Electronic Frontiers Australia Inc.
ABN: 35 050 159 188
W www.efa.org.au
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Director, Online Safety Reform and Research Section
Department of Infrastructure, Transport, Regional Development and Communications
GPO Box 2154
Canberra ACT 2601

11 November 2021

By web form

Dear Director,

RE: Draft Online Safety (Basic Online Safety Expectations) Determination 2021

EFA welcomes the opportunity to comment on the draft Basic Online Safety Expectations.

EFA's submission is contained in the following pages.

About EFA

Established in January 1994, EFA is a national, membership-based, not-for-profit organisation representing Internet users concerned with digital freedoms and rights.

EFA is independent of government and commerce, and is funded by membership subscriptions and donations from individuals and organisations with an altruistic interest in promoting civil liberties in the digital context.

EFA members and supporters come from all parts of Australia and from diverse backgrounds. Our major objectives are to protect and promote the civil liberties of users of digital communications systems (such as the Internet) and of those affected by their use and to educate the community at large about the social, political, and civil liberties issues involved in the use of digital communications systems.

Yours sincerely,

Justin Warren
Board Member
Electronic Frontiers Australia

Introduction

EFA believes there is good intent behind many of the goals of the determination, but the road to hell is paved with good intentions. The enabling legislation has been passed with unseemly haste and without incorporating the feedback of marginalised stakeholders that attempted to engage with the Commissioner in good faith. The resulting law, and this determination, is overbroad, vague, and prone to error and abuse.

EFA is concerned that the determination creates a system of censorship and suppression of dissent that will be used to silence critics of the powerful and drive already marginalised communities further from the mainstream in the name of making already powerful people feel safer.

EFA is concerned that the system will cause new harm to already marginalised groups of people, privileging the feelings of certain groups over the actual safety of others.

The purpose of a system is what it does, not what it purports to do.

Summary of Recommendations

1. **That the term 'safe' be replaced throughout the determination with harm reduction language.**
2. **That the specific harms to be reduced are specifically defined and enumerated in the determination.**
3. **That the Commissioner delegates the consultation under section 7 to an advisory council with diverse membership from Australian society to guide providers on what the community considers reasonable.**
4. **Any advice or guidance provided by the Commissioner to any one provider should be made public, in writing, so that all providers may benefit from the Commissioner's advice.**
5. **That the determination's scope be limited to social media services.**
6. **Alternatively, that the determination's scope be limited to the top three services for which there is substantial evidence of concrete harm resulting from the use of the services.**
7. **That specific services are enumerated in the determination to provide clarity for providers and end-users of what will be made 'safe'.**
8. **The definition of *child* used in the determination should include greater nuance and provide a distinction between different levels of childhood development.**

9. **That the clause ‘or being used by’ should be removed from s 6(3)(b) of the determination.**
10. **That creation of a parallel “children’s Internet” service should not be required for a provider to comply with the determination.**
11. **Section 12 should be removed from the determination.**
12. **Section 8 of the determination should be completely removed.**
13. **Section 9 of the determination should be completely removed.**
14. **That the complaint record retention period be reduced.**
15. **That providers are required to destroy all records of a complaint after the required retention period expires.**
16. **That clause (h) of section 11 of the determination be removed.**

What does ‘safe’ mean?

EFA is very concerned by the broad and ill-defined use of ‘safe’ throughout the draft Basic Online Safety Expectations (BOSE) determination. The precise meaning of ‘safe’ is not defined in the determination, nor is it defined in the *Online Safety Act*[1] which provides the Authority for the BOSE determination.

The *Online Safety Act* refers instead to *harm*, specifically *serious harm* which is defined as “serious physical harm or serious harm to a person’s mental health, whether temporary or permanent.”[2] The *Online Safety Act* also limits its scope for blocking online material to that which “could cause significant harm to the Australian community”[3].

It is unclear who, precisely, is being made safe and from what. “Safety” is highly context dependent; fire can cause harm, but it can also cook food. Chemotherapy drugs are poisons that are nonetheless used to treat cancer. EFA is concerned that certain groups are being prioritised to be kept ‘safe’[4] while others are deemed as less worthy of protection from harm.

Perfect safely is impossible as life is not risk free and cannot be made so. Instead of attempting an impossible task, the determination should instead focus on harm reduction. Further, the specific harms that are to be reduced should be specifically defined and enumerated.

Recommendation: That the term ‘safe’ be replaced throughout the determination with harm reduction language.

Recommendation: That the specific harms to be reduced are specifically defined and enumerated in the determination.

Concentration of Risk

The lack of clarity about what ‘safe’ actually means creates an environment in which providers cannot know in advance how to comply with the determination. Section 7 of the determination attempts to patch over this major flaw by requiring providers to consult with the eSafety Commissioner. This positions the Commissioner as the sole arbiter of what safety means and risks creating a capricious and arbitrary regulatory framework that is prone to error and abuse.

This system represents a substantial risk to the reputation of the Office of the eSafety Commissioner. EFA is concerned that the good work of the Commissioner will be undermined by the inevitable errors and abuses that are the likely outcome of such a system. The concentration of so much power in so few hands, and with such little oversight, also concentrates the responsibility for these errors and abuses.

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[1] *Online Safety Act 2021.*
[2] Ibid 5.
[3] See, e.g. Ibid 91,96,99.
[4] Alison Phipps, ‘White Tears, White Rage: Victimhood and (as) Violence in Mainstream Feminism’ (2021) 24(1) *European Journal of Cultural Studies* 81 (‘White Tears, White Rage’).

Recommendation: That the Commissioner delegates the consultation under section 7 to an advisory council with diverse membership from Australian society to guide providers on what the community considers reasonable.

Overbroad scope

The scope of the determination is too broad, and should be limited to a subset of the services included in section 45 of the *Online Safety Act*.

Section 5 of the determination continues the overbroad scope of section 45 of the *Online Safety Act* by including:

a. a social media service;
b. a relevant electronic service of any kind;
c. a designated internet service of any kind.

From the definitions in the *Online Safety Act* this includes in its scope a variety of technologies that are predominantly used for private person-to-person communications, not broadcast technologies. For example, section 13A includes the following items in the definition of "relevant electronic service":

a. a service that enables end-users to communicate, by means of email, with other end-users;
b. an instant messaging service that enables end-users to communicate with other end-users;
c. an SMS service that enables end-users to communicate with other end-users;
d. an MMS service that enables end-users to communicate with other end-users;
e. a chat service that enables end-users to communicate with other end-users;
f. a service that enables end-users to play online games with other end-users;

The combination of the broad scope together with the vague and context-dependent nature of 'safety' creates an impossible task for both the Commissioner and also providers.

EFA is concerned that the Commissioner's necessarily limited resources make it impossible for all providers within scope to be afforded an equal opportunity to consult with the Commissioner, as required by section 7 of the determination. This will result in some providers being unable to comply with their legal obligations through no fault of their own.

Further, there is no requirement for the Commissioner to make public any advice given to a provider about what constitutes reasonable, which risks creating a system where only those with privileged access to the Commissioner are able to comply with the law. Such a system has no place in a liberal democracy like Australia.

Recommendation: Any advice or guidance provided by the Commissioner to any one provider should be made public, in writing, so that all providers may benefit from the Commissioner's advice.

Alternately, the Commissioner may choose to limit its attention to a subset of providers, and therefore some end-users will not be kept safe by the Commissioner's choice of who to prioritise.

This exposes the essential problem inherent to the determination's framing of its goal as 'safety' rather than harm reduction. The scope of the determination as drafted is too broad, cannot be achieved, and should be reduced.

Rather than encompassing all of the services that the Minister may include, as permitted by section 45 of the *Online Safety Act*, the determination should limit itself to a subset of these services. EFA recommends that only the services that result in the greatest harm should be addressed in the first instance, and that additional services can be added later if the evidence of harm justifies their inclusion.

Recommendation: That the determination's scope be limited to social media services.

Recommendation: Alternatively, that the determination's scope be limited to the top three services for which there is substantial evidence of concrete harm resulting from the use of the services.

False Sense of Safety

The uneven consultation that is the likely result of the overbroad scope and finite resources discussed above will result in uneven application of the determination across the industry, creating confusion for end-users that may result in additional harms. By attempting to do too much, the Commissioner is setting up unrealistic expectations for end-users who are doomed to be disappointed.

For example, end-users may falsely believe that a provider they use has consulted with the Commissioner because they are legally required to do so. These end-users may, therefore, believe the provider's services are 'safe' to use (whatever that means) and will then be disappointed, or worse, when their false belief is exposed to the harsh reality of the truth.

As discussed above, the Commissioner risks undermining confidence in their Office if end-users' inflated safety expectations are not realised. EFA believes this is inevitable with the current system design encapsulated in the determination.

Recommendation: That specific services are enumerated in the determination to provide clarity for providers and end-users of what will be made 'safe'.

'Children' is not a monolithic category

EFA submits that a single, blanket definition of *child* is inappropriate for legislation governing speech.

It is generally recognised that children at different stages of development require different levels of care, and are differently able to make decisions for themselves. What may be an

appropriate restriction on what pre-school-age children see and experience should not be required for those in secondary school. Requiring a 17-year-old to be treated as a three-year-old would not only be insulting, it would undermine their ability to grow into a fully-independent adult who can navigate the modern information environment.

Children should not be robbed of the skills they need to become full adult members of today's society because of a misplaced desire to insulate them from any and all harms. As parents, we must one day have the courage to give our children what they most need from us: their independence.

Recommendation: The definition of *child* used in the determination should include greater nuance and provide a distinction between different levels of childhood development.

No Separate Children's Internet

EFA notes that the language of s 6(3)(b) inadvertently converts all services to being children's services:

> if a service or a component of a service (such as an online app or game) is targeted at, **or being used by**, children (the children's service)—ensuring that the default privacy and safety settings of the children's service are robust and set to the most restrictive level;

Any service that came to be used by children, even if not specifically designed to be used by children, would immediately be required to cater to the youngest child rather than its original intended audience of adults.

The National Classification Code expressly states that "adults should be able to read, hear, see and play what they want".[5] Not everything is designed for children, nor should it be.

Recommendation: That the clause 'or being used by' should be removed from s 6(3)(b) of the determination.

EFA strongly rejects the idea that there should be a separate "children's Internet" and that children should be kept completely isolated from the adult world until they reach an arbitrary age. Children need to learn about the world as it is in order to grow into adults capable of participating in society and navigating its many risks.[6]

Recommendation: That creation of a parallel "children's Internet" service should not be required for a provider to comply with the determination.

Technology doesn't solve social problems

Section 12 of the determination requires that:

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[5] *National Classification Code 2005* 1(a).
[6] Neil Brown, 'Unpicking the "Making Children as Safe as They Are Offline" Fallacy - Internet, Telecoms, and Tech Law Decoded' <https://decoded.legal/blog/2021/03/unpicking-the-as-safe-as-they-are-offline-fallacy>.

> *The provider of the service will take reasonable steps to ensure that technological or other measures are in effect to prevent access by children to class 2 material provided on the service.*

EFA has long advocated against the imposition of legislated technological measures that amount to censorship in the name of attempting to restrict the ability of minors to access pornography and other arguably harmful content.

EFA remains firmly opposed to such approaches, as they:

1. are almost always trivial to circumvent for anyone with basic technical knowledge;
2. inevitably restrict access to entirely legitimate content;
3. replace parental judgement with bureaucratised or corporate control;
4. are always subject to scope creep, often very quickly; and
5. perhaps most importantly, divert attention and resources away from responses that are likely to be more successful in addressing harm.

There is current an active review of Australia's classification regulation[7] in progress. Until that review is complete, there should be no expansion to the use of the National Classification Code to regulate online content.

Recommendation: Section 12 should be removed from the determination.

Do not undermine encryption

EFA is greatly concerned that section 8 of the determination is yet another misguided attempt to undermine encryption. Section 8 states:

> *If the service uses encryption, the provider of the service will take reasonable steps to develop and implement processes to detect and address material or activity on the service that is or may be unlawful or harmful.*

Even when subjected to a technical assistance request (TAR), technical assistance notice (TAN) or technical capability notice (TCN), providers are forbidden from building a systemic weakness into systems or systemic vulnerability.[8]

The Australian Parliament has been very clear in its consistent rejections of law enforcement's continuous demands for mandating backdoors that would break encryption and undermine the safety and security of everyone.

Encryption is the one tool we have that we are confident makes computer systems more secure, which it overwhelmingly does, every single day. Breaking encryption is possibly the single worst thing any government could do to make the Internet less secure, so EFA strongly advocates that

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[7] Transport Department of Infrastructure, 'Review of Australian Classification Regulation' (Text, 23 December 2019) <https://www.communications.gov.au/have-your-say/review-australian-classification-regulation>.
[8] *Telecommunications Act 1997* 317ZG.

undermining encryption should never happen[9], and certainly not in legislation that claims to be about improving online safety.

Undermines Privacy

EFA is further concerned that the determination requires providers to subject end-users to constant surveillance in order to detect material that merely *may* be harmful. Undermining privacy directly causes harm and has no place in a determination that purports to codify basic safety expectations.

Recommendation: Section 8 of the determination should be completely removed.

Do not undermine anonymity

There are regular calls to ban anonymity, and every time we point, once again, to the wealth of research and evidence that anonymity is good, actually[10] and that so-called "real names" policies are actively harmful[11] while they do nothing much to address the problems they claim to be aimed at solving.[12]

EFA notes that the right to anonymity or pseudonymity is specifically encoded in the Australian Privacy Principles.[13]

Recommendation: Section 9 of the determination should be completely removed.

Honeypot of complaints

Section 19 of the determination requires providers to maintain a database of complaints for 5 years after the time of the report or complaint. This information could be highly sensitive and, if exposed, could place people who have already been subjected to abusive conduct at substantial additional risk.

EFA is concerned that long-term retention of complaint records will place complainants at additional risk from a data breach. EFA questions the need to retain records of *all* complaints made for 5 years.

Recommendation: That the complaint record retention period be reduced.

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[9] Kieren McCarthy in San Francisco, '200 Experts Line up to Tell Governments to Get Stuffed over Encryption' <https://www.theregister.com/2016/01/11/experts_defend_encryption/>.
[10] Samantha Floreani, 'Online Anonymity Is Really Important, Actually', *Overland literary journal* <https://overland.org.au/2021/10/online-anonymity-is-really-important-actually/>.
[11] Oliver L Haimson and Anna Lauren Hoffmann, 'Constructing and Enforcing" Authentic" Identity Online: Facebook, Real Names, and Non-Normative Identities' [2016] *First Monday* ('Constructing and Enforcing" Authentic" Identity Online').
[12] Daegon Cho, Soodong Kim and Alessandro Acquisti, 'Empirical Analysis of Online Anonymity and User Behaviors: The Impact of Real Name Policy' in *2012 45th Hawaii International Conference on System Sciences* (2012) 3041 ('Empirical Analysis of Online Anonymity and User Behaviors').
[13] *Privacy Act 1988* APP 2.

Recommendation: That providers are required to destroy all records of a complaint after the required retention period expires.

Whistleblowing on abhorrent conduct

Section 11 (h) of the determination would prevent reporting on abhorrent violence by others.

Whistleblowers, journalists and historians need to, at times, depict abhorrent violent conduct in order to expose it to scrutiny and sanction.

EFA is concerned that s 11 (h) will enable abhorrent violent conduct to continue without being exposed due to a misguided "out of sight, out of mind" approach that presumes hiding the conduct from view is the same as stopping it.

While many may find the conduct unpalatable, pretending the conduct is not happening is not the same as taking action to stop it.

A blanket ban on depiction of abhorrent violent conduct lacks the nuance required to maturely expose, discuss, scrutinise, and sanction violent conduct that may be abhorrent, or may not be. The arbitration of such material should not rest with online service providers, but with society itself through its legal processes, including Parliament.

EFA notes that promotion, incitement, and instruction in abhorrent violent conduct is already covered by clauses (e) through (g) and questions the need for clause (h).

Recommendation: That clause (h) of section 11 of the determination be removed.