

Restricted Access System Declaration

Online Safety Act 2021

Discussion Paper

August 2021



Introduction

On 23 June 2021, the Australian Parliament passed into law the Online Safety Act 2021 (Cth) (the Act).

The Act creates a modern, fit for purpose regulatory framework that builds on the strengths of the existing legislative scheme for online safety. In addition to schemes tackling image-based abuse, serious child cyberbullying, and seriously harmful adult cyber abuse, the Act:

- introduces an updated Online Content Scheme ('the Scheme') to replace Schedules 5 and 7 of the Broadcasting Services Act 1992 (Cth) ('BSA')
- creates a range of options for the eSafety Commissioner to deal with harmful online content through the Scheme, including removal and remedial notices
- requires a new Restricted Access System declaration to be in place by the time the Act commences in January 2022.

Under the Scheme, the eSafety Commissioner will have the power to issue removal notices to a variety of services in relation to the most harmful forms of material online. These include child sexual abuse material, material providing instruction in crime and violence, and material that promotes or advocates a terrorist act. For some other material that is provided from or hosted in Australia, the eSafety Commissioner will be able to issue a remedial notice to a service. Under such a notice, the service must either remove the material or ensure that it is subject to a Restricted Access System (RAS).

A RAS is a way of controlling access to certain material based on age. The purpose of a RAS is not to prevent access to age-restricted content, but to ensure access is limited to people who are 18 years and over. Where the method used to limit access meets a minimum standard under the RAS (including methods for confirming age), the need to seek removal of the content is eliminated.

A RAS covers the kind of material that has been or is likely to be classified R18+ or Category 1 Restricted ('Restricted Material') under the National Classification Code. This category includes:

- realistically simulated sexual activity between adults
- high impact nudity
- high impact violence
- high impact drug use
- high impact language.

It should be noted that the new RAS declaration will not address material showing actual sexual activity between adults (which falls under the X18+ classification). Where such X18+ material is provided from Australia or is hosted in Australia it may be subject to a removal notice.

Under the Act, a RAS declaration must be in place at all times from commencement. The new RAS will be established through a legislative instrument to be declared by the eSafety Commissioner. The first RAS was declared under the BSA in 2007, and updated by a 2014 instrument. This instrument will remain in place until the Online Safety Act commences in January 2022.

The Act changes the operation of the existing RAS in two important ways.

First, it broadens the scope of services that are obligated to meet the requirements of the new RAS. These services include social media services, designated internet services and relevant electronic services that are providing access to material from Australia. It also applies to Australian hosting service providers, who are required to either stop hosting the material or take reasonable steps to ensure access to Restricted Material is limited in accordance with the RAS.

Second, the Act now limits the scope of the Restricted Access System to focus on material that is unsuitable for a minor to access. The provisions for a Restricted Access System under the BSA apply to commercial MA15+ material and all R18+ material hosted from Australia. However, the Act has narrowed the focus to Restricted Material, where the material can be accessed on a service provided from Australia, or where the material is hosted in Australia.

Age verification roadmap

Additionally, on 1 June 2021, the Australian Government tabled its response to the House of Representatives Standing Committee of Social Policy and Legal Affairs report, 'Protecting the age of Innocence'. The Government's response indicated support for Recommendation 3, which called for the eSafety Commissioner to lead

development of an implementation roadmap for a mandatory age verification regime for online pornography.

eSafety will undertake extensive research and consultation to help inform and identify recommendations for government on how to achieve a proportionate, effective and feasible age verification regime for the purposes of reducing the exposure of children and young people under 18 to online pornography in Australia. The roadmap will not be limited to material that is hosted or provided from Australia, and will cover both commercially produced and user-generated sexually explicit material. The roadmap will cover all forms of online pornography and is not limited to just the Restricted Material that falls under the requirements of a RAS. A public call for evidence will be published in August 2021.



Consultation on the RAS

Consultation on the new RAS will consist of two phases. The first involves a public consultation on a range of broad questions, including about available technologies, methods and policy options, and the likely impact of a RAS on industry. The second phase will involve public consultation on the draft legislative instrument.

The following timeline outlines the steps the eSafety Commissioner will take in formulating the RAS:

16 August 2021	Public consultation on RAS Discussion Paper opens
12 September	Public consultation on RAS Discussion Paper closes
September 2021	Assess public submissions and draft RAS and explanatory statement
October 2021	Public consultation on RAS instrument and explanatory statement opens (30 days)
November 2021	Review public submissions and amend documents as required
End of November 2021	Lodgement of RAS and explanatory statement with the Office of Parliamentary Counsel
December 2021	Registration of RAS and explanatory statement

The eSafety Commissioner invites submissions from industry and the public on matters set out in this Discussion Paper, to assist in the drafting of a new RAS declaration. The information gathered through this consultation process will also be used to help inform the development of eSafety's age verification implementation roadmap for online pornography.

Regulatory framework

The regulatory framework for drafting a new RAS declaration is set out in the Act.

Under subsection 108(1) of the Act, the eSafety Commissioner may, by legislative instrument, declare that a specified access-control system is a Restricted Access System in relation to material for the purpose of the Act.

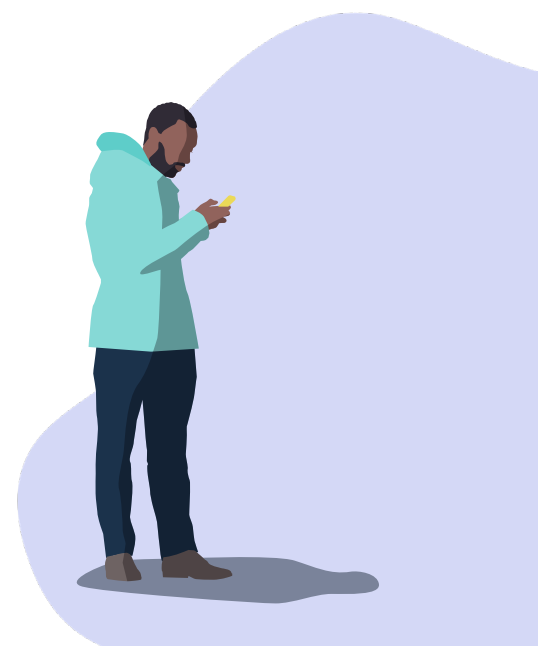
In making the instrument, subsection 108(4) requires the Commissioner to have regard to:

- a)** the objective of protecting children from exposure to material that is unsuitable for children; and
- b)** the extent to which the instrument would be likely to result in a financial or administrative burden on providers of the following services:
 - i.** social media services;
 - ii.** relevant electronic services;
 - iii.** designated internet services; and
- c)** such other matters (if any) as the Commissioner considers relevant.

Under subsection 108(5) of the Act, the eSafety Commissioner must ensure that a Restricted Access System declaration is in force at all times after the commencement of the Act. Under the Act, a Restricted Access System is only applicable to class 2 material that meets the requirements of subclauses 107(1)(f), (g), (h), (i), (j), (k) or (l) which is online material that is, or is likely to be, considered either R18+ or Category 1 for publications, under the National Classification Code. The specific subclauses are provided at the end of this paper. Further, to be subject to a Restricted Access System the material must be available on a service provided from Australia, or the material must be hosted in Australia. The Explanatory Memorandum for the Act notes that the

phrase ‘provided from Australia’ is “intended to capture, for example, social media services who have a registered office or carry-on business in Australia or a website based in Australia.”¹

Under section 119 of the Act, the eSafety Commissioner may issue a remedial notice to a social media service, relevant electronic service or designated internet service that is providing access to Restricted Material to people under 18. The notice directs the service to either remove the material or ensure it is subject to a Restricted Access System. Under section 120 of the Act, a remedial notice may also be issued by the eSafety Commissioner to a hosting provider to take the same action, either through removing the material or directing their customer to place the material behind a RAS.



¹Explanatory Memorandum, Online Safety Bill 2021 (Cth), 128.

Questions

The eSafety Commissioner invites submissions on any matters that should be considered in drafting a new Restricted Access System declaration. The information gathered through this process will also be used to inform the development of eSafety's age verification implementation roadmap for online pornography.

The process of developing the Restricted Access System declaration and the age verification implementation roadmap will also help to inform the development and implementation of other regulatory tools within eSafety's remit under the Act. In particular, it will guide eSafety's engagement with the technology industry as codes of practice and Basic Online Safety Expectations are developed. These tools will also play critical roles in limiting children's and young people's exposure to age-inappropriate material.

The following questions have been provided to assist in focusing submissions. They are a guide only and not intended to limit the scope of submissions. Responses can be provided to all or any of the questions. The eSafety Commissioner requests that submitters provide reasons to support any views expressed.

Restricted Access System effectiveness and impacts

Views are being sought on the impact of the new RAS being extended to cover a larger segment of the online industry that now includes social media services, relevant electronic services and designated internet services providing material from Australia.

We also wish to assess industry and public opinion about the effectiveness of the current Restricted Access System, and how its elements might be strengthened or amended to form a new RAS. We are keen to understand how the RAS should meet the policy objective of keeping children and young people safe online, while not placing unnecessary financial or administrative burden on industry.

Question 1

Under the Online Safety Act 2021, the RAS will only apply to Restricted Material that is provided from Australia on a social media service, relevant electronic service or designated internet service, or that is hosted in Australia. What elements should be part of an effective system to limit access to that kind of material?

Question 2

Has industry experienced any difficulty complying with the [Restricted Access System Declaration 2014](#)?

Question 3

Has the Restricted Access System Declaration 2014 allowed industry the flexibility to develop access-control systems appropriate to their business models?

Question 4

What is the nature of the impact that has been experienced by:

- (a) industry; and
- (b) the Australian public

as a result of the Restricted Access System Declaration 2014? Have financial and administrative burdens been placed on service providers by the 2014 RAS Declaration? Have there been any indirect effects (for example, costs being passed on to customers or suppliers)? Please provide examples.

Age restriction methods

The Act requires that systems for restricting the access of children and young people under 18 to age-inappropriate material are in place from commencement of the Act, but it does not specify the requirements for how this should be implemented. To help inform the eSafety Commissioner's design process, we are seeking views on what should be included, or excluded, in the Restricted Access System.

Since the implementation of the Restricted Access System Declaration 2014, there has been significant technological advancement in methods for determining or assuring the age of online services users, and for protecting children and young people from exposure to age-inappropriate material.

In June 2021, the Australian Government directed eSafety to create an age verification implementation roadmap, with a specific focus on preventing children's access to pornography.

The RAS provisions under the Act will address a broader range of material than pornography, including material depicting high-impact violence. To help guide the coordinated development and harmonisation of the Restricted Access System and the age verification roadmap, we are seeking industry's views on current and future methods of age assurance and verification.

Question 5

What factors should be considered when assessing the effectiveness and impacts of systems, methods and approaches to limiting access or exposure to age-inappropriate material?

Question 6

What systems, methods and approaches do you consider effective, reasonable and proportionate for verifying the age of users prior to limiting access age-inappropriate material?

Question 7

Should the new RAS be prescriptive about the measures used to limit children's exposure to age-inappropriate material, or should it allow for industry to determine the most effective methods?

Additional information

We encourage you to provide further information that may not be covered in answers to the previous questions.

Question 8

Is there any additional information eSafety should consider in drafting a new Restricted Access System declaration?

Submissions

The eSafety Commissioner invites submissions from industry and the public on matters set out in this Discussion Paper. Views expressed through this consultation will assist the eSafety Commissioner to draft a new Restricted Access System declaration under the Online Safety Act 2021.

How to make a submission

There are three ways to make a submission.

By uploading via this link:

esafety.gov.au/restricted-access-system

By email:

submissions@esafety.gov.au

By mail:

Executive Manager, Investigations
Office of the eSafety Commissioner
PO Box Q500,
Queen Victoria Building NSW 1230

Each submission should be accompanied by:

- the name of the individual or organisation making the submission
- a name for publication purposes (this can be the name of the individual or organisation, or a pseudonym, or 'anonymous')
- contact details (such as a telephone number, postal address or email address).

A submitter may claim confidentiality over their name or contact details (see 'Publication of submissions').

The closing date for submissions is 12 September 2021.

Publication of submissions

eSafety may publish submissions we receive on our website, including any personal information in the submissions. In case your submission is made public, please ensure that you do not include any personal information that you do not want published.

Confidentiality

We prefer to receive submissions that are not claimed to be confidential. However, we accept that you may sometimes wish to provide information in confidence. In these circumstances, we ask you to identify the material (including any personal information) over which confidentiality is claimed and provide a written explanation for the claim.



eSafety will consider each confidentiality claim on a case-by-case basis. If we accept a claim, we will not publish the confidential information unless authorised or required by law to do so.

Privacy information

We collect personal information for the purpose of considering the issues raised in the discussion paper and to contribute to the transparency of the consultation process by clarifying, where appropriate, whose views are represented by a submission. We may also use your details to contact you regarding your submission. We will never share or make public any of your contact details (including email address or phone number) that you provide as part of our online form or that you provide with your email or postal submission. eSafety will not use the personal information collected for any other purpose, unless the submitter has provided their consent or eSafety is otherwise permitted to do so under the Privacy Act 1988 (Cth) (Privacy Act). For more information, please see our [Privacy Policy](#) and [Collection Notification](#).

eSafety's [Privacy Policy](#) contains details about how an individual may access personal information about them that is held by eSafety and seek the correction of such information. It also explains how an individual may complain about a breach of the Privacy Act and how eSafety will deal with such a complaint.

Release of submissions

Any submissions provided to the eSafety may be released under the Freedom of Information Act 1982 (Cth) (unless an exemption applies) or shared with other Australian Government agencies and certain other parties under Part 9 of the Enhancing Online Safety Act 2015 (Cth). eSafety may also be required to release submissions for other reasons including for the purpose of Parliamentary processes or where otherwise required by law (for example, under a court subpoena). While eSafety seeks to consult submitters of confidential information before that information is provided to another party, eSafety cannot guarantee that confidential information will not be released through these or other legal means.

Relevant legislation

Online Safety Act 2021

Part 1 – Preliminary

[...]

13 Social media service

1. For the purposes of this Act, social media service means:

a) an electronic service that satisfies the following conditions:

(i) the sole or primary purpose of the service is to enable online social interaction between 2 or more end users;

(ii) the service allows end users to link to, or interact with, some or all of the other end users;

(iii) the service allows end users to post material on the service;

(iv) such other conditions (if any) as are set out in the legislative rules; or

(b) an electronic service specified in the legislative rules;

but does not include an exempt service (as defined by subsection (4)).

Note: Online social interaction does not include (for example) online business interaction.

2. For the purposes of subparagraph (1)(a)(i), online social interaction includes online interaction that enables end users to share material for social purposes.

Note: Social purposes does not include (for example) business purposes.

3. In determining whether the condition set out in subparagraph (1)(a)(i) is satisfied, disregard any of the following purposes:

a) the provision of advertising material on the service;

b) the generation of revenue from the provision of advertising material on the service.

Exempt services

4. For the purposes of this section, a service is an exempt service if:

a) none of the material on the service is accessible to, or delivered to, one or more end users in Australia; or

(b) the service is specified in the legislative rules.

13A Relevant electronic service

1. For the purposes of this Act, relevant electronic service means any of the following electronic services:

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;

g) an electronic service specified in the legislative rules;

but does not include an exempt service (as defined by subsection (2)).

Note 1: **SMS** is short for short message service.

Note 2: **MMS** is short for multimedia message service.

Exempt services

2. For the purposes of this section, a service is an exempt service if none of the material on the service is accessible to, or delivered to, one or more end users in Australia.

14 Designated internet service

1. For the purposes of this Act, designated internet service means:

- a) a service that allows end users to access material using an internet carriage service; or
- b) a service that delivers material to persons having equipment appropriate for receiving that material, where the delivery of the service is by means of an internet carriage service;

but does not include:

- c) a social media service; or
- d) a relevant electronic service; or
- e) an on demand program service; or
- f) a service specified under subsection (2); or
- g) an exempt service (as defined by subsection (3)).

2. The Minister may, by legislative instrument, specify one or more services for the purposes of paragraph (1)(f).

Exempt services

3. For the purposes of this section, a service is an exempt service if none of the material on the service is accessible to, or delivered to, one or more end users in Australia.

Part 9 – Online content scheme

Division 1 – Introduction

[...]

107 Class 2 material

1. For the purposes of this Act, class 2 material means:

[...]

- f) material where the following conditions are satisfied:
 - (i) the material is a film or the contents of a film;
 - (ii) the film has been classified as R 18+ by the Classification Board under the Classification (Publications, Films and Computer Games) Act 1995; or
- g) material where the following conditions are satisfied:
 - (i) the material is a film or the contents of a film;
 - (ii) the film has not been classified by the Classification Board under the Classification (Publications, Films and Computer Games) Act 1995;
 - (iii) if the film were to be classified by the Classification Board under that Act—the film would be likely to be classified as R 18+; or
- h) material where the following conditions are satisfied:
 - (i) the material is a publication or the contents of a publication;
 - (ii) the publication has been classified as Category 1 restricted by the Classification Board under the Classification (Publications, Films and Computer Games) Act 1995; or
- i) material where the following conditions are satisfied:
 - (i) the material is a publication or the contents of a publication;
 - (ii) the publication has not been classified by the Classification Board under the

Classification (Publications, Films and Computer Games) Act 1995;

- (iii) if the publication were to be classified by the Classification Board under that Act—the publication would be likely to be classified as Category 1 restricted; or
- j) material where the following conditions are satisfied:
 - (i) the material is a computer game;
 - (ii) the computer game has been classified as R 18+ by the Classification Board under the Classification (Publications, Films and Computer Games) Act 1995; or
- k) material where the following conditions are satisfied:
 - (i) the material is a computer game;
 - (ii) the computer game has not been classified by the Classification Board under the Classification (Publications, Films and Computer Games) Act 1995;
 - (iii) if the computer game were to be classified by the Classification Board under that Act—the computer game would be likely to be classified as R 18+; or
- l) material where the following conditions are satisfied:
 - (i) the material is not a film, the contents of a film, a computer game, a publication or the contents of a publication;
 - (ii) if the material were to be classified by the Classification Board in a corresponding way to the way in which a film would be classified under the Classification (Publications, Films and Computer Games) Act 1995—the material would be likely to be classified as R 18+.

[...]

108 Restricted Access System

1. The Commissioner may, by legislative instrument, declare that a specified access control system is a Restricted Access System in relation to material for the purposes of this Act.

Note: For specification by class, see subsection 13(3) of the Legislation Act 2003.

2. An instrument under subsection (1) may make different provision with respect to different kinds of material.

3. Subsection (2) does not limit subsection 33(3A) of the Acts Interpretation Act 1901.

4. In making an instrument under subsection (1), the Commissioner must have regard to:

- a) the objective of protecting children from exposure to material that is unsuitable for children; and
- b) the extent to which the instrument would be likely to result in a financial or administrative burden on providers of the following services:
 - (i) social media services;
 - (ii) relevant electronic services;
 - (iii) designated internet services; and
- c) such other matters (if any) as the Commissioner considers relevant.

5. The Commissioner must ensure that an instrument under subsection (1) is in force at all times after the commencement of this section.

[...]

Division 4 – Remedial notices relating to class 2 material

119 Remedial notice given to the provider of a social media service, relevant electronic service or designated internet service

1. If:
 - a) material is, or has been, provided on:
 - (i) a social media service; or
 - (ii) a relevant electronic service; or
 - (iii) a designated internet service; and
 - b) the Commissioner is satisfied that the material is class 2 material covered by
 - c) the material can be accessed by end users in Australia; and
 - d) the service is not:
 - (i) an exempt Parliamentary content service; or (ii) an exempt court/tribunal content service;or
 - (iii) an exempt official inquiry content service; and
 - e) the service is provided from Australia;
the Commissioner may give the provider of the service a written notice, to be known as a remedial notice, requiring the provider to:
 - f) take all reasonable steps to ensure either of the following situations exist in relation to the material:
 - (i) the material is removed from the service;
 - (ii) access to the material is subject to a Restricted Access System; and
 - g) do so within:
 - (i) 24 hours after the notice was given to the provider; or
 - (ii) such longer period as the Commissioner allows.
2. So far as is reasonably practicable, the material must be identified in the remedial notice in a way that is sufficient to enable the provider of the service to comply with the notice.

120 Remedial notice given to a hosting service provider

1. If:
 - a) material is, or has been, provided on:
 - (i) a social media service; or
 - (ii) a relevant electronic service; or
 - (iii) a designated internet service; and
 - b) the Commissioner is satisfied that the material is class 2 material covered by paragraph 107(1)(f), (g), (h), (i), (j), (k) or (l); and
 - c) the material can be accessed by end users in Australia; and
 - d) the service is not:
 - (i) an exempt Parliamentary content service; or
 - (ii) an exempt court/tribunal content service; or
 - (iii) an exempt official inquiry content service; and
 - e) the material is hosted by a hosting service provider; and
 - f) the material is hosted in Australia;
the Commissioner may give the hosting service provider a written notice, to be known as a remedial notice, requiring the provider to:

- g)** take all reasonable steps to ensure either of the following situations exist in relation to the material:
 - (i)** the service ceases to host the material;
 - (ii)** access to the material is subject to a Restricted Access System; and
- h)** do so within:
 - (i)** 24 hours after the notice was given to the provider; or
 - (ii)** such longer period as the Commissioner allows.

2. So far as is reasonably practicable, the material must be identified in the remedial notice in a way that is sufficient to enable the hosting service provider to comply with the notice.



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