30 September 2022

Industry Consultation on Online Safety Codes

Development of Industry Codes under the Online Safety Act

Thank you for the opportunity for the **Australian Child Rights Taskforce** (the Taskforce) to make a submission to this consultation process. The Taskforce[1] is a coalition of over 100 organisations, networks and individuals committed to the protection of the rights of children in Australia.

As part of the process of developing measures to ensure online safety, the eSafety Commissioner has invited industry (through its various associations) to prepare draft codes for its own regulation. This represents an opportunity for responsible industry self-regulation that is aligned with international best practice and appropriate child rights protections and standards.

Based on our initial consideration of the draft Codes during the limited consultation period provided, our view is that this important opportunity for industry has been missed. The Codes do not reflect or align with existing international best practice. They fail to ensure that monitoring and regulation will support and protect children's rights in the digital world. There is minimal evidence of a consistent focus on identifying risk, addressing harms, enabling prevention of harm, and creating child-safe environments online.

For the purposes of the Online Safety Act's process of development, the draft Codes do not meet or provide appropriate community standards. The Codes should not be registered.

The Australian Child Rights Taskforce and its work

One of the key roles of the Taskforce is to assess the implementation of the *United Nations Convention on the Rights of the Child* (the Convention) in Australia. When Australia ratified the Convention in 1990, this was a commitment that every child in Australia should enjoy the rights set out in the Convention.

Since 2004, the Australian Child Rights Taskforce has published a series of reports (most recently 'The Children's Report')[2], that have examined the implementation of the Convention in Australia. These reports have assisted the United Nations Committee on the Rights of the Child[3] in its review of Australia's child rights implementation. They have also informed the Committee's recommendations[4] over a broad range of policy areas where improvements were necessary, including in health, mental health, business practice, services and online safety policy and practice.

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[1] https://childrightstaskforce.org.au/about-us/
[2] https://apo.org.au/node/200771
[3] http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx
[4] https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/AUS/CO/5-6&Lang=En

The Child Rights Approach

The Convention reflects a fundamental shift that occurred during the 20th Century in the way that children were viewed. Previously, children were largely viewed as the property of adults and sometimes as objects of protective intervention. This shift to an understanding of children as autonomous rights holders with agency has begun to be reflected in domestic legal systems as well as international law. The Convention sets out this understanding in a range of ways, including through its requirement that processes in law, policy, practice, and review act to support the implementation of the rights set out in the Convention for each Australian child.

International Best Practice

The child rights approach reflects international best practice in supporting children and their rights, including to guide and support their online experiences. The application of the 'best interests' principle (as set out in the Convention) calls for consideration of the full circumstances of a child's experience and circumstances and calls for ongoing assessment and attention to the most effective protection and support for each child. It allows for balancing the rights of access to information, learning and expression with the protections for safety and privacy. It recognises the evolving development and capacities of a child and calls for guidelines and restrictions that reflect and respect those stages and allow for circumstances to address issues of disadvantage and discrimination.

We note that the developing body of knowledge in international child rights principles includes:
-    The UN Child Rights Committee's General Comment 14 (Best Interests)
-    The UN Child Rights Committee's General Comment 25 (Rights in a Digital World)
-    The UN Special Rapporteur's Report - UN Special Rapporteur on the Right to Privacy, *Artificial Intelligence and Privacy, and Children's Privacy* (UN Doc A/HRC/46/37, 25 January 2021)

Areas for Attention in Australia

Among the recommendations made by the UN Child Rights Committee to the Australian Government[5] are the following relating to online environments:

- *Ensure the legal accountability of Australian companies … for violations of children's rights … and establish mechanisms for the investigation and redress of such abuses* [and] r*equire companies to undertake assessments, consultations, and to make full public disclosure of the environmental, health-related and children's rights impacts of their business activities and their plans to address such impacts* (Paragraph 17)

- *Expand access to information, including via the Internet …, to children in rural or remote areas; promote children with disabilities' access to online information through making available audio description and captioning; ensure that children, their parents, and other caregivers are taught appropriate online behaviour, including preventive strategies, against online abuse and/or exploitation services, in particular those under 14 years* (Paragraph 27)

- *Increase the availability of online mental health services and web-based counselling, while making in-person mental health services child-friendly and accessible to children, including those under 14 years (Paragraph 38)*

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[5] https://www.ohchr.org/en/documents/concluding-observations/committee-rights-child-concluding-observations-combined-fifth-and

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The Australian Child Rights Taskforce and this Review

This submission has been prepared by the Taskforce's Policy Working Group. Given the timeframe of this consultation, it does not necessarily reflect the detailed views of all organisations, networks and individuals who constitute the broad membership of the Taskforce. However, the submission is based on previously endorsed collaborative and collective work of the Taskforce over many years (and several child rights reporting cycles). Our processes are consultative and draw on the experiences of children and young people and those who work with them across a range of sectors and communities.

As is clear, this work is built on an understanding of the Convention and the child rights approach and on our ongoing knowledge and experience in translating this understanding and approach into policy and practice. Members of the Taskforce have been working with **Reset Tech** and other civil society organisations including UNICEF Australia, Save the Children and Child Wise on understanding the best approach to provide for online safety for children and young people.

Our key messages are:

- The work of creating child safe environments is challenging and requires ongoing and shared commitment. This work extends to online environments. The protection of personal information and privacy and the prevention of harm are all important features of a safe online environment for children as well as adults. **Responsibility for this should be shared by government, industry, families, and civil society**.

- **Involving children and supporting their involvement** in creating and maintaining safe environments is essential. This must include **recognition of their rights and views** and involving them in a meaningful way in setting and maintaining regulatory settings for access, use and privacy.

- Given ongoing developments in online environments, **evolving and ongoing scrutiny** should be given to the **effectiveness of proposed regulatory reforms** including in protecting children, their data and privacy, and in creating child safe environments.

- We encourage and support the alignment of the Codes with international child rights principles and best practice; with existing child safety and child protection law and obligations and with national policies including the **National Strategy to Prevent and Respond to Child Sexual Abuse**, and the ongoing implementation of the recommendations of the **Royal Commission into Institutional Response to Child Sexual Abuse**.

- In the context of online environments, the guidance of the **UN Child Rights Committee** should lead to ongoing attention and efforts to ensure **appropriate regulation of companies operating in Australia** including to monitor for violations of children's rights, full public disclosure of the impacts of business activities on child rights and plans to address impacts.

- The **UN Child Rights Committee** is also expecting efforts to expand access to online information to children in rural or remote areas; children with disabilities; children in need of mental health services and to ensure that children and communities are taught appropriate online behaviour, including **preventive strategies against online abuse and/or exploitation services**.

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Key Concerns with the Codes

The Codes do not reflect or align with existing international best practice. They fail to ensure that monitoring and regulation will support and protect children's rights in the digital world. There is minimal evidence of a consistent focus of identifying risk, addressing harms, enabling prevention of harm, and creating child-safe environments online.

Of particular concern to the Taskforce is the lack of clear, unambiguous acceptance of the need to proactively detect and report material and activities relating to child abuse (including child sexual abuse). Given that it is generally accepted (and legislated in many jurisdictions) that community members should report evidence of abuse, it clearly falls below the required community standard, that industry should not share this responsibility.

The opportunity for responsible self-regulation calls for transparency and clarity, particularly in matters of assessment and response. Currently, the proposed mechanisms lack the necessary clarity and openness. Risk assessments allow for significant exercise of discretion in reviewing and assessing content and in the required level of response to harm.

A narrow conception of 'safety' is used which fails to incorporate and support issues of privacy and expression[6] and fails to address the issues and experiences that can impact on the health and welfare of children and young people. There should be better evidence in the Codes of the need to understand and address experiences of online bullying and harassment and mental health impacts.

The proposed social media codes only focus on 'child sexual exploitation material and pro-terror content'. There is an obvious need to protect children from online sales of harmful products. The sale of e-cigarettes (Vapes) is an example given access via social media platforms and the serious harm[7]. A more comprehensive approach and understanding of risk, safety and harm would recognise the impacts of online advertising and sales and the socialising of dangerous behaviours and exposure to unsafe environments. We would support recognition of the increased risks of exposure to harms to health (such as junk food, alcohol, gambling and tobacco) through advertising and socialisation by commercial interests supported by industry.

At a time when the protection of data is a key public concern, there is little evidence of a proactive and preventive approach. At the least, the Codes should reflect a prohibition on the collection of GPS location data to address risk of misuse or safety breaches.

Generally, minimum compliance measures are lower than equivalent standards elsewhere and show no evidence of a proactive and rights-respecting approach. The good will and opportunity reflected in the Australian approach to the initial development of regulation has been wasted.

An awareness and attention to the rights of children and support in balancing their participation, protection and privacy is lacking. Even the time provided for consultation reflects a lack of genuine commitment to effective engagement with children and their communities.

For the purposes of the Online Safety Act's process of development, the draft Codes do not contain or reflect appropriate community standards to protect and support children. The Codes should not be registered.

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[6] https://fairplayforkids.org/wp-content/uploads/2022/07/design-discriminations.pdf
[7] https://www.nhmrc.gov.au/health-advice/public-health/electronic-cigarettes

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Our View on Next Steps

Given the importance of the Codes, the process for their development calls for a transparent and comprehensive examination of international best practice and the opportunity for informed and engaged public debate and discussion.

We support the more detailed analysis provided by Reset Tech in its submission. We refer once again with support to the discussion contained in the submission to the *Enhancing Online Safety Bill* consultation made by Dr Witt, Dr Dimopoulos, Professor Henry, and Stefani Vasil[8].

The examination and debate should be led by an independent facilitator (such as the eSafety Commissioner) and properly resourced to allow for full and effective community engagement.

There should be appropriate research into the most effective regulation for the industry.

This could be provided for within the framework of the existing *Online Safety Act*. However, further legislative guidance may be required to achieve an appropriate level of confidence in the community in the protection and regulation provided by the Codes and their enforcement mechanisms.

We thank you for the opportunity to contribute to this consultation. We only wish that we could express a more positive view about the results presented by industry.

We are committed to ongoing engagement with the critically important public policy discussions that are still required to provide appropriate regulation of the industry, and protection and support for the rights of children and young people online.

Yours sincerely

On behalf of the Australian Child Rights Taskforce

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[8] https://www.infrastructure.gov.au/sites/default/files/submissions/osb-dr-alice-witt-dr-georgina-dimopoulos-prof-nicola-henry-stefani-vasil-rmit-university_0.pdf

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