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To whom it may concern,

Draft Online Safety (Basic Online Safety Expectations) Amendment Determination 2023

The Eros Association is Australia's industry association for adults-only retail, wholesale, media and entertainment. We write in relation to the *Online Safety (Basic Online Safety Expectations) Determination 2022* ("the Determination") and the *Draft Online Safety (Basic Online Safety Expectations) Amendment Determination 2023* ("the Amendment Determination").

In general, we are supportive of the Determination in that it provides flexibility for social media, electronic, and internet service providers to determine the most appropriate method for meeting the expectations. This is particularly important as many service providers in our industry lack the resources to comply with onerous regulations and reporting requirements. Thus, flexibility is essential.

Class 1 material

The Determination provides that social media, electronic, and internet service providers must take reasonable steps to minimise the provision of class 1 material.¹ Class 1 material includes Refused Classification ("RC") material.² RC material includes "gratuitous, exploitative or offensive" depictions of sexual activity accompanied by fetishes or practices which are "offensive or abhorrent" such as "body piercing, application of substances such as candle wax, 'golden showers', bondage, spanking or fisting."³ The Review of Australian Classification Regulation ("the Stevens Review") recommended that legal fetishes be removed from the RC classification.⁴

The Stevens Review noted that:

*Departmental research into attitudes towards Refused Classification content shows that the community is unconcerned about depictions of most fetishes, as long as there is consent, and no serious harm is inflicted.*⁵

¹ *Online Safety (Basic Online Safety Expectations) Determination 2022* cl 11(d).

² *Online Safety Act 2021* s 106(1)(a)(ii).

³ *Guidelines for the Classification of Films 2012*.

⁴ *Review of Australian Classification Regulation* (2020) p 93.

⁵ *Review of Australian Classification Regulation* (2020) p 93 citing *RC and High Level Content – Report for the Department of Communications and the Arts* (2018) pp 11-17, 23-25.

The *eSafety Industry Codes Position Paper* (“the Position Paper”) creates the designation of “class 1C material” as a subcategory of class 1 material that comprises particular online pornography including fetish material, as distinct from “class 1A material” (that comprises child sexual exploitation material, pro-terror content, and extreme crime and violence) and “class 1B material” (that comprises crime and violence, and drug-related content).⁶ This acknowledges the relative severity and potential for harm associated with different types of material. The latter two designations have been adopted in the *Draft Online Safety (Designated Internet Services - Class 1A and Class 1B Material) Industry Standard 2024* (“the Draft Standard”).⁷

In light of the recommendations of the Stevens Review and in line with the approach in the Draft Standard, we recommend that the Amendment Determination incorporate an amendment to clause 11(d) of the Determination to replace “class 1 material” with “class 1A material and class 1B material” with definitions drawn from the Draft Standard.

In addition, in light of the recommendations of the Stevens Review, we recommend that the *Guidelines for Classification of Films 2012* (“the Guidelines”) be amended to remove legal fetishes from the RC classification.

Class 2 material

The Determination provides that social media, electronic, and internet service providers must take reasonable steps to prevent access by children to class 2 material.⁸ Class 1 material includes X18+ material.⁹ X18+ material includes real depictions of actual sexual intercourse and other sexual activity between consenting adults.¹⁰

Whilst this provision is flexible and allows a variety of methods to restrict access, it 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 Determination.¹¹ We do not support provisions that could lead to a de facto ban on online pornography. Adults should be able to access online pornography coupled with appropriate protections for children. We recommend that this be reflected in the explanatory statement for the Amendment Declaration.

The Amendment Determination proposes to insert an additional provision that social media, electronic, and internet service providers could, to prevent access by children to class 2 material, “develop, support or source, and implement improved technologies and processes.”¹² In effect, this includes four steps:

⁶ *eSafety Industry Codes Position Paper* (2021) pp 20-24.

⁷ *Draft Online Safety (Designated Internet Services - Class 1A and Class 1B Material) Industry Standard 2024* cl 6(1).

⁸ *Online Safety (Basic Online Safety Expectations) Determination 2022* cl 12.

⁹ *Online Safety Act 2021* s 107(a)(ii).

¹⁰ *Guidelines for the Classification of Films 2012*.

¹¹ *Draft Online Safety (Basic Online Safety Expectations) Determination 2021 - Consultation Paper* (2021) p 3.

¹² *Draft Online Safety (Basic Online Safety Expectations) Determination 2023* sch 1 cl 10.

- develop/support/source improved technologies;
- develop/support/source improved processes;
- implement improved technologies; and
- implement improved processes.

Whilst this is not mandatory, it is complicated and its complexity could lead providers to adopt a blanket prohibition of online pornography. It raises several questions:

- What does it mean to “support” improved technologies and processes?
- Does implementing improved technologies and processes not require that these technologies and processes be developed or sourced?
- What does it mean that technologies or processes are “improved”?

In order to reduce complexity, we recommend that clause 10 of the Amendment Determination be altered to replace “develop, support or source, and implement improved technologies and processes” with “implement technologies and processes”.

Transparency reports

The Amendment Determination proposes to insert an additional provision that social media, electronic, and internet service providers must publish annual “transparency reports” including “the number of active end-users of the service in Australia” and give this information to the Commissioner upon request.¹³

The Consultation Paper on the Amendment Determination states that “information about the number of Australian end-users of particular services will assist the Commissioner in assessing the reach and prevalence of the service within Australia, and consequently the level of risk a service poses to Australians.”¹⁴

Many service providers may not collect this information on end-users’ location in order to protect users’ privacy. There is also a lack of clarity of what is meant by “in Australia”. Does it mean a user who is accessing the service within the geographical boundaries of Australia or does it mean a user who is ordinarily resident in Australia? Furthermore, how is this information about users’ location or residency to be obtained and should users give informed consent to this data collection?

These are but some of several issues with this provision in relation to both its regulatory impact on industry and its impact on users’ right to privacy. Of concern is that there has not been a statement of compatibility prepared in relation to the Amendment Determination that assesses whether it is compatible with human rights, including the right to privacy, as required under the *Human Rights (Parliamentary Scrutiny) Act 2011*.¹⁵

¹³ *Draft Online Safety (Basic Online Safety Expectations) Determination 2023* sch 1 cl 15-16.

¹⁴ *Amending the Online Safety (Basic Online Safety Expectations) Determination 2022 - Consultation Paper* (2023) p 16.

¹⁵ *Human Rights (Parliamentary Scrutiny Act) 2011* s 9.

In light of this, we recommend that a statement of compatibility be prepared to assess how clauses 15 and 16 of the Amendment Declaration, which require the collection and publication of information on users' location or residency, is compatible with human rights, including the right to privacy.

We further recommend that clauses 15 and 16 of the Amendment Declaration not proceed, pending further consultation with industry to understand impact.

Conclusion

The Eros Association welcomes the opportunity to discuss with you further our views on these issues.



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