CHILDREN & MEDIA AUSTRALIA

Thriving in a digital world

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# SUBMISSION IN RESPONSE TO PUBLIC CONSULTATION PAPER ON THE STATUTORY REVIEW OF THE *ONLINE SAFETY ACT*

Thank you for the opportunity to provide input to this very important review.

Children and Media Australia (CMA) has a long history of engaging with, analysing and critiquing laws and regulations intended to protect the child media consumer, and is pleased to see the comprehensive approach that this review is taking. In our estimation it has the potential to bring about real improvements to online safety in Australia.

CMA is a peak not-for-profit national community organisation whose mission is to support families, industry and decision makers in building and maintaining a media environment that fosters the health, safety and wellbeing of Australian children. CMA membership includes ECA (Early Childhood Australia), ACSSO (Australian Council of State Schools Organisations), APPA (Australian Primary School Principals Association), AHISA (Association of Heads of Independent Schools Australia), the AEU (Australian Education Union), the Australian Children's Television Foundation, the Parenting Research Centre, the Council of Mothers' Union in Australia, SAPPA (South Australian Primary Principals Association), and other state-based organisations and individuals.

CMA's core activities include the collection and review of research and information about the impact of media use on children's development, and advocacy for the needs and interests of children in relation to media use.

In its work, CMA is always guided by child development research and by the UN Convention on the Rights of the Child (CRC). We discuss the Convention in more detail below, but for now we draw

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attention to article 18, which recognises the role of parents, and places an obligation on States to support them in their child-rearing:

> 2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall *render appropriate assistance* to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children. (emphasis added)

The provision of an effective system for protecting children's online safety is an important aspect of this assistance, especially in modern times when the role of online engagement in children's lives is bigger than ever, and continuously growing.

This submission has been written by CMA's President, Professor Elizabeth Handsley, and Hon CEO, Barbara Biggins OAM. We would be happy to be consulted further on the views put forward here.

## Introduction

CMA sets out below its views on specific aspects of the *Online Safety Act* (*OSA*, or the Act) and the regime it sets up. However, we would like at this stage to draw attention to the unfortunately fragmented way in which current Australian law regulates matters which co-exist and are interdependent in the real lives of children and families. We are referring to at least four things:

1. the matters that the *OSA* covers;
2. privacy and data protection;
3. content classification; and
4. public health issues such as overuse and addiction.

If we were starting from scratch, we would be recommending a legislative and regulatory structure where government interventions into these matters form a cohesive whole. This is especially the case given the tendency we have observed over many years of agencies to pass the buck when issues and problems don't fit neatly into one regulatory regime. At other times, even with the best will the world, such problems simply fall through the cracks in the overall governmental scheme. A topical example that might illustrate this dynamic is the Commonwealth's recent development of an Early Years Strategy that makes no mention of the role of digital and screen-based media in young children's lives. CMA remains mystified as to how this could have happened, though one possible explanation might be that those responsible for that Strategy took the view that the digital world is addressed elsewhere, including in the *OSA*. Please, in this review, don't let young children's interests as consumers of online content fall through the cracks by presuming that they are taken care of elsewhere. They are not.

It may be too much to ask of this review to ensure the joining-up of the four areas, or even make significant strides in that direction. However, such efforts need to start somewhere, so we commend to the review any and all measures that can bring them together, even if it just a matter of smoothing the way for various regulators and agencies to talk to each other. Better still would be measures to mandate active cooperation between them. This is particularly the case with privacy, considering that the foundation for so many of the risks and harms that children face online is in the collection of their data. We could have the best online safety regime in the world and it would still count for little if the collection of children's data were not effectively regulated.

As will become clear from our comments below, CMA sees a great need for:

- inclusion in the *OSA* of measures to restrict persuasive or addictive design, in view of children's right to access online services and content, and to do so safely;
- extension of the online content scheme to address all content that could be harmful or disturbing to children – that is, content from PG up; and
- a stronger focus on the requirements of the UN Convention on the Rights of the Child (both for its own reasons and as a way of cementing a best-interests principle).

CMA also supports the introduction of a general duty of care, as a model which can future-proof the *OSA* scheme against the development of new risks and harms as technologies grow and change.

In the rest of this submission we provide comments on a number of other matters on which the Issues Paper has questions. We have answered only those questions on which we have an informed view.

## Answers to Questions

**1. Are the current objects of the Act to improve and promote online safety for Australians sufficient or should they be expanded?**

In CMA's view nobody could take issue in principle with the objects as stated, but a question arises as to what counts as safety or, more relevantly, un-safety. This in turn depends on the definition of 'harm', or what is included in the list of harms recognised by the Act. CMA submits that a more inclusive list would be in order, especially in relation to the experiences and outcomes that flow from persuasive design. Phenomena such as overuse, problematic use, disordered use and addiction seem like major omissions.

**4. Should the Act have strengthened and enforceable Basic Online Safety Expectations?**

As CMA commented in its submission to the recent BOSE Determination inquiry:

CMA's preference is always for direct regulation of industry by a well-resourced and independent government regulator; our long experience with the scheme of 'co-regulation' for broadcasting leaves us sceptical as to the capacity of this scheme truly to work in the interests of the Australian public, and especially of children. This is no criticism of industry, which will naturally seek to pursue its own interests to the greatest extent possible. Rather it is to emphasise the need for a strong government regulator, whose powers and general approach are predicated on such a realistic appraisal of this tendency of industry and an unwavering commitment to the public good. Co-regulation does not lend itself to the creation of such a situation.

One particular aspect of the BOSE system that gives us pause is the approach of listing '**reasonable steps**' in relation to each expectation. In spite of the 'without limiting' language accompanying these, we suspect that the steps will (if they have not already) become a kind of check-list for providers, rather than fostering an attitude of ongoing curiosity as to what could be done better. Yet this is this kind of attitude that is needed, if industry is to rise to the responsibilities that co-regulation imposes (or should impose), particularly in such a dynamic and fast-changing field. If the Government is willing to take on that role, and add to the lists of reasonable steps from time to time as new issues and solutions emerge, that is one thing. However, we perceive considerable faultlines in this approach and would prefer to see clear regulations as to how providers should exercise their considerable power over the Australian public.

CMA also has reservations about the categorisation of Expectations as **'core' and 'additional'**; and in particular we have difficulty in seeing why a matter such as the best interests of the child should be an additional expectation and not core. This expectation is relevant to Australia's international obligations under the *UN Convention on the Rights of the Child* and it should be enshrined in legislation, not subject to change (or removal) on a stroke of the ministerial pen. We expect that over time, perhaps not under this Government but in the future, Ministers will come under pressure from industry to scale back the additional expectations. The best interests principle should be protected from such pressure.

Another general area of concern for CMA is the repeated references to '**reasonable steps to consider** end-user safety'. We wonder if this isn't evidence of an unreflective habit of using the words 'reasonable steps' in these regulations, even where they make little sense. A matter which is only for consideration does not need to be subject to the additional qualification of 'reasonableness'. Consideration cannot be more than a reasonable step in and of itself.

Finally, and perhaps most importantly, CMA is disappointed to see that there is no reference in the BOSE to the profound issue – for all internet users but particular[ly] for children – of **persuasive/addictive design**. We urge the Department to take any steps possible to enshrine an expectation of age-appropriate design and safety by design. Without these

fundamental protections baked in, the matters covered in the existing BOSE will have little impact on children's overall safety and wellbeing.

**5. Should the Act provide greater flexibility around industry codes, including who can draft codes and the harms that can be addressed? How can the code drafting process be improved?**

In relation to the first part of this question, CMA hopes that it is not indicating an intent to allow sections of industry to pick and choose which harms they address. As always, matters of public interest are best kept in the hands of publicly accountable organisations (such as government departments and agencies). If the intent instead is to allow industry to add further harms not mandated by legislation, CMA would have no objection to this.

As to the second part of the question, based on CMA's long experience of participating in public consultations on the drafting of codes, standards, guidelines and the like, we find it most effective when we are presented with a range of options on which to comment. At times a draft is produced and disseminated before the public has any opportunity to comment, and in these cases it is very much open to question whether it is worth our time to participate, as the changes seem like a foregone conclusion.

**6. To what extent should online safety be managed through a service provider's terms of use?**

While CMA has no objection in principle to the inclusion in a service provider's terms of use of reference to safety measures, such information should be available, and promoted, separately. We refer to the 2021 Reset Australia report on terms of use, which illustrates graphically how problematic these are, as a source of information to assist users.

**7. Should regulatory obligations depend on a service provider's risk or reach?**

The level of risk associated with a service provider's operations seems like a sensible consideration when one is determining the appropriate level of regulatory obligations. However, CMA notes that the level of risk will change over time. Therefore if it is to be taken into account, it needs to be reviewed regularly.

As to reach, again CMA agrees in principle, but submits that the regulations should avoid bright-line thresholds. This is because one can easily imagine – especially if the regulations are effective – providers structuring their businesses so as to avoid crossing the threshold. We commend the (proposed) Canadian approach to social media services referred to on page 17 of the Issues Paper, of reserving the right to designate some services that do not reach the threshold. This leaves the ultimate say to the common sense and pragmatism of an accountable government body.

**8. Are the thresholds that are set for each complaints scheme appropriate?**

CMA submits that there is no justification for limiting the Online Content Scheme to legally restricted material (rated MA15+ or higher). If full recognition is given to children's right to access the digital world safely this must mean that the government has an obligation, in a scheme such as this, to assist them and their families in relation to lower-classified content. Even that which is (or would be) rated M or PG can be inappropriate and harmful for children of certain ages.

This is not to say that the assistance should necessarily take the same form as that which currently applies for higher-classified content. CMA would welcome the opportunity for a full public discussion of the matter, to air the full range of possible approaches. Such a discussion might usefully be scheduled for a time after the currently-proposed amendments to the National Classification Scheme are bedded down.

CMA recently participated in public consultation on proposed changes to the National Classification Scheme and noted a degree of confusion as to the respective roles of the eSafety Commissioner and the proposed single regulator for classification. We are concerned that the needs of children under 15 not fall through the crack between these two schemes, that is, we see a risk that they come outside the eSafety Commissioner's brief (because the material is not legally restricted) and also outside the classification regulator's brief (because the material is online).

On a more specific matter, CMA submits that the justification for not having removal notices to end-users under the Online Content Scheme may be open to question, given the growth of user-generated content.

**9. Are the complaints schemes accessible, easy to understand and effective for complainants?**

Unfortunately the answer to the first two parts of this question is no. The schemes are very complex and convoluted, and they rely on opaque language or jargon. For example the term 'relevant electronic service' gives no indication as to what it is referring to.

CMA would expect that as further matters are added to the complaints schemes (as we hope will be an outcome of this review) this will tend to compound the complexity. Such an outcome would be especially unfortunate under a scheme that relies on members of the public to identify breaches and take action. It may be preferable to have a scheme based on broad descriptions of the kinds of behaviour it wishes to address, with officers within the regulator handling the nitty-gritty once a complaint is received.

**12. What role should the Act play in helping to restrict children's access to age inappropriate content (including through the application of age assurance)?**

As noted above, it is imperative as a matter of children's rights that there be effective regulation of all levels of content online, from PG up. CMA would not wish to suggest there is only one way to do this, and again, the main concern is that this matter not fall through the cracks between the *OSA*

and the National Classification Scheme. We would also strongly recommend that all content on all platforms be classified using a single classification regime (categories, elements, decision-making tools) even if different bodies might enforce the regime in different publication contexts.

CMA understands that age assurance is a controversial matter, raising a need to balance privacy and safety. However, looking at all relevant considerations from a practical perspective, we conclude that age assurance is justified.

In many cases, subscription services such as social media will already have enough data points on existing users to determine whether they are above an age threshold or not. For new accounts, it is possible to design a system where an appropriate piece of identification is shown to the provider once, and then records are destroyed. Under such a system, there is little if any concern about privacy.

The only remaining possible concern regards children's privacy vis-à-vis their parents. Age assurance may require minors to obtain parental assistance in setting up an account, but in the vast majority of cases there should be no concern about a parent knowing that a child or young person has a particular kind of account (as distinct from the content of that account, which the child or young person should be able to keep private if the parent agrees). Indeed, it would normally be considered part of a parent's responsibility to keep abreast of such a thing. There may be circumstances where a young person justifiably wishes to keep even the existence of an account a secret, but we expect that this would be rare – certainly not sufficiently prevalent to reject the whole idea of age assurance.

By hypothesis, we would suggest that a child who is under an age threshold for establishing an account, and whose parents would not agree to the establishment of such an account, should not have such an account. In other words, we should trust parents to make the call in those circumstances, according to their own values and their own view of their children's interests. In those rare cases where a child or young person would feel unable even to ask his or her parents for assistance in setting up an account, we suggest that something is amiss within that family, and it is not the role of the *OSA* to correct it.

CMA acknowledges that some children and young people will find ways to circumvent age assurance systems. However, this is not a reason not to have such systems. No law or regulation achieves 100% compliance, and yet laws and regulations remain an important way of stating societal values and expectations – in this case not just to children and young people but to their families, as well as to industry. Moreover, CMA expects that even the existence of an age assurance procedure will slow down and deter some users who would otherwise have a free pass to inappropriate content and contact.

**14. Should the Act empower 'bystanders', or members of the general public who may not be directly affected by illegal or seriously harmful material, to report this material to the Commissioner?**

CMA can see some value in such an extension, especially in that it would open the way for organisations with relevant aims to take action for the public good. This could take some of the pressure off individuals who are directly affected, as they may already be too traumatised to wish to take action, or may fear reprisals from the perpetrators. It would also facilitate system-level reports, which could be greatly helpful in relation to some kinds of content.

**16. What more could be done to promote the safety of Australians online, including through research, educational resources and awareness raising?**

There is a need for an autonomous peak body to represent the interests of consumers of online content and services, along the lines of the Australian Communications Consumer Action Network (ACCAN). To facilitate the establishment and continued secure existence of such an organisation, CMA recommends the inclusion in the *OSA* of a similar provision to s 593 of the *Telecommunications Act 1997*. More information about ACCAN can be found here.

**21. Should the Act incorporate any of the international approaches identified above? If so, what should this look like?**

CMA is strongly in favour of safety by design and the best interests of the child, as enshrined in United Kingdom law. The logic behind safety by design is compelling: the internet was not designed with children's needs and interests in mind, and because children not only are present on the internet but have a right to be present there, the design needs to change. We believe that these principles are widely accepted nowadays, and the time for their inclusion in Australian law has come.

As the Issues Paper notes, the primacy of the best interests of the child is enshrined in article 3 of the UN Convention on the Rights of the Child, to which Australia is a signatory. Therefore we suggest that it is not sufficient for the principle to be included in the BOSE, but rather it should have 'teeth'. We note further that the best interests principle is fully recognised in the Children's Rights and Business Principles.

**22. Should Australia place additional statutory duties on online services to make online services safer and minimise online harms?**

CMA supports the introduction of a general duty of care for online services. This has the potential to future-proof the OSA, by requiring industry to consider its obligations whenever technological (or other) developments bring about new risks, or where existing risks extend to new harms. If there is a general duty of care, industry cannot sit and wait for specific rules relating to those new risks or harms, rather it is expected to extrapolate from existing rules to determine the expectations on it.

The duty of care should expressly incorporate important principles, such as the best interests of the child.

CMA acknowledges that a duty of care is only a first step, and there would need to be a system for identifying and investigating possible breaches, and for accountable decision-making at the end of that process. Such a system could be built along the lines of what we currently have for breaches of the *Broadcasting Services Act* (and of licence conditions under that Act).

**24. Should there be a mechanism in place to provide researchers and eSafety with access to data? Are there other things they should be allowed access to?**

In principle, CMA is in favour of such a mechanism. These companies wield power equivalent, in many respects, to that of the government, and they should expect to be subject to similar accountability and transparency requirements.

**25. To what extent do industry's current dispute resolution processes support Australians to have a safe online experience? Is an alternative dispute resolution mechanism such as an Ombuds scheme required? If so, how should the roles of the Ombuds and Commissioner interact?**

CMA is in favour of the addition of further independent input into these processes. In our experience, systems of media regulation tend to provide insufficient support to those who wish to question the status quo. An Ombuds scheme would be an appropriate remedy to this.

**26. Are additional safeguards needed to ensure the Act upholds fundamental human rights and supporting principles?**

CMA submits that the UN Convention on the Rights of the Child (CRC) should be considered central to the further development of the *OSA*. The CRC has widespread acceptance throughout the international community, with more signatories than any other international agreement. Australia has obligations under the Convention in any case, but CMA submits that the strong acceptance of the norms it embraces should provide a further impetus for the Government to weave them into the fabric of the *OSA*.

When considering legislation or government action to protect the interests of children, it is important to bear in mind that children pass through different stages of development, with strengths and vulnerabilities evolving over time. Not coincidentally, the Convention, too, recognises children's evolving capacities as an important principle:

> States Parties shall respect the responsibilities, rights and duties of … persons legally responsible for the child, to provide, *in a manner consistent with the evolving capacities of the child*, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention. (article 5; emphasis added)

Regarding media use, article 17 is most obviously salient:

> States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.
>
> To this end, States Parties shall:
>
> (a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;
> (b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;
> (c) Encourage the production and dissemination of children's books;
> (d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;
> (e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

Article 13 lays down the child's right to freedom of expression, and to seek and impart information, subject to certain limits; and as we saw above, article 18 addresses the role of parents. Article 29 refers to the matters that should guide children's education, including for example the preparation of the child for life in a free society.

CMA draws your attention particularly to the requirement in article 17 to encourage the development of guidelines to protect children from injurious content (para (e)). There is ample evidence to suggest that 'injurious' in this context should be read to include violent and scary content, and that which can be implicated in the grooming of children as future gamblers (for example games with loot boxes), as currently addressed in the National Classification Scheme (and hopefully soon to be more effectively addressed). It is also arguable that the term should be seen as encompassing content that is designed to maximise engagement, and make disengagement difficult – that is, what is known as 'persuasive design'.

Article 17 is known to have been the subject of a complicated negotiation process, where some states parties wanted stronger protection and some wanted weaker.[1] CMA suggests that if the Convention had been negotiated in the 2020s instead of the 1980s, article 17 would have looked

[1] John Tobin and Elizabeth Handsley, 'Article 17. The Mass Media and Children: Diversity of Sources, Quality of Content, and Protection Against Harm' in John Tobin and Philip Alston (eds), *Commentary on the Convention on the Rights of the Child* (Oxford University Press, 2019) ISBN 9780198262657.

significantly different, due to the massive growth in significance of mass media activities over the intervening years. (For example, the concept of 'mass media' would have given way to one that more clearly includes user-generated content, social media and online influencers.) In any case, the Committee on the Rights of the Child has recently gone some way towards filling the gap with its *General comment No. 25 on children's rights in relation to the digital environment* (GC25). CMA commends that document to you, and urges you to look closely at all that it has to say. We draw your attention, in particular, to:

- the need to have regard to up-to-date research from a range of disciplines in designing age-appropriate measures in keeping with the principle of evolving capacities;
- the discussion of the role of the business sector (especially significant given the way article 17 is phrased); and
- the link to other rights such as health and welfare, education, and leisure and play.

In short, children have a right to access digital services, but to do so safely – that is, in ways which do not undermine their healthy development. The *OSA* should include measures to make this a reality, including the allocation of resources to support parents and carers in using the *OSA*'s mechanisms in their own local context.

There are a number of relevant articles in the CRC that could be incorporated into the online safety scheme, for example:

- Children's right to survival and development (article 6)
- The obligation on governments to take measures to combat the illicit transfer and non-return of children abroad (article 11)
- Children's right to receive information (article 13)
- Children's right to protection of the law against interference with privacy (article 16)
- The obligation on governments to '[e]ncourage the development of appropriate guidelines for the protection of the child from material injurious to his or her well-being' (article 17)
- The obligation on governments to 'render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities' (article 18)
- Children's right to protection from 'all forms of physical or mental violence, injury or abuse … including sexual abuse' (article 19)
- Children's right to education (article 28) which should be directed to 'the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin' (article 29)
- Children's right 'to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts' (article 31)
- Children's right to protection from economic exploitation (article 32)

- The obligation on governments to 'prevent the abduction of, the sale of or the traffic in children' (article 35)

These do not form part of Australian law unless and until they are incorporated into legislation. Therefore, at a minimum, the *OSA* should include a statement requiring those exercising power under it to take the above articles into account in their actions and decision-making. Among other benefits, this could give additional meaning and content to the best interests principle.

While the rights laid down by the CRC are binding on signatory governments, they are now coming to be recognised as general norms for appropriate behaviour by private corporations and individuals where children's interests are concerned. In particular, the *Children's Rights and Business Principles* provide that businesses should:

> 1. Meet their responsibility to respect children's rights and commit to supporting the human rights of children;
> 4. Ensure the safety and protection of children in all business activities and facilities; and
> 5. Ensure that products and services are safe, and seek to support children's rights through them.

As the *OSA* necessarily requires the compliance of a range of businesses for the protection of children's rights and interests, its further development should be informed by these norms. This is particularly so considering the (relatively new, and likely to be expanded) role of businesses in classifying their own content under the National Classification Scheme, which will have flow-on effects for online safety.

**28. What considerations are important in balancing innovation, privacy, security, and safety?**
CMA would point to human rights as an important consideration here, especially those of vulnerable groups, for example children. It is also important to recognise two meanings of 'privacy' namely freedom from surveillance and security of personal data, and to specify which is being referred to in any given balancing.

**33. Should Australia consider introducing a cost recovery mechanism on online service providers for regulating online safety functions? If so, what could this look like?**
CMA has reservations about cost recovery as some forms of it seem to set up a situation where the industry sees itself as the government's client rather than as a subject of regulation for the public good. These issues are avoided to some extent by a system such as that in the UK and EU (and proposed in Canada) where industry contributes in a general way to the running of the online safety system. This should avoid any appearance of regulation being a user-pays service, or any sense of industry having any greater stake in the system than the rest of society does. Terms such as 'annual

supervisory fee' create a better impression, as does the calculation of the fee based on providers' revenue, rather than based on their level of engagement with the regulator. Such a fee is in essence a levy, and not really cost-recovery at all.

## Conclusion

CMA hopes that the above observations and recommendations will assist the review process; and we should be most pleased to engage further, for example by answering any questions or presenting at a hearing. Please direct any correspondence to [redacted]

Thanks once again for the opportunity to put our views forward.

*******END OF SUBMISSION*******