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Submitted: by upload to ACMA website

Consultation 39/2021 – New rules to prevent fraud from unauthorised customer interactions with telecommunications providers – Proposal to make the *Telecommunications Service Provider (Customer Identity Verification) Determination 2021*

Thank you for the opportunity to provide comments on the proposed Determination, the objective of which is to prevent unauthorised customer interactions involving telecommunications services and accounts. Our comments relate principally to:

- the definition of family violence by reference to the definition set out in the *Family Law Act 1975* (Cth)
- identity verification processes in which authorised representative arrangements are in place for a customer, and
- the proposed time limit of one day for multi-factor identity verification to be completed using identity documents.

Recommendations

Recommendation 1

The ACMA should consult with the Commonwealth Attorney-General's Department to arrive at a nationally-applicable and expansive definition of family violence for the purposes of this Determination.

Recommendation 2

The ACMA should engage with the Attorney-General's Department about timely implementation of enduring powers reforms to support consumer, business and regulator confidence in the integrity of authorised representative arrangements.

Recommendation 3

The ACMA should clarify what is meant by 'direct and immediate access' in clause 9 of the Determination, and the intended relationship between paragraphs 9(2)(a) and 9(2)(b).

The work of the Relationships Australia federation

Relationships Australia is a federation of community-based, not-for-profit organisations with no religious affiliations. Our services are for all members of the community, regardless of religious

belief, age, gender, sexual orientation, lifestyle choice, living arrangements, cultural background or economic circumstances. Relationships Australia has, for over 70 years, provided a range of social services to Australian families, including individual, couple and family group counselling, dispute resolution, services to older people, children's services, services for victim survivors and perpetrators of family violence, and relationship and professional education. We respect the rights of all people, in all their diversity, to live life fully and meaningfully within their families and communities with dignity and safety, and to enjoy healthy relationships.

We focus on strengths-based approaches, and therefore tend to refer to systemic and structural barriers to participation, rather than using 'deficit' language. Relationships Australia contextualises its services, research and advocacy within imperatives to strengthen connections between people. These imperatives are also supported by a robust commitment to human rights, recognised universally and without discrimination. We are committed to:

- working in regional, rural and remote areas, recognising that there are fewer resources available to people in these areas, and that they live with pressures, complexities and uncertainties not experienced by those living in cities and regional centres
- collaboration with local and peak body organisations to deliver a spectrum of prevention, early and tertiary intervention programs with older people, men, women, young people and children
- ensuring that social and financial disadvantage is no barrier to accessing services, and
- contributing practice evidence and skills to research projects, the development of public policy, and the provision of compassionate and effective supports to individuals, families and communities.

We serve many cohorts who are disproportionately more likely to experience systemic and structural barriers. Relationships Australia is concerned that without conscious attention to, and support for, ongoing access to trustworthy telecommunications services, members of these cohorts will be left behind and social inclusion eroded to the national detriment, through:

- denial of social, political, economic and cultural human rights
- social exclusion and isolation, leading to loneliness and its consequent adverse health impact, and
- further polarising our society; thus avoidably limiting Australia's capacity to flourish.

Overarching position

Relationships Australia welcomes the ACMA's initiative to anticipate and respond promptly to emerging harms as scammers turn away from targets hardened through effective regulatory policy to chase more vulnerable targets. We also acknowledge the work already done by some carriage service providers and by the Comms Alliance in developing an industry code to support strong identity verification.

Relationships Australia recognises the potential of the draft Determination to further curtail the operations of scammers who represent themselves to carriage service providers as customers in the course of perpetuating identity theft and other fraudulent activities. Further, we welcome the ACMA's attention to ensuring that the Determination will not inadvertently harm customers experiencing circumstances of vulnerability such as those which arise in family violence or

emergency contexts, and which may impair their capacity to engage successfully with the customer identification processes otherwise contemplated by the Determination.

Relationships Australia supports the ACMA's choice of a legislative instrument to achieve its policy objectives. While acknowledging the value of the industry code, the magnitude and pervasiveness of the threat justifies the ACMA in putting in place options to swiftly impose suitable sanctions, and to amend the Determination in a short timeframe, if required to meet emergent threats. Overall, the Determination appears to be a reasonable, proportionate and appropriately flexible regulatory approach to addressing the underlying issue.

Definition of 'family violence'

The draft Determination creates specific rules of identity verification for customers in vulnerable circumstances (clause 11). 'Customer in vulnerable circumstances' is defined by clause 6 to be a customer who:

- does not have access to a telecommunications service, device, or category A or B documents
- by reason of that lack of access, cannot comply with the identity verification processes prescribed elsewhere in the Determination, and
- is experiencing harm, detriment or disadvantage arising from their personal circumstances, which include (without limitation) the customer being 'emergency-affected' or 'family violence-affected'.

Clause 6 defines 'emergency', 'emergency-affected individual', 'family violence' and 'family violence-affected individual'.

'Family violence' is defined by reference to the definition of that term in section 4AB of the *Family Law Act 1975* (Cth). Relationships Australia considers that this is an overly restrictive approach, for the following reasons.

First, the Family Law Act definition is drafted within the very specific constraints imposed by the complex interplay between Commonwealth and State constitutional powers in respect of families, marriage and children. These constraints do not apply to the Commonwealth in its regulation of carriage service providers. Accordingly, the Family Law Act definition may be inappropriately – and unnecessarily - narrow.

Second, Australian legislation contains an array of definitions of family violence. In addition to the Family Law Act definition, each state and territory has its own definitions. Where a carriage service provider operates nationally (and under national legislation), then – at a minimum – 'family violence' for the purposes of the Determination should include not only conduct falling within the Family Law Act definition, but also conduct falling within any definition of 'family violence' applying in the jurisdiction from which the customer is making the request (which will not necessarily be the jurisdiction of which the customer is an habitual resident).

Third (and related to the first reason), the Family Law Act definition does not encompass conduct that constitutes abuse of older persons. There is no reason of principle or practice why

an older person affected by abuse might not face the same challenges of proving identity, for the purposes of conducting a high-risk interaction, as another person affected by family violence that would fall within the Family Law Act definition of the term.

Finally, the Family Law Act has been properly criticised for its underlying Western and heteronormative assumptions.¹ There has been significant advocacy calling for the Act to be re-framed to ensure that the family law system as a whole accommodates the diversity of family formation and composition characteristic of contemporary Australian society. This is a further reason to avoid confining (or at least appearing to confine) the scope of this Determination to a definition that has emerged from particular circumstances that are not necessarily shared in the telecommunications market.

Relationships Australia acknowledges that ‘personal circumstances’ is explicitly inclusive, and may therefore be construed as sufficiently broad to accommodate circumstances of family violence that fall beyond the scope of section 4AB of the Family Law Act. We would, nevertheless, urge the ACMA to put this beyond doubt by incorporating a definition of ‘family violence’ that is expressly and transparently inclusive.

The Commonwealth Attorney-General’s Department has policy responsibility for the Family Law Act, reforms relating to the abuse of older persons, and for family violence policy at the Commonwealth level. We would urge the ACMA to consult with that Department in formulating an expansive and nationally applicable definition of family violence for the purposes of this Determination.

Authorised representative arrangements

For some years now, the Attorney-General’s Department has been tasked with working towards harmonisation of state and territory laws about enduring powers of attorney and the development of a national register of enduring powers of attorney. The Communiqué produced from the Meeting of Attorneys-General on 12 November 2021² indicates that officials have now been tasked with reporting back to the Meeting by the end of 2022. Very little substantive progress has been made over the past three years, although stakeholders (including financial services peak bodies) consistently advise Government that the absence of harmonised laws and a national register create and exacerbate risks of financial abuse, including abuse of older Australians.

This lack of progress should concern all government agencies performing regulatory functions aimed at supporting an economic and commercial environment in which good actors can confidently transact for goods and services. The ACMA is such an agency. The Consultation Paper notes that authorised representative arrangements pose challenges for identity verification processes, thus underscoring the value that a national register of enduring powers,

¹ See, for example, the following Family Law Council reports: *Parentage and the Family Law Act* (2013), *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (2012), and *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (2012). These reports are located at <https://www.ag.gov.au/families-and-marriage/family-law-council/family-law-council-published-reports>. See also Australian Law Reform Commission Report 135, *Family Law for the Future – an Inquiry into the Family Law System* (2019); eg Recommendation 9 and discussion at pp 183-185.

² See <https://www.ag.gov.au/about-us/publications/meeting-attorneys-general-mag-communique-november-2021>, viewed 26 November 2021.

based on harmonised national laws, would have to the ACMA. These reforms would offer carriage service providers, and the ACMA, a reliable and efficiently accessible source of identity verification information.

Accordingly, we would urge the ACMA to engage with the Attorney-General's Department to express its interest in timely implementation of enduring powers reforms.

Multi-factor identity verification – subclause 9(2)

Relationships Australia welcomes the ACMA's intentions to provide customers experiencing vulnerable circumstances a degree of flexibility in how they can verify their identity to undertake a high-risk interaction. We are concerned, however, that what is intended by the expression 'direct and immediate access' may be unclear. What does 'direct' add to 'immediate' (or, what would be regarded as 'indirect access')? Also, there may be ambiguity about the intended relationship between paragraphs 9(2)(a) and 9(2)(b), in that there is no conjunction between them (as there is, for example, between paragraphs 9(2)(b) and 9(2)(c), and between 9(2)(c) and 9(2)(d)).

Additional protections

Relationships Australia supports the proposed additional protections described in Part 3 of the Determination. These are potentially valuable supports and protections for people experiencing vulnerable circumstances, and people who are repeatedly made subject to attacks by scammers. We also support the requirement, in clause 14, not to charge a fee for a message or notification that providers are obliged to provide.

Conclusion

Thank you again for the opportunity to comment in this Consultation. Please feel free to contact us if you would like further information on any of the matters canvassed in this submission. I can be contacted at ntebbey@relationships.org.au; alternatively, Dr Susan Cochrane, our National Policy Manager, can be contacted at scochrane@relationships.org.au. We can both be contacted by telephone on 02 6162 9300.

Kind regards



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