parental controls. Age verification should follow an

---

<sup>10</sup> *Ibid* [2.92-2.97].

<sup>11</sup> *Ibid* [2.102-2.105].

<sup>12</sup> *Ibid* [2.116-2.122].

<sup>13</sup> Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Identity-Matching Services Bill 2019 and the Australian Passports Amendment (Identity-Matching Services) Bill 2019 (2019)* [2.19-2.57].

‘opt-in’ model when it comes to ISP level blocks, rather than a ‘default block’ approach as canvassed in the PAI Report.<sup>14</sup>

There is also a risk that public reporting of online content may encourage ISPs to arbitrarily block content. There is thus a need for review rights for websites subject to blocks.

It is also worth noting that, depending on the form of ‘block’ in place, such barriers are capable of being circumvented by tech-savvy young people via VPNs and other technical workarounds.

### **Other age verification methods: education**

Technological solutions alone will not stop children from accessing online pornography. A focus on regulating industry diminishes the role of parental engagement and education, which was a key aspect of the PAI Report.<sup>15</sup>

In our view, there is a need to invest in better sex education in schools and other educational settings to encourage safer and affirming sex practices, boost sexual literacy and set realistic expectations about sex. Sex education is important to challenge sexual violence and violence against women and gender diverse people. The Commissioner can also play a role in developing resources to support online safety and navigating adult content online.

### **Other international approaches**

There is a lack of precedent for a regime of mandatory age verification in any other jurisdiction, which suggests that there would be challenges in implementing such a scheme.

### **The UK Model**

The PAI Report considered the United Kingdom's *Digital Economy Act 2017* (hereafter ‘the UK Model’). Under the UK Model, producers of adult content are required by law to implement strict age verification controls on their websites or risk fines as well as ISP level blocks. The British Board of Film Classification would implement this regime in line with content guidelines. The implementation of the UK Model locally would be an expensive and unnecessary intervention into the personal freedoms of Australians.

Eros strongly opposes the implementation of the UK Model of age verification, in particular we have concerns regarding:

---

<sup>14</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, *Protecting the Age of Innocence: Report of the Inquiry into Age Verification for Online Wagering and Online Pornography* (2020) [3.122].

<sup>15</sup> *Ibid* [3.158-3.171].

- **Privacy:** The UK Model creates an ideal ‘honey pot’ for potential hacks and the leaking of personal data with insufficient protections for data privacy,<sup>16</sup> as acknowledged in the PAI Report.<sup>17</sup> The Act also gives wide powers for data to be requested and shared between ISPs and the regulator, increasing the risk of privacy breaches.
- **Unintended breadth:** Under current broadcasting laws and classification guidelines a variety of non-pornographic content would likely fall under content requiring age verification tools including general advertising by adults-only businesses, R18+ films, works of art and educational material.
- **Censorship:** Under current classification guidelines many forms of consensual adult sexual expression are ‘refused classification’ and would likely be blocked under the UK Model. This includes many queer and diverse expressions of sexuality.<sup>18</sup>
- **Compliance burden:** The UK Model would increase the red-tape burden on Australia’s small producer/performer adult media industry. This is particularly the case if the law extends to private sex workers and webcam performers. The UN Special Rapporteur for Freedom of Expression has called web blocking ‘difficult to justify’ on the grounds of child protection given the disproportionate penalties imposed.<sup>19</sup>
- **Conflicts of interest amongst age verifiers:** One of the key beneficiaries of the UK Model is MindGeek, the Canadian company behind many ‘porn tube’ sites such as Pornhub. MindGeek is currently the most competitive provider of third-party age verification tools through its ‘AgeID’ service, something criticised by civil liberties groups as providing a conflict of interest between the privacy interests of the user and the data-mining and market interests of the company.<sup>20</sup>
- **Civil liberties concerns:** Much of the opposition to the UK Model has centred on moral objections to empowering regulators to block online content without any judicial oversight.<sup>21</sup>
- **Resourcing:** The regime would result in inefficient use of the resources of the Commissioner and other online content regulators whose main focus should

---

<sup>16</sup> Open Rights Group, ‘Age Verification - Risks and Recommendations’ <[https://www.openrightsgroup.org/assets/files/pdfs/Article\\_13\\_briefings/ORG%20AV%20Briefing.pdf](https://www.openrightsgroup.org/assets/files/pdfs/Article_13_briefings/ORG%20AV%20Briefing.pdf)>.

<sup>17</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, *Protecting the Age of Innocence: Report of the Inquiry into Age Verification for Online Wagering and Online Pornography* (2020) [3.125].

<sup>18</sup> Zahra Stardust, ‘Fisting is not permitted: Criminal intimacies, queer sexualities and feminist porn in the Australian legal context’ (2014) 1(3) *Porn Studies* 242-259.

<sup>19</sup> United Nations General Assembly, ‘Report of the Special Rapporteur for Promotion and Protection of the Right to Freedom of Opinion and Expression’ (16 May 2011) <[http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf)>.

<sup>20</sup> Jim Killock, ‘The government is acting negligently on privacy and porn AV’ (8 May 2018) <<https://www.openrightsgroup.org/blog/2018/the-government-is-acting-negligently-on-privacy-and-porn-av>>.

<sup>21</sup> Pandora Blake ‘Age verification for online porn: more harm than good?’ (2019) 6(2) *Porn Studies* 228-237.

be child exploitation material and image based abuse.<sup>22</sup> The UK Government has spent approximately \$4.15 million on implementing the scheme.<sup>23</sup>

- **Ineffectiveness:** Most forms of ISP blocking are easily circumvented by VPNs and other solutions, rendering the UK Model obsolete.<sup>24</sup>

Australia should not follow the UK Model of age verification established by the *Digital Economy Act 2017* (UK). Indeed, the UK Government has announced that it will not commence age verification under the Act due to the concerns outlined here.

### The FOSTA/SESTA Model: US

The PAI Report did not consider the United State's *Fight Online Sex Trafficking Act 2018* and the *Stop Enabling Sex Traffickers Act 2018* (hereafter 'the FOSTA/SESTA Model'). Under the FOSTA/SESTA Model, websites are banned from hosting advertisements placed by sex trafficking operations, supposedly making it easier to prosecute illegal trafficking operations. However, the language of both bills is so broad that websites became responsible if they were hosting advertisements for consensual sex work. The difficulties in enforcement became so hard that many sites simply banned whole sections of their platforms in response.

Eros strongly opposes the implementation of the FOSTA/SESTA Model, in particular we have concerns regarding:

- **Unintended breadth:** The FOSTA/SESTA Model resulted in the de-platforming of sex workers because of the risk they posed to the host websites.
- **Ineffectiveness:** According to the US government's own Government Accountability Office Report, only one persecution has taken place under the law and, instead, the broad sweeping restrictions have made it more difficult to prosecute illegal sex trafficking organisations.<sup>25</sup> By not creating clearer and more specific directions in the FOSTA/SESTA Model, the US Government forced host websites to remove platforms completely, driving third parties overseas and making it harder to prosecute illegal activity.

### Case study: OnlyFans

One of the biggest stories in the adult industry in the last month has been OnlyFans, the site synonymous with pornography, announcing a ban on all adult materials on

---

<sup>22</sup> *Ibid.*

<sup>23</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, *Protecting the Age of Innocence: Report of the Inquiry into Age Verification for Online Wagering and Online Pornography* (2020) [3.77].

<sup>24</sup> Brett Danaher et al, 'The effect of piracy website blocking on consumer behaviour' (2020) 44(2) *MIS Quarterly* 631-659.

<sup>25</sup> Gustavo Turner, 'Federal oversight office's report highlights FOSTA/SESTA's failure', *xbiz* (23 June 2021)

<<https://www.xbiz.com/news/260027/federal-oversight-offices-report-highlights-fosta-sestas-failure>>.

their site despite having a number of checks and balances to ensure age-appropriate access to their content.

Banks and payment processors had raised concerns about the material hosted on OnlyFans and threatened to remove their services. Instead of losing their ability to receive payments, OnlyFans was forced to ban porn. Pressure from these financial institutions continues to disproportionately impact the adult industry, with OnlyFans becoming the latest to fall.

Thankfully, public and creator pressure forced OnlyFans to reverse their decision, citing a new agreement with their financial service providers. There is some hesitancy within the adult industry that the ban may still go ahead in the future, with this uncertainty plaguing the confidence of creators and their reliance on regular income from OnlyFans.

We are particularly concerned by the proposal, mooted in the PAI Report, of issuing notices to ancillary service providers, including payment providers.<sup>26</sup> Our concern is that banks and payment providers may preemptively cut off adult businesses to avoid receiving such notices.

Banks' refusal to deal with the adult industry is a far too common occurrence in Australia. Eros knows of many examples of businesses being cut off from services without warning, and banks even extending this discrimination to employees. The old line of 'we don't deal with your industry' is based on ignorance and damages a legitimate industry and legitimate businesses.

## **Conclusion**

Any age verification and restricted access system must include robust standards for privacy, safety and security and must be understood, accepted and supported by industry.<sup>27</sup> The Eros Association welcomes the opportunity to assist in advising on age verification and restricted access systems.

If there is any way we can assist further in advising on age verification and restricted access systems, please don't hesitate to contact.



**Rachel Payne**  
General Manager  
Eros Association

E: [rachel@eros.org.au](mailto:rachel@eros.org.au) | [www.eros.org.au](http://www.eros.org.au)

---

<sup>26</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, *Protecting the Age of Innocence: Report of the Inquiry into Age Verification for Online Wagering and Online Pornography* (2020) [3.118-3.121].

<sup>27</sup> *Ibid* [3.180].