

TO: Director, Online Safety Reform and Research Section,
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Submission on the Draft Online Safety (Basic Online Safety Expectations) Determination 2021

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 media and businesses. Eros also supports positive sexual expression.

We welcome the opportunity to provide comments in response to Draft Online Safety (Basic Online Safety Expectations) Determination 2021.

Eros is opposed to any censorship of consensual adult media. In particular, we suggest that reform to restrict access to adult media be postponed until the review of classification guidelines is completed.

The Draft Determination has three areas of key concern to us:

- social media, electronic and internet service providers must take reasonable steps to minimise the provision of Refused Classification material;
- social media, electronic and internet service providers must take reasonable steps to prevent access by children to X18+ material, including through technological or other measures possibly including age assurance mechanisms and child safety risk assessments; and
- social media, electronic and internet service providers must ensure there are mechanisms to report and make complaints about Refused Classification and X18+ material, policies and procedures for dealing with reports and complaints, information and guidance on how to make a complaint to the Commissioner, and records of reports and complaints.

Eros is not opposed to reasonable steps to prevent access by children to adult material, however the proposed Draft Determination is a blunt instrument and includes broad requirements that are not fit for purpose. Our primary concern is that the Draft Determination could cause social media, electronic and internet service providers to prohibit X18+ material, as suggested in the accompanying Consultation

Paper.¹ This would impact the livelihood of producers, sex workers and adult retailers. The Draft Determination is so broad reaching it would also limit the sexual expression of Australians online whether or not they are posting sexually explicit content for profit.

Access to X18+ material

Under the current classification guidelines, X18+ material includes real depictions of actual sexual intercourse and other sexual activity between consenting adults.

Our concern is the requirement for service providers to take reasonable steps to prevent access by children to X18+ material could cause social media, electronic and internet service providers to adopt a blanket prohibition of X18+ material, as suggested in the Consultation Paper on the Draft Determination.²

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.”³

The Draft Determination 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.

Access to Refused Classification material

Under the current classification guidelines, Refused Classification material includes “gratuitous, exploitative or offensive” depictions of sexual activity accompanied by fetishes or practices which are “offensive or abhorrent.” These include “body piercing, application of substances such as candle wax, ‘golden showers’, bondage, spanking or fisting.”⁴

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

¹ Draft Online Safety (Basic Online Safety Expectations) Determination 2021 - Consultation Paper (2021) 3.

² Draft Online Safety (Basic Online Safety Expectations) Determination 2021 - Consultation Paper (2021) 3.

³ 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>>.

⁴ Guidelines for the Classification of Films 2012.

ensure they reflect contemporary Australian community values.⁵ 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 suggest that reform to restrict access to Refused Classification material be postponed until the classification guidelines are reviewed.

Age assurance mechanisms

We understand that the eSafety Commissioner 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.⁶

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.⁷ 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.⁸ 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.

⁵ For further information, see

<https://www.communications.gov.au/have-your-say/review-australian-classification-regulation>

⁶ 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].

⁷ Association of Sites Advocating Child Protection, 'Industry Best Practices - Adult Sites' <https://www.asacp.org/index.html?content=best_practices#adultsites>.

⁸ 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].

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.

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 users, 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.

We strongly believe there should be collaboration and consultation between industry and government when considering models for age verification and restricted access. We have laid out some factors to consider in assessing possible age verifications in our submission on age verification.⁹ In our view, any proposed system for age verification 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.

Reports and complaints

The Draft Determination stipulates that social media, electronic and internet service providers must ensure there are mechanisms to report and make complaints about

⁹ Eros Association, ‘Submission to age verification call for evidence and restricted access system call for submissions’ (2021)
<<https://www.eros.org.au/wp-content/uploads/2021/09/Eros-Association-Submission-.pdf>>.

Refused Classification and X18+ material, policies and procedures for dealing with reports and complaints, information and guidance on how to make a complaint to the Commissioner, and records of reports and complaints

There is a risk that public reporting of online content may encourage internet service providers to arbitrarily block content. There is thus a need for review rights for websites subject to reports or complaints.

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 their site despite having a number of checks and balances to ensure age-appropriate access to their content. Thankfully, public and creator pressure forced OnlyFans to reverse their decision. 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.

Our concern is that the Draft Determination may place pressure on websites like OnlyFans to arbitrarily prohibit X18+ material on their site.

Conclusion

The Eros Association welcomes the opportunity to assist in advising on the Draft Determination. If there is any way we can assist further, please don't hesitate to contact us.



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