

Submission to the Statutory Review of the *Online Safety Act 2021*

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Executive Summary

Guided by the United Nations Convention on the Rights of the Child (CRC) and informed by our work in over 190 countries improving the lives of children including in digital environments, UNICEF Australia welcomes the opportunity to provide a submission to the statutory review of the *Online Safety Act 2021*.

The current generation of children are the first true digital natives. They will never know a world without smartphones. Constant connectivity is their norm. They will have an online presence almost immediately after birth, and they already disproportionately occupy online spaces more than any other group, meaning the design of those spaces will have a greater impact on them and for longer than any other generation before them. This is particularly the case given their unique developmental vulnerability.

UNICEF Australia envisions an online world which minimises risks and harms to children's safety and wellbeing, at the same time as providing all the positive benefits that allow children to thrive in an increasingly digital world. In this regard, the *Online Safety Act* has been a landmark piece of legislation which has enabled Australia to remain responsive to the emerging challenges faced by children and young people in digital environments.

But the pace of change in the digital realm is rapid, and UNICEF Australia's own [research](#) has revealed that when it comes to their online safety, Australian children desire a much more positive online world than the one that currently exists, and recognise that some kind of significant change needs to take place.¹ UNICEF Australia shares this desire and we present several recommendations in this submission to further strengthen the *Online Safety Act*.

These include the introduction of an overarching duty of care towards users in the Online Safety Act, to help reduce risk in the underlying systems of digital platforms, as well as keep Australia ahead of the regulatory curve when it comes to emergent online harms. To help realise a duty of care, we call for a series of complementary measures ranging from identifying and mitigating risk, to transparency, accountability and enforcement, backed by appropriate resourcing for our independent regulators to fulfil their role in Australia's strengthened online safety framework. Across all of this, the rights of children are both a pressing priority and helpful guide, particularly the voices of children whose innate sense for the online world can help ensure the solutions we devise actually make a positive impact.

As with all reform, we're unlikely to arrive at a perfectly air-tight and comprehensive framework in one fell swoop, but our aspiration should be to provide the highest level of protection possible for children without unduly limiting their rights. Our recommendations will also help bring Australia into line with the emerging international regulatory norms which should have the double benefit of making compliance easier for digital platforms faced with the difficult task of tailoring their services to a variety of regulatory frameworks across jurisdictions.

Finally, we draw your attention to the submissions of the [Australian Child Rights Taskforce](#) and its members, whose individual views may differ from our own but collectively represent contemporary thinking on the rights of children in Australia within digital environments. From civil society to governments and the private sector, UNICEF Australia is eager to work with all involved, to help realise our vision and make Australia the best place in the world for children to go online.

Summary of Recommendations

1. Introducing a duty of care in the Online Safety Act

- *Introduce an overarching duty of care towards users in the Online Safety Act, placing obligations on platforms to identify risks associated with the systems and elements of their products, and mitigate harms before they happen.*

2. Identifying and mitigating risks in the systems of digital platforms

- *Introduce a requirement that platforms assess all their systems and elements for the serious risks they may pose to users, especially children.*

- *Introduce a requirement that platforms take reasonable steps to mitigate against each risk identified through risk assessments.*
- *Require that platforms defer to established guidance on upholding children's rights in digital environments when assessing and mitigating risks for children.*

3. Transparency's role in realising a duty of care

- *Introduce a suite of measures which provide an effective transparency framework in the Online Safety Act, ensuring that platforms uphold their duty of care towards users.*

4. The importance of strong accountability and enforcement

- *Introduce a suite of measures which provide strong and effective accountability and enforcement of the Online Safety Act in Australia.*

5. Children's rights across Australia's digital reforms

- *Undertake genuine and meaningful consultation with children and young people across all concurrent active reforms in digital policy in Australia, to ensure solutions are effective as possible.*
- *Ensure alignment across concurrent reforms in digital policy in Australia, always opting for the highest level of protection for children possible without unduly limiting their rights.*

Detailed Recommendations

1. Introducing a duty of care in the *Online Safety Act*

The online world is evolving at a rapid rate. Each week Australia faces a new challenge, an emerging technology, a previously unknown threat. And while our *Online Safety Act* was a welcome initial foray into regulation in the digital age, the pace of change requires not just responsiveness in reform, but regulation that is future-proofed and able to respond to emergent issues as they arise.

Australia's current approach to online safety could be described as one fixated on content – we identify something that is risky, we issue notices, then the content is removed (if all goes to plan). But this will always leave us playing catch up, not least because the sheer amount of content has reached a level that is difficult to monitor, but also because previously unknown threats manifest quickly, leaving us to then respond and mitigate risk after-the-fact. In the face of this, an emerging international norm including in the European Union (EU) and United Kingdom (UK), is an upstream approach to regulation which focuses on the underlying systems and elements of digital platforms.ⁱⁱ

This approach moves beyond content to those underlying systems where this content sits, taking into account the design and operation of a digital platform and compelling its creators to assess and mitigate the risks posed by their platform to all who use it. The vehicle for such an approach is the creation of a duty of care towards users which we have seen in the UK.ⁱⁱⁱ

A duty of care pushes platform developers to be proactive in their identification of the risks posed by their product, looking beyond content (which may be user-generated), to the underlying systems which are within the platform's control and may, in their design and operation, be creating or amplifying risk. For example, a specific piece of content may pose a risk in and of itself, but a recommender system may amplify that risk by preferencing that content over others. A duty of care would compel platforms to consider the risks posed to user safety, including the unique risks faced by children, in all systems and elements that constitute the platform, and appropriately mitigate harms before they unfold.

The added benefit of the duty of care approach is its flexibility in responding to new risks as they arise. The online world is incredibly dynamic, as is the way in which users interact with it. Any regulation that focuses on itemising types of content or behaviours will quickly become outdated. By encouraging the identification and mitigation of risk as systems and processes are created, a duty of care will help Australia stay ahead of the game in making it the safest place in the world for children to go online.

Recommendation

Introduce an overarching duty of care towards users in the Online Safety Act, placing obligations on platforms to identify risks associated with the systems and elements of their products, and mitigate harms before they happen.

2. Identifying and mitigating risks in the systems of digital platforms

For a duty of care to be made real, a series of measures will need to be introduced to assist platforms in meeting their obligations. The first of these is identifying and assessing where serious risk exists, so that it can be appropriately mitigated. Both the EU and UK require risk assessments^{iv} in their equivalent regulatory models, which require platforms to assess all their systems and elements for the serious risks they may pose.

Risk assessments incentivise systemic change by platforms and could be focused on key priority areas across various elements, systems and types of content. As an illustrative (but not exhaustive) example, this could include:

- safety settings for children, recommender systems, advertising systems, content moderation systems, trusted flagger systems, artificial intelligence systems, notice and complaint mechanisms, and terms and conditions;

- illegal material such as Class 1A & 1B material, and harmful content such as image-based abuse, violent material, self-harm material, hate-speech, and cyberbullying;
- online scams, risks to electoral integrity, risks to public security and health, and risks to human rights including the rights of children.

As one of many measures needed to realise a duty of care, risks assessments can play a crucial role in incentivising systemic change by platforms and protecting users before harm occurs.

Recommendation

Introduce a requirement that platforms assess all their systems and elements for the serious risks they may pose to users, especially children.

Assessing risk needs to be accompanied by taking steps to mitigate those risks once identified. Again, both the EU and UK regimes also require platforms to mitigate against those risks identified in assessments.^v This includes a requirement that platforms take reasonable steps to mitigate against identified risks, and include these mitigations within the assessments they provide, usually to regulators. As a complementary step to risk assessments, mitigation further helps platforms realise their duty of care to users.

Recommendation

Introduce a requirement that platforms take reasonable steps to mitigate against each risk identified through risk assessments.

For any platform identifying and mitigating serious risks to users including children, an assessment of children's unique needs and rights is going to be required. This follows a welcome trend in Australian digital policy – the incorporation of child rights principles into Australian law and regulation, including most recently the best interests principle in the *BOSE Determination*^{vi} and a similar proposal in the review of the *Privacy Act*.^{vii}

Various mechanisms for this assessment of children's rights are starting to emerge, be it a privacy impact assessment, a child rights impact assessment, a children's best interests assessment, or some other methodology. Each is likely to have its benefits and drawbacks and some are more limited than others, but we must be cognisant of limiting unnecessary or duplicative regulatory burden on private industry where possible. Some form of child rights due diligence is certainly needed and whatever the form, assessors should be required to give reference to the emerging but well-established guidance on how to uphold children's rights in the digital age, including most notably through the Committee on the Rights of the Child's General Comment 25.^{viii}

The CRC is the most ratified treaty in the world and its forward-looking principles remain deeply relevant today, including for the role that government and industry can play in considering children's views, their best interests, their evolving capacities, and the promotion of all their rights.^{ix} For brevity's sake, a deeper exploration of children's rights in online environments can be found in our [submission](#) to the *Inquiry into the Influence of International Digital Platforms*.

An important challenge to be aware of is that the task of balancing children's rights to be protected and free from harm, with others such as the right to privacy and access to information, can be a difficult one.^x Parental consent frameworks may be in place to protect children but can at times lead to the overriding of a child's right to freedom of expression and participation.^{xi} However, fundamental to a rights-based approach is an understanding that all rights are interdependent, indivisible, and non-hierarchical.^{xii} In performing the difficult task of balancing children's rights, it is children's voices, the right to non-discrimination, and the best interests and evolving capacities principles, that are essential in helping to ensure our decisions promote not undermine them. Embedding these rights in our online governance frameworks will give government and industry alike the tools they need to do so.

Recommendation

Require that platforms defer to established guidance on upholding children's rights in digital environments when assessing and mitigating risks for children.

3. Transparency's role in realising a duty of care

Transparency also plays a key role in realising a duty of care, helping (through oversight) to ensure that serious risks are indeed identified and effectively mitigated, and allowing governments, regulators, civil society, academia and others, to better understand the lay of the land in the online world.

Once again we can look to the European jurisdiction for guidance and the *Digital Services Act*,^{xiii} which includes a suite of measures to promote transparency, offers an approach that could be mirrored in Australia's framework including:

- *Annual risk assessments*, as previously mentioned which serve a transparency function in addition to risk identification and mitigation;
- *Annual public transparency reports*, to provide important information about the platform's operations, content moderation, trust and safety practices and compliance with regulations, with prescriptive metrics set by regulators;
- *Annual independent audits*, conducted by an external party to assess claims made by platforms against the above transparency measures;
- *Ad archives or repositories*, which are searchable databases showing all of the ads that exist on platforms including information about the advertisers and targeting options; and,
- *Researcher access to data*, allowing researchers to monitor and assess compliance, with appropriate safeguards in place to ensure their legitimacy, independence, and ability to uphold data security.

While no single measure will provide a silver bullet for transparency, the combination of several will help ensure that a duty of care is better realised, and that Australian children are better protected in online spaces.

Recommendation

Introduce a suite of measures which provide an effective transparency framework in the Online Safety Act, ensuring that platforms uphold their duty of care towards users.

4. The importance of strong accountability and enforcement

In shifting the Online Safety Act from a content focused notice and takedown approach to a duty of care approach, a considerably different enforcement framework will be needed, to ensure that Australia's new regulatory regime is adhered to.

Similar to transparency, the EU and UK can provide guidance here on what a suite of enforcement powers could be^{xiv} including a combination of:

- strong investigative and effective notice and take down powers for regulators;
- the ability to issue penalties for failure to comply;
- compelling redress and changes to platform systems and elements where required;
- powers to turn off services where compliance is not met and other measures have been exhausted; and,
- providing a public facing complaints mechanism.

A strengthened online safety framework in Australia will have little impact without an effective accountability and enforcement regime, and similar to transparency, it is the combination of measures rather than any single one that will help ensure this is the case.

Recommendation

Introduce a suite of measures which provide strong and effective accountability and enforcement of the Online Safety Act in Australia.

It must be acknowledged that this proposed model for a strengthened *Online Safety Act* signifies a step-change in our regulatory framework from one focused on content to something that aims to transform the underlying systems of platforms to ultimately reduce risks to users, including children.

It follows that Australia's independent regulators, namely the eSafety Commission, would also see a step-change in the important role that they play. This would mean the regulator shifting from a system focused on notice and takedown to one in which they must be able to understand the quality of risk identification and mitigation, backed by the ability to exercise their expanded enforcement powers.

All-told, this is likely to necessitate an increase in resourcing for our independent regulators including the eSafety Commission. Thankfully, successive Australian governments have shown a commitment to ensuring that our regulators are better equipped and ably supported to fulfil their role which is crucial in protecting Australia's children, including through the Albanese Government's recent increase of the eSafety Commission's core funding.^{xv}

Recommendation

Ensure that Australia's independent regulators are adequately resourced to fulfil their obligations under Australia's online safety framework.

5. Children's rights across Australia's digital reforms

The reform of the *Online Safety Act* along with a series of other concurrent digital reforms happening in Australia present an opportunity for us to get our approach to the online world right and introduce changes that will actually make a difference.

Children have an innate sense for the online world - we all know a parent who has sought digital help from a child. We can replicate that approach in our digital reform. Put simply, given children know the online world better than anyone, they're the best people to ask for advice about what will actually work for them.

In addition to being the smart thing to do, it is also the *right* thing to do. According to Article 12 of the CRC, every child and young person under 18 has the right to participate and have their opinions included in decision-making processes that relate to their lives.^{xvi} Young people also engage with digital environments, particularly through social media, at comparatively high rates compared to other age groups.^{xvii} Therefore changes to those environments stand to have a comparatively greater impact on them.

Given this, children and young people should be afforded every opportunity to influence how digital environments are designed. There is already promising practice in this regard including the eSafety Commission's Youth Advisory Council. Across the several concurrent reforms in digital policy active in Australia at the moment, including the review of the *Online Safety Act*, the *Online Safety Codes for Class 2 content*, the *Privacy Act* reforms, and the *Joint Select Committee on Social Media*, every effort should be made to undertake genuine and meaningful consultation with children and young people.

Recommendation

Undertake genuine and meaningful consultation with children and young people across all concurrent active reforms in digital policy in Australia, to ensure solutions are effective as possible.

The multiple active concurrent reforms on digital policy in Australia undoubtedly present a unique opportunity to strengthen how we govern the online world and put in place greater protections for children. Across these reforms there are already promising proposals being put forward, for example, an incorporation of the best interest principle into Australia's *Privacy Act*^{xviii} as well as in the *BOSE Determination*.^{xix}

However, these concurrent reforms also present a risk that the rules that govern digital environments become disjointed and misaligned. As an illustrative example, the *BOSE Determination* calls on platforms to set privacy and settings to the most restrictive by default for services used by children,^{xx} but the recently registered Online Safety Codes for class 1A content only carry this similar requirement for younger children under the age of 16.^{xxi}

If we leave gaps in our regulatory frameworks, we risk children falling through them and being exposed to risk and harm. Ensuring alignment across all these concurrent reforms, and in doing so, seeking the highest level of protection for children without unduly limiting their rights, should be a priority.

Recommendation

Ensure alignment across concurrent reforms in digital policy in Australia, always opting for the highest level of protection for children possible without unduly limiting their rights.

About UNICEF Australia

UNICEF believes in a fair chance for every child and we are the world's leading organisation working to protect and improve the lives of children in over 190 countries. At UNICEF Australia we work to protect and promote children's rights by advocating for the rights of children in Australia and overseas.

UNICEF Australia would welcome the opportunity to expand further on the measures we have outlined in this submission.

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- ⁱⁱ Reset Australia (2024), *A duty of care in Australia's Online Safety Act: Policy briefing*, <https://au.reset.tech/news/briefing-a-duty-of-care/>
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- ^{vi} Department of Infrastructure, Transport, Regional Development, Communication and the Arts (2024), *Basic Online Safety Expectations amendments to help keep industry accountable*, <https://www.infrastructure.gov.au/department/media/news/basic-online-safety-expectations-amendments-help-keep-industry-accountable#:~:text=The%20BOSE%20Determination%20sets%20out,the%20Online%20Safety%20Act%202021.>
- ^{vii} Australian Government (2023), *Government Response – Privacy Act Review Report*, <https://www.ag.gov.au/sites/default/files/2023-09/government-response-privacy-act-review-report.PDF>
- ^{viii} Committee on the Rights of the Child, *General comment No. 25 (2021) on children's rights in relation to the digital environment*, 86th sess, CRC/C/GC/25 (2 March 2021).
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- ^x UNICEF (2021), *The Case for Better Governance of Children's Data: A Manifesto*, <https://www.unicef.org/globalinsight/reports/better-governance-childrens-data-manifesto>.
- ^{xi} UNICEF (2021), *The Case for Better Governance of Children's Data: A Manifesto*, <https://www.unicef.org/globalinsight/reports/better-governance-childrens-data-manifesto>.
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