

TO: eSafety Commissioner
via submissions@esafety.gov.au

23 November 2021

Submission to Draft Restricted Access Systems Declaration 2021

The Eros Association is Australia's leading adult industry body, 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 Draft Restricted Access Systems Declaration 2021, and strongly believe there should be collaboration and consultation between industry and government when considering models for 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.

It is important that the 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.¹ 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

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

sexually explicit media.² Broadcasting laws also render sexually explicit media subject to take down notices by the eSafety Commissioner,³ 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.⁴ 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 regarding restricted access be postponed until the classification guidelines and adult media laws are reviewed.

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.”⁵

Section 8 - confirmation of age

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.⁶ 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

² Jarryd Bartle, ‘Is porn legal in Australia?’, *Eros Association*
<<https://www.eros.org.au/is-porn-legal-in-australia/>>.

³ *Online Safety Act 2021* pt 9.

⁴ For further information, see
<https://www.communications.gov.au/have-your-say/review-australian-classification-regulation>

⁵ 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>>.

⁶ Association of Sites Advocating Child Protection, ‘Industry Best Practices - Adult Sites’
<https://www.asacp.org/index.html?content=best_practices#adultsites>.

- 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).

Age screening or age gating is a valid method of online verification.⁷ 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. Secondary age verification comes during the subscription with a credit card.

Flexibility

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 our view, the Declaration 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.

In this regard, we are pleased that the Draft Restricted Access System Declaration 2021 does not specify or prescribe technologies or processes to be used by service providers to determine age and restrict access to content

We note the Declaration includes further explanatory information that suggests that:

- a sole trader operating an adult website might implement a restricted access system using a credit card to confirm age (along with the other access control steps prescribed by the instrument); and
- a larger, better-resourced and more technically sophisticated service may be expected to employ multiple measures working in concert, rather than relying on a single method.

In our view, the focus of the Declaration should be on larger websites, such as Pornhub, which provide (often copyright-infringing) adult content without requesting payment.⁸

⁷ 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].

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) [3.98-3.101].

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.

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.

Privacy rights

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 welcome the additional explanatory information with the Draft Restricted Access System Declaration 2021 that "age confirmation methods should be privacy-preserving. They should limit the scope of information collected by the system to ensure the only attribute being tested is the age of the applicant. For the avoidance of doubt, age confirmation does not involve identity verification."

Scope

Any 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.

We welcome the additional explanatory information with the Draft Restricted Access System Declaration 2021 that "the Declaration is not intended to capture materials or resources providing information or promoting awareness about sexuality, sex education or sexual health."

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.

If there is any way we can assist further in relation to Eros' position, please don't hesitate to contact.

A handwritten signature in black ink, appearing to read 'Rachel', with a long horizontal stroke extending to the right.

Rachel Payne
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