CHILDREN & MEDIA AUSTRALIA

Thriving in a digital world

15 February 2024

Department of Infrastructure, Transport, Regional Development, Communications and the Arts
By email to: BOSEreform@communications.gov.au

SUBMISSION ON PROPOSED AMENDMENTS TO THE *ONLINE SAFETY (BASIC ONLINE SAFETY EXPECTATIONS) DETERMINATION 2022*

Thank you for the opportunity to provide input to the development of these standards.

Children and Media 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), AEU (Australian Education Union), Parenting Research Centre, 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, rights and interests of children in relation to media use.

This submission has been written by our President, Professor Elizabeth Handsley, and our Hon CEO, Barbara Biggins OAM CF. In addition to our comments below, we have seen drafts of the submissions by the Alannah and Madeline Foundation and the ARC Centre of Excellence for the Digital Child, and we commend to you the points made there.

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General comments

Overall, CMA is glad to see that the Government is aiming to close some gaps in the existing Determination, and in particular to catch up with artificial intelligence (AI). This is a serious challenge for governments around the world, which is all the more reason to act early.

However we would like to take this opportunity to express our ongoing reservations about certain aspects of this regulatory regime. 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 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. It may be too late for such a significant matter to be covered in the current process, but we very much hope the Department will commence a process soon towards bringing Australia up to date with practices in other jurisdictions.

Best interests of the child

As might be expected, CMA has paid particular attention to the introduction of the best interests of the child, which we applaud as a positive development for young users. However, as already stated, we have concerns about their status as an 'additional' consideration. Our comment above about 'reasonable steps' also applies here: it is not asking too much of industry simply to ensure that children's best interests are 'a primary consideration'. Requiring providers only to 'take reasonable steps' in that direction amounts to a very weak regulation, that in practice will have next to no impact on children's lives. We note that the *Convention on the Rights of the Child* itself does not include any qualification as to 'reasonable steps' or similar, rather article 3 says simply that 'the best interests of the child *shall be* a primary consideration' (emphasis added).

CMA would suggest further that the expectation be rephrased to refer to the **best interests of children, not 'the child'**. If, as stated on page 11 of the Consultation Paper, 'services will be expected to consider the best interests of the child generally, including having regard to the physical, psychological and emotional wellbeing of children on a service', such a change of wording would more clearly and accurately reflect the intent behind the expectation. We understand the use of 'the child' as aligning with the language in the Convention, but the phrase there can be read in a flexible way to mean a particular child or children in general, depending on the context. In normal parlance, however, we do not use 'the child' in the latter way. Using 'children' instead would make the message clearer, and without any departure from the international obligation under the Convention. Such clarity is all the more important in a co-regulatory scheme where so much is left in the court of industry decision-makers, who cannot be expected to be conversant with the finer points of international law.

Nor can those charged with meeting these expectations be expected to understand **the content of 'best interests'** without guidance. Such guidance should come from the government, and ideally from the BOSE

Determination (or, ideally, the Act) itself. While there is always some debate about the practicalities of the concept, we can at least agree that children's 'best interests' include having their other Convention rights respected and protected. CMA would recommend, at a minimum, the inclusion in the expectation of words to this effect. It would also be appropriate to refer to those rights that have particular relevance in the context of online engagement, namely:

- 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)

Role of National Classification Scheme in online content regulation

If the best interests of children are to become a primary consideration in online safety, then the regime should link to all National Classification Scheme (NCS) film categories, not just RC, X18+ and R18+. Lower classifications also aim, however imperfectly, to protect children from age-inappropriate content, and there is no reason in principle to limit the BOSE to higher-end material. As with safety by design and related matters, it may be too late in this process to introduce such a significant change, but CMA urges the Department to commence, as soon as possible, a process towards determining the best way of using the full gamut of the NCS. (Ideally such a process would be coordinated with one for reforming the NCS to make it evidence- and age-based.)

CMA notes the reference on page 10 to class 2 material and 'other potentially distressing images and video' as subjects for opt-in user content controls. This may be simply a manner of speaking, but if the material to be restricted as 'class 2 material' does not already include all potentially distressing images and video (however classified), that suggests there is something wrong with the definition of class 2.

Alternatively, if additional descriptions, over and above the definition of class 2, are to be included in this or any other part of the BOSE, CMA recommends the addition of material that is developmentally inappropriate for children, even if not distressing.

CMA also questions, on the particular topic of user controls, why they should be opt-in. Protection of children would be significantly more effective under an opt-out system.

A co-regulatory scheme has a strong imperative to provide maximum clarity and information to those involved in administering the scheme – especially the industry actors who have the front-line responsibility. This is all the more so because under such a regime, with the best will in the world, breaches are more likely to fall through the cracks, making prevention all the more important. Clarity and full information can assist with that.

'Appropriate' age assurance mechanisms

On the question of age assurance mechanisms, the Consultation Paper says: 'The inclusion of the word "appropriate" signals that age assurance mechanisms to prevent children's access to class 2 material should be calibrated to the level of risk and harm of the material' (page 11). CMA questions whether providers are in a position to gauge the level of risk and/or harm as this would require a detailed knowledge of child development and the research evidence on children's needs at different ages and stages. It may be that, for reasons explained in the submission of the Alannah and Madeline Foundation, this passage means to refer to the risk of children encountering the material, rather than the risk that the material will be harmful, or the degree of harm risked, if children encounter it. In any case, CMA submits that there is no need for this kind of subtlety. Rather it should be assumed that the 'level of risk and harm' is the same for *all* class 2 material, so there is no need to calibrate age assurance mechanisms.

CONCLUSION

We thank the Department once again for the opportunity to comment on these proposed amendments, and we should be most pleased to expand on the points made here, if that would be helpful.

Yours sincerely

Professor Elizabeth Handsley

President