



Submission on the draft Online Safety (Basic Online Safety Expectations) Determination 2021

November 2021



To: OnlineSafety@infrastructure.gov.au

Director, Online Safety Reform and Research Section

Department of Infrastructure, Transport, Regional Development and Communications

Introduction

Thank you for the opportunity to provide feedback on the draft Online Safety (Basic Online Safety Expectations) Determination 2021 (the Expectations).

As Commissioner for Children and Young People, my mandate is to promote and advocate at a systemic level for the rights, interests and wellbeing of all children and young people in South Australia. It is also my role to ensure that South Australia, at all levels of government, satisfies its international obligations under the United Nations Convention on the Rights of the Child (UNCRC).

Since 2017, I have engaged with thousands of children and young people across regional and metropolitan South Australia about the issues affecting their lives and what matters most to them. As highlighted in my previous submissions and reports,ⁱ the digital world is simply one more place children and young people frequent each day, as citizens and rights holders.

Children and young people describe technology as the way they connect to the people and places they care about, the services they need, and their worlds of learning, earning, and play. They want to be equipped and empowered with tools to navigate the digital world confidently, with one of their biggest concerns being unsure who and what they can trust online.

The United Nations Committee on the Rights of the Child General Comment No. 25 (2021) on children's rights in relation to the digital environment highlights the need to strike a balance between protecting children from harm online while also promoting the full range of their rights and their access to the opportunities and benefits of what is an essential part of their lives.

It is important that the Expectations align with international human rights standards, and there is acknowledgement among many leaders and policymakers in government and academia globally, that the rights, safety and needs of children in the online world require particular consideration.

This is often framed with reference to Article 3 of the UNCRC: that the best interests of children shall be a primary consideration in all actions that affect them. Others, including England's Children's Commissioner and the Carnegie Trust, have gone further to improve safety of internet services in the UK through a proposed statutory duty of care enforced by a regulator.ⁱⁱ

Although it is disappointing that the *Online Safety Act 2021 (Cth)* (the Act) and the proposed Expectations do not impose a legally enforceable duty of care on service providers, it is

promising that some of the ‘reasonable steps’ providers may take to meet certain Expectations are specific to children (for example, age-assurance mechanisms or default privacy settings).

Background and summary of recommendations

I welcome the Expectations insofar as they seek to place greater responsibility on service providers to provide safer online services for their users. I also appreciate the Expectations have been drafted broadly to allow service providers flexibility in how they meet the Expectations. This flexibility seems appropriate to ensure the Expectations remain relevant and useful in a rapidly changing digital landscape.

At the same time, however, there is scope for the Expectations to be more specific and prescriptive regarding the safety and rights of children and young people online. Importantly, this can be achieved without compromising the overall flexibility of the Expectations.

Although the online world was created by adults for adults, the reality is that one in three internet users worldwide are children.

Given that the Expectations set out the Australian Government’s minimum safety expectations of online service providers ‘on behalf of the community’, the Expectations should reflect the rights, wellbeing and best interests of all community members, including Australia’s youngest citizens.

This submission makes several recommendations to ensure that the final Expectations embed children’s rights and safety in a more cohesive and consistent way. This feedback is consistent with the *Online Safety Act 2021 (Cth)* (the Act), which provides that the eSafety Commissioner must have regard to the UNCRC in carrying out their role.

Specifically, I recommend that the final Expectations embed child-specific considerations as ‘Additional expectations’ rather than limiting such considerations to ‘Reasonable steps’. Such child-focused ‘Additional expectations’ will not only complement but are in fact key to meeting the ‘core expectations’ set out in the Act.

In light of the above, I make the following recommendations:

1. The Expectations ‘regarding safe use’ include an Additional expectation to the effect that service providers will:

Take reasonable steps to design and build their online services for safety, with particular regard to the rights and safety of children and young people in line with the UNCRC.

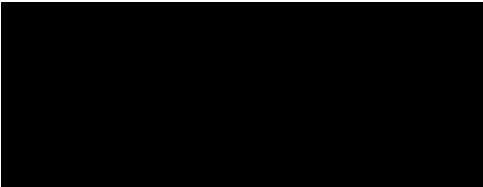
2. The Expectations ‘regarding certain material and activity’ include an Additional expectation to the effect that service providers will:

Take reasonable steps to assess and mitigate 'contract risks' and 'contact risks', as well as 'content risks' and 'conduct risks'.

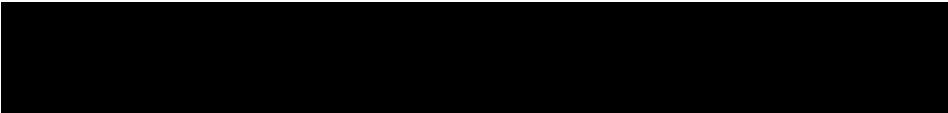
3. **The Expectations 'regarding making certain information accessible' include Additional expectations and Reasonable steps that promote child-focused transparency.**
4. **The Reasonable steps that providers may take to meet each of the Expectations cover non-technological as well as technological steps or 'solutions'.**
5. **The Expectations be reviewed regularly with a view to ensure they are fit for purpose in a rapidly changing digital landscape.**

If you have any queries or would like to discuss anything further, please do not hesitate to contact my office.

Yours sincerely,



Helen Connolly
Commissioner for Children and Young People SA



1. The Expectations ‘regarding safe use’ include an Additional expectation to the effect that service providers will:

Take reasonable steps to design and build their online services for safety, with particular regard to the rights and safety of children and young people in line with the UNCRC.

One of the proposed ‘Reasonable steps’ to meet the Expectations regarding safe use is to ensure that ‘assessments of safety risks and impacts are undertaken ... throughout the design, development, deployment and post-deployment stages for the service’ (s6(3)(e)).

Building on this, it is recommended that the final Expectations specifically include an Additional expectation that service providers will take reasonable steps to design and build their online services for safety, with particular regard to the rights and safety of children and young people.

Providers will therefore be expected to identify this group of users and take reasonable steps to ensure a range of child-specific and age-appropriate mechanisms are in place. Reasonable steps that could be taken to meet this Additional expectation may include the following:

- Ensuring that the services’ default settings are designed with consideration of the following:
 - Location settings do not collect, track or share user’s location unless this is essential to the service (eg. Maps services);
 - Privacy settings are robust and set to the most private level by default (as is already noted in s6(3)(b) of the draft Expectations);
 - ‘Data minimisation’ strategies to minimise the amount of data collected (see recommendation 2);
 - Software updates should not automatically change these default settings, which should be user-specific rather than device-specific.
- Ensuring that child rights impact assessments are undertaken (in addition to the general safety risks and impacts proposed in s6(3)(e)) to protect the rights of child users, including:
 - **The right to know** where their information is going, who is using it, for what purpose(s) and who is profiting from it;
 - **The right to remove** or easily edit content they have created or personal data (‘the right to be forgotten’);
 - **The right to safety and support** that is age-appropriate and easily accessible;
 - **The right to informed and conscious use** that empowers children and young people to benefit from online opportunities and environments while also having support to easily disengage;

- **The right to digital literacy**, to be critical digital thinkers and makers as well as consumers and to understand the structures and norms of the online service.
- Ensuring that child-friendly language and a range of methods are used to convey terms and conditions and other transparency information to child users so they can know, trust and provide clear consent to what information is being collected when, where and for what purposes (see Recommendation 4).

Such steps may be easier to implement for providers of a service targeted at children specifically ('children's service') than services targeted at adults or used by both adults and children. In any case, it is important for all service providers to have means of identifying their users and protecting children's rights and safety on their platform.

The eSafety Commissioner has already developed Safety by Design principles and resources, including assessment tools for technology companies as well as a 'vision for young people' in terms of 'how they expect the technology industry to help users navigate online environments freely and safely'.ⁱⁱⁱ It therefore seems logical that the Expectations embed these existing principles and resources.

This recommendation also aligns with the UK's Age-Appropriate Design Code and Ireland's Fundamentals for A Child-Oriented Approach to Data Processing (Ireland's Fundamentals), which may provide further useful guidance.^{iv}

2. The Expectations 'regarding certain material and activity' include an Additional expectation to the effect that service providers will:

Take reasonable steps to assess and mitigate 'contract risks' and 'contact risks', as well as 'content risks' and 'conduct risks'.

Risk is only one of many dimensions of children's experiences online. The multinational research network EU Kids Online has classified online risks for children into four categories. These categories are framed in a way that recognises children's agency without holding them unduly responsible for potential risks of which they may be unaware or over which they have little control:

- **CONTENT risks** where a child engages with or is exposed to harmful content (e.g., violent content, harmful or illegal pornography, or misinformation);
- **CONDUCT risks** where a child witnesses, participates in or is a victim of potentially harmful (peer) conduct (eg. bullying, sexual harassment or non-consensual sexting);
- **CONTACT risks** where a child experiences or is targeted by potentially harmful (adult) contact (eg. Stalking or unwanted excessive surveillance, sexual grooming or harassment);
- **CONTRACT risks** where a child is party to or exploited by a potentially harmful contract (eg. data harvesting and profiling for targeted advertising).^v

The Expectations set out in the draft Determination appear to be limited to ‘content’ and ‘conduct’ risks, with a particular focus on abhorrent violent material, Class 1 or 2 material, cyber-bullying or abuse and non-consensual intimate images.

This focus is important. However, in addition to minimising access to harmful content, it is essential that service providers also keep children safe from ‘contract risks’ that arise when service providers collect, share or profit from user’s data, often in ways that often take advantage of their vulnerabilities and are used to profile and target them with advertisements.

Offline, there is protection and regulation that limits the range of products or services that can be advertised to or purchased by children and young people. Given that a key aim of the *Online Safety Act 2021 (Cth)* is to ensure that the rules and protections we enjoy offline also apply online, it is recommended that the final Expectations include this Additional expectation that service providers will provide similar protections for children online.

Reasonable steps that could be taken to meet this Additional expectation may include the following:

- Minimising the amount of data collected, including users’ date of birth, geolocation, full name, friends, family or education situation;
- Clear information (data transparency), including about tools for children to erase, rectify or retract information they do not want in the public realm;
- Ensuring assessments of child-specific rights and safety impacts are undertaken (see Recommendation 1), which consider the cumulative risks.
 - For example, making a child’s profile public is one risk (a ‘contract’ risk), which becomes more concerning if a service profiles the child for a friend suggestion with an adult user who they do not know (a ‘contact’ risk).

It is important to note that EU Kids Online have developed a parallel classification for online opportunities alongside online risks as follows:^{vi}

- **Content opportunities:** Access to educational resources, global information, diversity of resources, advice.
- **Contact opportunities:** With others who share similar interests, being invited or inspired to create or participate and share experiences with peers.
- **Conduct opportunities:** Civic engagement, expression of identity, collaborative or individual learning.

Any steps or measures designed to minimise or restrict children’s access to certain material and activity must promote and protect children’s rights and best interests, including their rights to education, information and participation. Indeed, Ireland’s Fundamentals clarify that providers of services that are intended for or likely to be accessed by children cannot ‘bypass [their] obligations simply by shutting [children] out or depriving them of a rich service experience’.^{vii}

For example, what might providers need to consider to ensure that steps taken to prevent children’s access to violent or pornographic sexual content (‘content risks’) do not prevent their access to evidence-based educational resources about respectful relationships and sexual health (‘content opportunities’)?

3. The Expectations ‘regarding making certain information accessible’ include Additional expectations and Reasonable steps that promote child-focused transparency.

A recent report from Reset Australia raises serious concerns about the extent to which terms and conditions allow children and young people to provide informed and meaningful consent when they sign up for or use a service.

Based on a national poll of 400 young people conducted in May 2021, the report highlighted that 45% of 16 and 17 year olds in Australia never read terms and conditions while only 4% of young people read them ‘all the time’.^{viii}

Only 7% of young people reported being confident they understood what they were consenting to. They explained challenges related to reading and understanding terms and conditions with reference to the length of the documents, the complex language used and the confusing way in which this information is presented.

As such, it is recommended that the Expectations regarding ‘making certain information accessible’ include an Additional expectation that specifically promotes child-focused transparency.

Although there is no one-size-fits-all solution to this, it is recommended that the final Expectations specify how providers might ensure the information they provide is ‘readily accessible’ and ‘written in plain language’ (as expected in s17(1)(e) of the draft Determination), particularly for children.

Providers should be expected to consider the way information is delivered as well as the content, including the timing, the language and the amount of information. A best practice guide developed by the Behavioural Insights Team may be useful in drafting reasonable steps providers may take to meet this expectation.^{ix}

The Guide highlights that the following design features can significantly increase understanding of terms of service:

- Displaying key terms as frequently asked questions
- Using icons to illustrate key terms
- Showing terms in a scrollable text box instead of requiring a click to view them
- Providing information in short chunks at the right time
- Using illustrations and comics.

4. The Reasonable steps that could be taken to meet each of the Expectations include non-technological as well as technological steps or ‘solutions’.

While this office understands that ‘user education and empowerment’ are somewhat covered in s138 of the Act and in industry codes, there is nevertheless an opportunity for these efforts to be reinforced here.

The draft ‘Reasonable steps’ refer almost exclusively to technology capabilities or and technological ‘solutions’. While technological solutions are a necessary part of meeting the Expectations, it is important that they are not treated as ‘silver bullets’ for complex social issues and relationships experienced both online and offline.

Evidence suggests that content moderation algorithms alone are not effective at identifying specific content and disproportionately remove some content over others.^x Technological solutions, such as the proposed steps to verify age or identity, raise particular privacy and data protection issues for children.

References to children in debates and research online safety are often limited to their position as ‘victims’ of adult crimes (e.g., child abuse, exploitation). It is important that the Expectations encourage providers to take steps that also consider the rights and agency of children as active creators, consumers and users of their services. These efforts should be informed by children and young people’s own concerns, priorities and aspirations.

For example, Ireland’s Fundamentals prohibit providers from carrying out automated decision-making in relation to children for marketing purposes, ‘unless they can clearly demonstrate how and why it is in the best interests of the child to do so’.^{xi}

This aligns with the right to not be subject to automated decisions without human involvement (freedom from automated decision-making), which is embedded in the General Data Protection Regulation (GDPR) Act in Europe.

5. The Expectations be monitored, evaluated and reviewed regularly to ensure they remain fit for purpose in a rapidly changing digital landscape.

As set out in section 45(4) of the Act, this Determination does not impose a legally enforceable duty on service providers. It is concerning that the Consultation Paper appears to assume that a provider simply ‘having the necessary capabilities’ to detect and respond to harm is equivalent to a provider actually taking action to detect and respond to harm (Page 4 of the Consultation Paper).

In the absence of legal enforceability, it is recommended that the Expectations are reviewed regularly to ensure they remain up-to-date, relevant and effective. This is particularly important as the digital world continues to evolve and technology becomes more sophisticated and ubiquitous.

Such review should give particular consideration to the extent to which the Expectations are adequately promoting and protecting the rights and safety of child users.

While the Expectations clarify the need for clear complaints and reporting mechanisms, the onus remains largely placed on users to make a complaint or report harm after the fact. This is of particular concern in relation to children given that research from the eSafety Commissioner shows young people are more likely to turn to informal support networks or address problems themselves than take action through formal channels such as the social media companies themselves. This reiterates the importance of ensuring the Expectations consider the rights and safety of child users and ensure services are built and designed for safety by default.

ⁱ Connolly, Helen. Commissioner for Children and Young People, 2021. My Digital Life: Understanding the impact of digital poverty on children and young people. Available at https://www.ccyp.com.au/wp-content/uploads/2021/08/202107-Digital-Poverty-Report_Screen.pdf.

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ⁱⁱ Carnegie UK Trust, 2019. Online harm reduction – a statutory duty of care and regulator. Available at

https://d1ssu070pg2v9i.cloudfront.net/pex/carnegie_uk_trust/2019/04/08091652/Online-harm-reduction-a-statutory-duty-of-care-and-regulator.pdf.

ⁱⁱⁱ Australian Government, eSafety Commissioner. Safety by Design. Available at <https://www.esafety.gov.au/about-us/safety-by-design>.

^{iv} Information Commissioner's Office, 2020. Age appropriate design: a code of practice for online services. Available at <https://ico.org.uk/media/for-organisations/guide-to-data-protection/key-data-protection-themes/age-appropriate-design-a-code-of-practice-for-online-services-2-1.pdf>. Data Protection Commission, Wales, Children Front and Centre: Fundamentals for a Child-Oriented Approach to Data Processing. Available at

https://www.dataprotection.ie/sites/default/files/uploads/2020-12/Fundamentals%20for%20a%20Child-Oriented%20Approach%20to%20Data%20Processing_Draft%20Version%20for%20Consultation_EN.pdf.

^v Livingstone, S and Stoilova, M. 2021. The 4Cs: Classifying Online Risk to Children (CO:RE Short Report Series on Key Topics. Available at https://www.ssoar.info/ssoar/bitstream/handle/document/71817/ssoar-2021-livingstone_et_al-The_4Cs_Classifying_Online_Risk.pdf?sequence=4&isAllowed=y&lnkname=ssoar-2021-livingstone_et_al-The_4Cs_Classifying_Online_Risk.pdf.

^{vi} EU Kids Online, 2009. What do we know about Children's use of Online Technologies? Available at <http://eprints.lse.ac.uk/24367/1/What%20do%20we%20know%20about%20children%E2%80%99s%20use%20of%20online%20technologies%28Isero%29.pdf>.

^{vii} Data Protection Commission, Wales, Children Front and Centre: Fundamentals for a Child-Oriented Approach to Data Processing. Available at https://www.dataprotection.ie/sites/default/files/uploads/2020-12/Fundamentals%20for%20a%20Child-Oriented%20Approach%20to%20Data%20Processing_Draft%20Version%20for%20Consultation_EN.pdf.

^{viii} Reset Australia Policy Memo, July 2021. 'Did we really consent to this'? Terms & Conditions and young people's data. Available at https://au.reset.tech/uploads/101_resettechaustralia_policymemo_t_c_report_final-july.pdf.

^{ix} Behavioural Insights Team, 2019. Improving consumer understanding of contractual terms and privacy policies: evidence-based actions for businesses. Best Practice Guide. Available at <https://www.bi.team/publications/improving-consumer-understanding-of-contractual-terms-and-privacy-policies-evidence-based-actions-for-businesses/>.

^x Cambridge Consultants, Use of AI in Online Content Moderation – 2019 Report produced on behalf of Ofcom. Available at https://www.ofcom.org.uk/consult/condocs/ai/ai_data/assets/pdf_file/0028/157249/cambridge-consultants-ai-content-moderation.pdf.

^{xi} Data Protection Commission, Wales, Children Front and Centre: Fundamentals for a Child-Oriented Approach to Data Processing.