

Submission on the Draft Industry Codes under the *Online Safety Act*

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Executive Summary

UNICEF Australia welcomes the opportunity to provide this submission to the public consultation on the Draft Industry Codes under the *Online Safety Act*.

The digital world was not originally designed for children but it undoubtedly plays a significant role in their lives.ⁱ Being able to connect online provides children valuable opportunities to learn, play and socialise with friends and peers, as well as to access information and support. However, spending time online also comes with risks for children such as being exposed to potentially harmful content or having their personal data compromised or exploited.

UNICEF Australia seeks an online world that mitigates these risks and contributes to the healthy development and wellbeing of children. As children's lives become increasingly enmeshed with digital technologies, we envision a future in which these advancements are applied in service of children, their families, and communities.ⁱⁱ To make this vision a reality, we will need to strengthen the laws that govern the online world and the Draft Industry Codes are an important step in this journey. The decisions we make now will set the foundation for years to come, therefore as we move to regulate this space, we must carefully consider our choices so as not to introduce new risks into the fold.

The recommendations we lay out in this submission are in keeping with this approach and centre around three main areas:

1. Given the importance of the Codes to ensuring the safety of children and young people and the significant impact they may have on their lives, expanding the consultation process so it can meaningfully engage with their voices;
2. Broadening the scope of the Codes beyond the most severe forms of harm they currently cover to incorporate a more holistic understanding of the harms that children and young people face online; and,
3. To ensure the protection and promotion of all children's rights, embedding a rights-based approach in the Codes which considers children's best interests and evolving capacities.

Australia is in many ways a pioneer when it comes to online safety and the development of these Codes is another opportunity to break new ground. In keeping with this, our ambitions should be lofty and our eyes set on being an innovative world-leader in best practice. UNICEF Australia is eager to work collaboratively with industry and other relevant actors to achieve just this, creating an online world that enables every child to thrive.

Summary of Recommendations

1. Consultation is key

- Extend and expand the public consultation on the Draft Industry Codes to ensure they better meet community expectations, with particular efforts made to genuinely consult with children, young people, organisations that work with them, and Children's Commissioners and Guardians.

2. Lifting our ambition for safety

- Broaden the scope of the Draft Industry Codes to provide greater protection for children and young people in line with a more holistic understanding of the harms they face online.

3. The value of a rights-based approach

- Embed a rights-based approach in the Draft Industry Codes which considers children's best interests and evolving capacities, to ensure the protection and promotion of all their rights.

Detailed Recommendations

1. Consultation is key

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, according to Article 12 of the Convention on the Rights of the Child (CRC).ⁱⁱⁱ Including the voices of children and young people in the development of policy isn't just the right thing to do, it's the smart thing to do – policies co-designed with children and young people are better tailored to their needs and deliver better outcomes.

Children and young people have also displayed a strong interest in how the digital world is designed and treats them. UNICEF Australia's own research has shown that children and young people have a keen understanding of the profound and growing impact of social media on their lives and want support to safely navigate online spaces and strengthened protections to keep them safe.^{iv}

Young people engage with the online world, particularly through social media, at comparatively high rates compared to other age groups,^v therefore changes to that world stand to have a comparatively greater impact on them. Given this, children and young people should be afforded every opportunity to influence how the online world is designed. UNICEF

Australia notes that the current public consultation on the Draft

Industry Codes was for just over 30 days, a relatively short period of time given there are nine Codes of a technical nature requiring review. To our knowledge, there has also been little direct engagement with children and young people on the design of the Codes.

Given the importance of the Codes to ensuring the safety of children and young people (and the community more broadly), UNICEF Australia would like to see an extended and expanded public consultation process, employing genuine and meaningful consultation with children, young people, organisations that work with them, and statutory bodies charged with protecting their rights such as Children's Commissioners and Guardians. Taking the time to do so now will ensure the Draft Industry Codes best meet community need and provide essential protection for some of our most vulnerable.

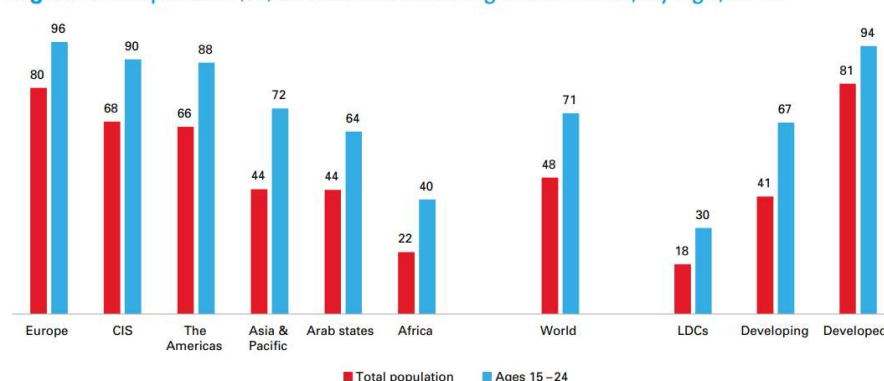
Recommendation

Extend and expand the public consultation on the Draft Industry Codes to ensure they better meet community expectations, with particular efforts made to genuinely consult with children, young people, organisations that work with them, and Children's Commissioners and Guardians.

2. Lifting our ambition for safety

In an online world in which children and young people learn, work, play and socialise, potential or actual harm can come in a variety of forms. Although the *Online Safety Act* directed the Draft Industry Codes to the most severe online content in Class 1A and 1B material, we know that harm can come to children and young people beyond these most pernicious forms.

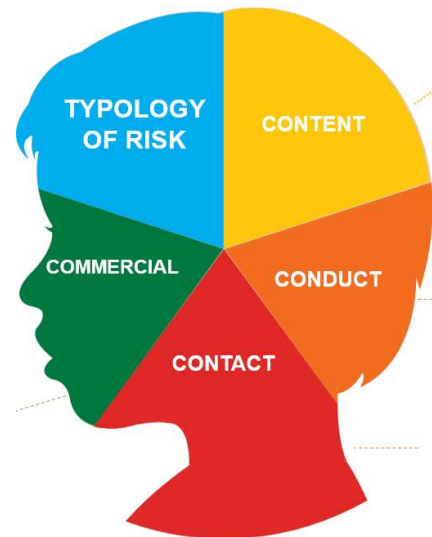
Figure 1. Proportion (%) of individuals using the internet, by age, 2017*



Source: International Telecommunication Union, from UNICEF Office of Research – Innocenti (2019) Global Kids Online Comparative Report

Children have a right to be free from all forms of mental and physical violence, abuse and injury, exploitation and maltreatment, as a consequence of their engagement with the online world. This can range from child sexual exploitation material (CSEM), to child labour, to economic exploitation including through data monetisation, microtargeted advertising, profiling and automated decision-making.^{vi} The implications for children and young people are also unique, both due to the importance of childhood as a time for development, and because they will face greater exposure over their lifetime given their young age,^{vii} creating the potential for compounding effects. In the context of this more holistic understanding of harm, and given the prevalence of children and young people in online spaces along with their unique vulnerability, our approach to their safety should always be one seeking the highest level of protection (without unduly limiting their rights).

To that end, the Draft Industry Codes would benefit from lifting their ambition in line with this approach. Some examples of specific areas where this is needed include the requirements for reporting CSEM under the Social Media Services Code, the age for defaulting children's accounts to private, and additional duties for services which *permit* children to hold an account as opposed to services children *actually* use. Broadly though, the Codes would be improved by taking a more holistic view of the harms and risks that children face online. This could be done in line with the widely used 4Cs typology – covering not just the risk from exposure to Content (as they currently do to an extent), but also from Contact with stranger adults, from their own harmful Conduct, and from Commercial risks.^{viii}



In many ways, Australia is pushing the envelope when it comes to online safety and the international community looks to us for cues, so the implications of the frameworks we put in place here may have ramifications beyond our borders. Accordingly, when talking about the safety and wellbeing of children and young people online, we should be aiming for the very best, placing ourselves at the forefront of the creation of safe and constructive online spaces for the youngest members of our communities.

Recommendation

Broaden the scope of the Draft Industry Codes to provide greater protection for children and young people in line with a more holistic understanding of the harms they face online.

3. The value of a rights-based approach

There is an emerging but well-established understanding of how children's rights should be upheld in the digital age, including most notably through the Committee on the Rights of the Child's General Comment 25.^{ix} As outlined in UNICEF's data manifesto for children, 'respect for and implementation of these rights as we move further into the digital age are not only legal and moral imperatives, but also represent an important step towards ensuring children's psychological and physical well-being.'^x

The CRC is the most ratified treaty in the world and it's forward-looking principles remain deeply relevant today, including for the role that the business sector should play in considering children's best interests, their evolving capacities, and the promotion and protection of all their rights.^{xi} UNICEF Australia believes these principles should be reflected in the Draft Industry Codes to ensure that the tech industry is best able to fulfil this role.

The best interests principle is a dynamic one which always requires an assessment appropriate to the specific context.^{xii} In considering the best interests of children we should 'have regard for all children's rights, including their rights to seek, receive and impart information, to be protected from harm and to have their views given due weight, and ensure transparency in the assessment of the best interests of the child and the criteria that have been applied.'^{xiii} The

Committee on the Rights of the Child's General Comment 14^{xiv} provides an even more detailed examination of the best interests principle and how it should be applied in practice. For industry, in practice this may mean making decisions in relation to children which seemingly clash with the interests of companies, such as not capturing and processing children's data in ways that are detrimental to them, for example, in persuasive design, behavioural advertising, and biometrics collection.^{xv} All told, the best interests of children should be a primary consideration in all decisions impacting them including those stipulated in the Draft Industry Codes.

The evolving capacities principle acknowledges that as children develop and grow, so to do their competencies, and in turn they need less direction and have an increased capacity to make decisions that affect their lives.^{xvi} For younger children, this agency is lower, presenting unique challenges when it comes to their online activities, say through parental controls.^{xvii} Just as children grow and change, so to must our governance frameworks, to ensure they balance the need for legal certainty with the diverse and evolving capacities of children.^{xviii} The UK Age Appropriate Design Code takes a practical approach to this, segmenting children into five age ranges which correspond to child developmental theory, which in turn serves as a guide to assess the capacity of a child to have an appropriate level of agency and control over online decisions, and assess the risks involved.^{xix} Similar to the best interests principle, children's evolving capacities should also be a consideration in all decisions impacting them.

UK Age Appropriate Design Code

0 - 5: pre-literate and early literacy

6 - 9: core primary school years

10 - 12: transition years

13 - 15: early teens

16 - 17: approach adulthood

Finally, it must be acknowledged 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.^{xx} 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.^{xxi} However, fundamental to a rights-based approach is an understanding that all rights are interdependent, indivisible, and non-hierarchical.^{xxii} In performing the difficult task of balancing children's rights, the best interests and evolving capacities principles are essential in helping to ensure our decisions promote not undermine them, and their inclusion in the Draft Industry Codes will give service providers the tools they need to do so.

Recommendation

Embed a rights-based approach in the Draft Industry Codes which considers children's best interests and evolving capacities, to ensure the protection and promotion of all 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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- ⁱ 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)
- ⁱⁱ UNICEF (2021), *The Case for Better Governance of Children's Data: A Manifesto*, <https://www.unicef.org/globalinsight/reports/better-governance-childrens-data-manifesto>
- ⁱⁱⁱ *Convention on the Rights of the Child*, opened for signature 20 November 1989, Treaty Series Vol. 1577 (entered into force 2 September 1990) art 12
- ^{iv} UNICEF Australia, (2021) *Children's Voices in a Changing World: 2021 UNICEF Australia Young Ambassador Report*. <https://www.unicef.org.au/our-work/unicef-in-emergencies/coronavirus-covid-19/childrens-voices>
- ^v UNICEF Office of Research – Innocenti (2019) *Global Kids Online Comparative Report*. <https://www.unicef-irc.org/publications/pdf/GKO%20Main%20Report.pdf>
- ^{vi} UNICEF (2021), *The Case for Better Governance of Children's Data: A Manifesto*, <https://www.unicef.org/globalinsight/reports/better-governance-childrens-data-manifesto>
- ^{vii} Ibid.
- ^{viii} Sonia Livingstone & Mariya Stoilova (2021), *The 4Cs: Classifying Online Risks to Children*. <https://doi.org/10.21241/ssoar.71817>
- ^{ix} 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).
- ^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} Ibid.
- ^{xii} 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).
- ^{xiii} Ibid.
- ^{xiv} Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 62nd sess, CRC/C/GC/14 (29 May 2013).
- ^{xv} UNICEF (2021), *The Case for Better Governance of Children's Data: A Manifesto*, <https://www.unicef.org/globalinsight/reports/better-governance-childrens-data-manifesto>
- ^{xvi} Ibid.
- ^{xvii} Ibid.
- ^{xviii} Ibid.
- ^{xix} Ibid.
- ^{xx} Ibid.
- ^{xxi} Ibid.
- ^{xxii} Ibid.