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Office of the eSafety Commissioner

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Industry Standards for Class 1A & 1B Material for Designated Internet Services and Relevant Electronic Services

Thank you for the opportunity for the Australian Child Rights Taskforce (the Taskforce) to make a submission to this consultation process regarding the development of Industry Standards. The Taskforce is a coalition of over one hundred organisations, networks and individuals committed to the protection of the rights of children and young people in Australia.¹

One of the key roles of the Taskforce is to monitor and report on the implementation of the *United Nations Convention on the Rights of the Child* ('the Convention'). 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. This includes monitoring and providing advice around children's right to safety and protection, and now includes their rights in relation to the digital world.

The development of Industry Standards for Class 1A & 1B Material for Designated Internet Services (DIS) and Relevant Electronic Services (RES) follows on from a difficult process of proposed and rejected industry codes. The Taskforce has submitted to consultations around the drafts of these codes, raising multiple issues,² and welcomed the eSafety Commissioner's decision to reject these drafts.³ The contents of these industry standards, and the way they are developed, has implications for the advancement of children's rights, and we welcome the opportunity to engage in the consultation process regarding their development. Sections 1 and 2 of this submission lay out a response to the consultation from a child rights framing, and make further suggestions to advance children's rights.

This submission represents the views of the Taskforce as laid out in Section 3. The focus of our submission is to outline how the process of developing, and the contents, of the Industry Standard could be enhanced to advance children's rights.

¹For more information about the Taskforce, please see <http://www.childrights.org.au/welcome>

²Australian Child Rights Taskforce 2023 *Submission to the revised Online Safety Codes consultation*
<https://onlinesafety.org.au/wp-content/uploads/wpforms/31-9e10405917e4c106e4ec5e69a7bc86/ACRT-submission-to-the-Revised-Online-Safety-Codes-March-2023-aa7fb069cf093dc4ef7ad245ec3423aa.pdf>

³Australian Child Rights Taskforce 2023 *Letter regarding the online safety codes*
https://childrightstaskforce.org.au/wp-content/uploads/2023/01/Online-Safety-Codes_-ACRT-letter-to-eSafety.pdf

Section I. The process of developing Industry Standards

We welcome the move from industry-drafted codes to regulatory drafted standards. The Taskforce, and its members, have often highlighted the failing of voluntary and co-regulatory approaches in adequately protecting children's rights.⁴ Independent regulators and legislators are better placed when it comes to advancing children's best interests in the digital environment. Given this, over time we hope to see all online safety codes developed as Industry Standards, and those drafted by industry reviewed, strengthened, and as needed replaced by Industry Standard.

We note that the development of Industry Standards provides an opportunity to advance children and young people's right to participate. The *UN Convention on the Rights of the Child* affords children the right to participate in decision making processes that affect them, which includes decisions made about the governance of the digital world.⁵ As the *General Comment No. 25 (2021) on Children's Rights in Relation to the Digital Environment* makes clear, "when developing legislation, policies, programmes, services and training on children's rights in relation to the digital environment, States parties should involve all children, listen to their needs and give due weight to their views."⁶

We are unclear about the extent to which young people have engaged in the development of these Industry Standards, but note that the Office of the eSafety Commissioner has an established Youth Advisory Council⁷. This signals an intent to ongoing consultation with children and young people, and we hope that this council—and young people more broadly—were consulted in the development of these Standards.

Section II. Improving proposals within the Industry Standards

We welcome the improved alignment of the proposals in the Industry Standards to the National Child Safe Standards (NCSS). Specifically, the closer alignment with the NCSS means that CSEAM reporting requirements have been strengthened. It is a positive step that online service providers have less discretion and are closer to the mandatory reporting requirements of those who work with children, and we thank the Office of the eSafety Commission for their work to assure this.

While we welcome these broad changes, we believe there are five sensible improvements that can be made to the proposed Standards which will provide even greater protections for children:

1. **Remove the distinction between 'young Australian child' as opposed to 'Australian child'.** The UN Convention on the Rights of the Child affords all children under 18 the right to recognition as children, and the category of 'young Australian child' appears only to create a ceiling age of 16 for certain protections. While this may align with other age settings, such as presumptions around the age of data consent as recommended by the OIAC, these were not determined with 'safety' in mind and are not appropriate in this setting. Removing this distinction would have two consequential effects:
 - a. **Raise the age for default privacy settings.** As with the industry-drafted codes, accounts will be defaulted to private for a 'young Australian child' in the RES Standard, meaning children aged 16 and 17 are not included in this privacy-preserving measure. We would like to see accounts for all Australian children under 18 defaulted to private to provide greater protection;

⁴ See for example Reset.Tech 2021 *How Outdated Approachs to Regulation Harm Children and Young People* <https://au.reset.tech/news/how-outdated-approaches-to-regulation-harm-children-and-young-people-and-why-australia-urgently-needs-to-pivot/>

⁵ Article 12, UN General Assembly (1989) *Convention on the Rights of the Child*, <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>

⁶ UN Committee on the Rights of the Child (2021) *General comment No. 25 (2021) on children's rights in relation to the digital environment*. <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-25-2021-childrens-rights-relation>

⁷ Office of the eSafety Commissioner 2022 *The online safety youth advisory council* <https://www.esafety.gov.au/about-us/consultation-cooperation/online-safety-youth-advisory-council>

- b. **Raise the age for location broadcasting.** Similarly, the broadcasting of location is only controlled by consent for children under 16 in the RES Standard. The location of children aged 16 and 17 will still be available to other end-users under the current proposal, so we would again like to see the same protections provided for a ‘young Australian child’ to all Australian children under 18;
2. **Strengthening the protections around location data.** We recommend shifting from preventing the broadcasting of location data to the prevention of the unnecessary collection of location data. The protects against risks from security breaches and internal misuse of location data;
3. **Genuine development programs.** We welcome the measures in both Standards which commit service providers to development programs which reduce risk and improve protections for children. However, we have concern that service providers may be able to satisfy this requirement through tokenistic measures (e.g. biased research or disingenuous engagement with non-government organisations) that allow them to meet their obligations without taking meaningful actions to strengthen protections for children. We would like to see this requirement strengthened so service providers are required to deliver development programs in good-faith and through measures that genuinely provide greater protections for children.
4. **Child-friendly complaints mechanisms.** We are supportive of requirements to review complaints mechanisms, and prioritise and escalate reports by end users with provisions to ensure this is done both “as soon as practicable” and “within a specified time-limit”. In the interests of empowering and enabling children and young people to take corrective actions in the first instance, we recommend that the standards ensure that mechanisms for end-user reporting are child-friendly and that internal operational guidance ensures a child-centred approach that facilitates rather than inhibits children self-reporting. This could include, for example, a standalone child-specific reporting mechanism supported by specially trained and skilled staff.
5. **Child-friendly policies and terms of use, including information on privacy settings.** We recommend requirements to ensure that terms and conditions be provided in child-friendly language and formats.

We appreciate that these recommendations would see the Industry Standard diverge in part from the industry-drafted safety codes, but this is in children’s best interests. It would be a missed opportunity if an Industry Standard set a lower bar of protection for children because of a desire to harmonise with lower levels of protection in industry-authored codes. Children’s best interests must be given priority.

For example, limiting privacy protections to ‘younger Australian children’ does not align with the UN’s *General Comment No. 25 (2021) on Children’s Rights in Relation to the Digital Environment*. The General Comment states that “states parties should require the integration of privacy-by-design into digital products and services that affect children”⁸ and applies to all people under 18 years old. Additionally, the existing *Basic Online Safety Standards* notes that “if a service or a component of a service (such as an online app or game) is targeted at, or being used by, children ... ensuring that the default privacy and safety settings of the children’s service are robust and set to the most restrictive level,”⁹ and presumably rests on the *Online Safety Act’s* definition of a child which is “an individual who has not reached 18 years”. Allowing public settings by default or location broadcasting for 16 & 17 year olds does not appear to be compliant with this.¹⁰ (Regarding this specific example, there may be an expectation that reforms regarding the *Privacy Act* may remedy this later, however, children should not be exposed to unnecessary risk while we wait for other regulations. This is a missed opportunity to improve protections now, and prevent harm today.)

⁸ UN Committee on the Rights of the Child (2021) *General comment No. 25 (2021) on children’s rights in relation to the digital environment*. <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-25-2021-childrens-rights-relation>, para 70

⁹ *Online Safety (Basic Online Safety Expectations) Determination 2022* Subsection 6(C)(3)

¹⁰ *Online Safety Act 2021* Sec 5

We note that proposals in the review of the *Basic Online Safety Expectations*¹¹ would require online services providers to act in the best interest of children. Our five suggestions to improve the Standard described above would realise children’s best interests and harmonise with these broader requirements.

Lastly, we would like to reiterate our concerns regarding the industry-drafted Head of Terms that still allows services to self-identify which Code or Standard their “predominant functionality” aligns with. We believe this creates the conditions for Code or Standard shopping, and would like to encourage the Office of the eSafety Commissioner to rigorously assess any potential evidence of Code shopping as the implementation of the Codes and Standards takes place. We believe that where there is any doubt, the strongest protections must be applied.

Section III. Collaboration with the Taskforce

The development of strong Industry Standards provides an opportunity to advance children’s rights under the Convention and is welcomed by the Taskforce and signatories to this letter. Some Taskforce members and partners have also submitted their own responses to the Review, offering particular expertise, differing or more specific view points. These include:

- UNICEF Australia
- Alannah & Madeline Foundation
- Children and Media Australia
- Reset.Tech Australia

Should the Taskforce, or any of our members, be able to assist the Office of the eSafety Commissioner, please do not hesitate to contact us.

Yours sincerely,

Australian Child Rights Taskforce

To contact the Taskforce, please contact either:

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¹¹ Department of Infrastructure, Trade, Regional Development, Communication and the Arts 2023 *Online Safety (Basic Online Safety Expectations) Amendment Determination 2023*
<https://www.infrastructure.gov.au/have-your-say/online-safety-basic-online-safety-expectations-amendment-determination-2023>