

22 March 2023

Onlinesafety.org, submitted online

Consolidated Industry Codes of Practice for the Online Industry (Class 1A and Class 1B Material) – second round of public consultation

Thank you for the opportunity to participate in the second round of public consultation, and to provide comments on changes made to the draft Codes in response to the preliminary assessment undertaken by the e-Safety Commissioner. In preparing these comments, while we have considered the preliminary comments from the Commissioner, Relationships Australia does not address whether the revisions respond to those comments. We have confined ourselves to expressing views on the extent to which we consider the revisions support (or do not support) the overarching safety objectives of the Codes.

Supplementary Explanatory Memorandum

Relationships Australia acknowledges the practical imperatives for the Codes to accommodate diverse services providing vastly disparate products and services and with widely varying resources. We are concerned, however, that the proposed definition of services, and delineation of their responsibilities, by reference to their legal and technical capabilities to review, assess and remove materials, may obscure rather than clarify the scope of application of the Codes, and hinder effective enforcement. It is also unclear how these definitions will operate in conjunction with the obligations on providers to invest in systems, processes and technology to enhance their abilities to deal with class 1A and 1B materials. To support achievement of the safety objectives underpinning the Codes, it may be preferable to specify objective legal, practical and technical reasons that might be considered to inhibit a provider's capabilities to review, assess and remove materials.

In addition, we consider that the safety objectives of the Codes might better be promoted by a proactive obligation on service providers to advise the Commissioner of their capabilities, rather than by requiring the Commissioner to seek this information.

Head Terms

The head terms would be enhanced by a clear explanation of how and why the differing terms of child sexual abuse material (CSAM) and child sexual exploitation material (CSEM) are used throughout the Codes. Further, Relationships Australia is concerned that the definition of CSAM is confined to 'visual depictions of child sexual abuse'. We suggest that the definition be broadened to align more closely with relevant definitions in the Commonwealth Criminal Code and the *Online Safety Act 2021* (Cth) by omitting the reference to 'visual'. This would ensure that the Codes apply to a broader range of material (eg audio and text descriptions of child sexual abuse).

Given that investigations about CSAM and terror offences can be lengthy and complex, we are concerned that the proposed record retention period is only two years. We consider that a period of five years would better support law enforcement measures and would better align with community expectations.

General comments

Relationships Australia considers that authentic co-design and ongoing community engagement is a prerequisite of effective legislative, policy and service provision. These Codes are intended to make the online world safer, with particular attention to cohorts whose safety faces particular challenges in that world. These cohorts include children and young people, and people living with disability. We understand that the timeframes for development of these Codes have been tight, and may have limited your capacity to reach out directly to members of these cohorts. As industry moves to implementation, monitoring and evaluation, however, we would strongly urge you to do so. Engagement with organisations who serve, and/or advocate for, these cohorts (such as Relationships Australia) is valuable and of course welcomed by us. It does not substitute, however, for direct engagement. The federal Government is currently establishing a range of methods to hear directly from children and young people about matters affecting them. This aligns with Australia's obligations under the Convention on the Rights of the Child, and offers industries a template for engagement.

As an overarching comment about language, we consider that, to better support enforceability, the language imposing obligations on providers should be clearer to distinguish what is required (eg 'minimal compliance measures') from what is desirable (eg 'optional compliance measures'). For example, mandatory requirements should be phrased using 'must', rather than 'should'.

Schedule 1 (social media services)

Relationships Australia shares the eSafety Commissioner's concern to ensure that the Codes are effective in addressing the creation, distribution and dissemination of first generation CSAM (paragraph 19 of the Commissioner's preliminary assessment). The new language in the guidance note for clause 7 (Compliance measures for class 1A and class 1B material) may inadvertently weaken the force of the substantive provision.

Schedule 2 (relevant electronic services)

Our comments about Schedule 1, in relation to first generation content, apply in relation to Schedule 2. A definition of 'Australian child' appears at clause 3, while clause 6 uses the term 'children under the age of 18'. Unless the intended scope of these clauses differ, then clause 6 should refer to 'Australian children' to enhance clarity.

Clause 5 (How this code applies to relevant electronic services) could be clarified by locating definitions in a discrete definitional provision, rather than in provisions imposing substantive obligations (see, for example, subparagraph 5.3(a)(ii)). In the guidance note for clause 8 (Compliance measures for class 1A and class 1B material), the new language may inadvertently weaken the force of the substantive provision.

Schedule 3 (designated internet services)

Our comments about Schedule 1, in relation to first generation content, apply in relation to Schedule 3. Relationships Australia supports the addition, in subparagraph 5(b)(iv), of a requirement that a provider should, in undertaking risk identification and assessment, take into

account the likely age-based demographics of the intended user base. We consider, however, that this should be supplemented by reference to circumstances of vulnerability, other than those related to age. This might include, for example, living with cognitive impairments, or language and cultural barriers which might put an end-user at heightened risk when engaging with certain apps.

Schedule 4 (internet search engine services)

ISOS are defined as ‘software-based services designed to collect and rank information on the WWW in response to user queries’. If this definition would catch products such as ChatGPT, it might be useful to state this explicitly.

Schedule 7 (internet carriage service providers)

To better support achievement of the safety objectives of the Code, subclause 6(3) should be re-framed as a proactive obligation imposed on ISPs, rather than an obligation that is enlivened only on request by the Commissioner.

Schedule 8 (equipment)

Reliance on subjective concepts (eg ‘intended significant function’) to enliven application of the Code risks undermining its safety objectives. We invite you to consider replacing – or complementing – subjective factors with objective criteria. For example, the definitions of the various kinds of devices should reflect whether a device is *in fact* used for a function or purpose, to the actual or constructive knowledge of a person to whom, or entity to which, the Code applies.

We welcome the express reference to supporting children’s online safety.

Conclusion

Thank you again for engaging with Relationships Australia in developing the Codes. We commend Onlinesafety.org for undertaking a second round of public consultation, despite the very tight timeframe. Please do not hesitate to contact us if we can be of further assistance. We can be contacted by telephone on 02 6162 9300 or by email at ntebbey@relationships.org.au or scochrane@relationships.org.au .

Kind regards



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