To: Director - Classification Reform
Online Safety, Media, and Platforms Division
Department of Infrastructure, Transport, Regional Development, Communications, and the Arts
GPO Box 594
CANBERRA ACT 2601

16 May 2024.

Dear Director - Classification Reform

The Digital Industry Group Inc. (DIGI) thanks you for the opportunity to provide our views on the second stage of reforms to the National Classification Scheme (the Scheme), as outlined in the *Public Consultation Paper: Modernising Australia's Classification Scheme - Stage 2 Reforms*, April 2024 (the Consultation Paper).

By way of background, DIGI is a non-profit industry association that advocates for the interests of the digital industry in Australia. DIGI's founding members are Apple, Discord, eBay, Google, Linktree, Meta, Microsoft, TikTok, X (f.k.a Twitter), Spotify, Snap, Twitch, and Yahoo. DIGI's vision is a thriving Australian digitally-enabled economy that fosters innovation, a growing selection of digital products and services, and where online safety and privacy are protected.

DIGI's primary focus in this submission is the impact of potential reforms to the Scheme on online services and the overall information ecosystem. We have not addressed the specific questions posed by the Consultation Paper but have indicated our support for relevant proposals outlined in the paper and made recommendations for your consideration.

We thank you for your consideration of the matters raised in this submission. Should you have any questions, please do not hesitate to contact me.

Yours sincerely,

Dr Jennifer Duxbury
Director Policy, Regulatory Affairs and Research
Digital Industry Group Inc. (DIGI)

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A. Interaction between the Classification Act and Online Safety Act 2021

At the outset we note that matters which fall within the remit of the Online Safety Act 2021(OSA) do not form part of this review of the National Classification Scheme (the Scheme). We understand that the statutory review of the OSA (the OSA review) will consider regulatory responses to harmful online material, including the eSafety Commissioner's powers with respect to restricted online content[1].

While the scope of the classification scheme review does not directly address the OSA, it is important to be aware that the scope of the restricted 'Class 1' or 'Class 2' material regulated under the OSA is defined by reference to the Scheme. Class 1 material is material that is or would be refused classification, such as child sexual abuse material and pro-terror material. Class 2 material is material that is or would be classified R18+ or X 18+ and includes pornography, as well as other high-impact material. As set out in the public consultation paper on the stage 2 classification reforms, to exercise certain powers the eSafety Commissioner must be satisfied that material is either Class 1 or Class 2. The eSafety Commissioner is also able to request advice from the Classification Board on whether particular material is Class 1 or Class 2.[2]

The eSafety Commissioner has powers under the OSA to require the removal of Class 1 online material and to restrict/remove Class 2 material (which is unsuitable for under 18-year-olds). In addition, the

[1]Terms of Reference – Statutory Review of the Online Safety Act 2021.
[2] Section 160, Online Safety Act 2021.

eSafety Commissioner has powers to request the development of industry codes to regulate Class 1 and Class 2 online materials (Industry Codes), failing which the Commissioner can develop standards. Industry Codes for Class 1A and I B materials are now in force for six industry sections[3] and we expect standards for designated internet services and relevant electronic services in relation to Class 1A and 1B materials to come into force this year (Industry Standards). We also anticipate that the process to develop Class 2 Codes will commence this year.

Consequently, any changes to the Classification Scheme will impact the OSA, including the scope of the eSafety Commissioner's jurisdiction to require the removal of Class 1 or Class 2 material under the OSA and to enforce Industry Codes or Industry Standards to regulate such material. The interaction of the OSA with the Classification Scheme is therefore a critical issue for all the industry sections within the scope of the OSA: social media services, app distribution services, search engine services, hosting services, equipment manufacturers and suppliers, relevant electronic services, and designated internet services.

Of ongoing concern to the broad scope of businesses regulated by the OSA is the extent to which the regulation of content under the OSA is tied to the Scheme, including the Classification Guidelines (the Guidelines). As the Consultation Paper acknowledges: "Definitions of content to be classified under the Classification Act however were developed in a predominantly physical media environment. Since this time, the rapid growth in online content and the emergence of new digital platforms for distributing content have posed challenges for the Scheme[4]". In particular, the criteria for the classification of content under the Guidelines, were developed for the regulation of specific categories of professionally produced material before its commercial release (films, computer games and publications), rather than for the regulation of the infinite every day online personal, business and governmental/public sector interactions by online intermediaries including private communications that occur on services as diverse as email and messaging services, hosting services, apps, social media services and websites. Further, the basic philosophy of the OSA is to regulate online harms whereas the basic philosophy of the Scheme is grounded in guiding principles that: "adults should be able to read, hear, see and play what they want; children should be protected from material likely to harm or disturb them; and everyone should be protected from exposure to unsolicited material that they find offensive."[5] Consequently, the key criteria for assessing the suitability of material for adults under the Scheme is the offensiveness of material, rather than its harmfulness. While the interaction between the Scheme and the OSA is out of scope of the review, we note that DIGI will be making a submission to the OSA Review, in which we will be canvassing the challenges of using the criteria of the Scheme as a proxy for regulating specific defined categories of harmful online content.

B. Purpose and scope of the National Classification Scheme

Professionally produced material.

With the interaction of the OSA and the Scheme in mind, DIGI supports the proposal to define the type of content that should be classified under the Scheme to:

[3] See *Consolidated Industry Codes of Practice for the Online Industry, Phase 1 (Class 1A and Class 1B material)* for social media services, app distribution services, search engine services, hosting services, internet service providers and equipment providers available at https://onlinesafety.org.au/codes/.
[4] *Consultation Paper* p. 8.
[5] Ibid.

- professionally produced – content with higher quality production values;
- distributed on a commercial basis – to capture organisations or individuals that distribute media content as part of their business, as opposed to individuals or community groups whose main purpose is not to distribute media content for commercial gain; and
- directed at an Australian audience – a selection of content is specifically made available for Australia or marketing is specifically directed at Australians.

While we agree in principle with this approach careful consideration will need to be given to drafting the definition of "professionally produced" material in the legislation. For example, consideration should be given to:

- the fact that the line between "professionally produced" content and other content may not always be immediately obvious and that the entity responsible for classification will need to determine whether or not the content meets this criteria;
- given the multiple parties involved in content supply chains, there could be questions regarding which entity's commercial purpose/benefit will be relevant and whether any commercial benefit will suffice (or whether there should be some threshold or definition of "commercial benefit");
- where more than one party is involved in the distribution of a piece of content, there could be questions regarding which party "makes the content available". Considerations regarding which party should be responsible for classification in an online context could also include:
    - the extent to which classification obligations that were intended to apply to physical media should be transposed on digital media, noting that it will be important to ensure there isn't an unnecessary overlap of obligations or compliance burdens on digital service providers already regulated under the OSA, and to ensure the two legislative schemes are in practice workable;
    - whether it makes more sense to impose classification obligations on the creator or other publisher of the professionally produced content in an online context, rather than the intermediary service provider, given that creators and publishers are involved in the production of the materials (and therefore, for example, better placed to make initial decisions as to whether material falls within the definition of professional content). The intermediary service provider is less equipped to make these judgements and is already subject to obligations under the OSA. Imposing additional obligations on online intermediaries could duplicate compliance obligations (with likely variations) and create unnecessary operational complexity;
    - if the Scheme is amended to impose obligations on service providers that distribute professionally produced materials, any changes to obligations placed on online service providers need to be workable – considerations could include the need to:
        - ensure those requirements are not retrospectively applied to content that is already available. Classification imposes downstream obligations on services that distribute content (for example, classified content can only be advertised in certain ways, must have certain markings, and must be sold in a particular way etc.). This isn't scalable for many online services, where existing catalogues of content are already vast; and

- in order to effectively determine what content is and is not classified and removed/restricted, rectify issues with navigation and inconsistent classifications within databases to ensure they are available and easily usable to make the scheme workable for service providers.

User Generated content

We also support the proposed exclusion of user generated content from the scheme and welcome clarity around this. However, there are also some significant questions raised by, and complexity involved in, applying the proposed touchpoints which will need to be addressed, namely the criteria that:

- classification is the responsibility of the service provider who makes the content available in Australia, regardless of who originally makes the content; and
- online content is only classifiable where it is "uploaded" to clarify that user-generated content that is professionally produced and distributed on a commercial basis does not require classification[6].

For example:

- ➔ where more than one party is involved in the distribution of a piece of content, there could be questions regarding which party "makes the content available; and
- ➔ we query whether using "upload" by the service provider as the trigger for excluding user generated content would work as intended. There are a broad range of online platforms, intermediaries, and services – and many involve a set of steps between submission of content by the creator, and the content becoming available on the service (eg. technical processes between user/creator upload to the system and the content going live on the service, or some forms of content moderation). See our comments above about the need to consider with whom responsibility for classification should lie.

We also note that there will be some circumstances where professionally produced material is uploaded by a service provider, for example, for the purpose of providing safety information or technical information about how to use features of the service. These types of materials should remain excluded from classification under s6B of the *Classification (Publications, Films and Computer Games) Act 1995.*

Submittable publications

Additionally, the discussion paper proposes the possibility of providing: a) additional clarification of what publications are required to be submitted (including expanding the scope to publications that are unsuitable for children under a certain age); and b) requiring publications to be classified. Publications currently only need to be classified if they meet the "submittable publications" definition. Given the breadth of literature available in Australia, whilst clarification of the concept of a "submittable publication" is welcome, any broadening of what should be a "submittable publication" should be considered very carefully informed by evidence as expansions in this category could have considerable practical consequences.

[6] Ibid p.9.

C. A framework for evidence-based classification guidelines

The Consultation Paper canvasses a proposal to establish an independent Classification Advisory Panel with the aim of ensuring advice provided to Commonwealth and State and Territory Governments on possible updates to classification criteria in the Classification Guidelines is "informed by empirical evidence, community research, international best practice and consultation with stakeholders, to help ensure that the decisions made are evidence-based and consider community attitudes so that the Scheme is responsive to community expectations[7]". We agree that it may be useful to establish a mechanism that ensure that Australian governments are informed at regular intervals about the views of the community on certain types of materials, for example, via surveys of the public or public consultation.

We note that of its nature classification is a highly contentious, value-laden regulatory space, particularly to the extent it relies on the criteria of "offensiveness". We note that decisions about whether particular material is in or out of scope of the Scheme are inherently values based judgements, largely about community concerns and expectations as well as the type of materials considered to be harmful to children and therefore it is likely that the Advisory Panel may be more useful as a sounding board for changes to the Scheme, rather than as a means of providing an expert 'evidence -base" for decision-making is in practice. We do not have a view as to whether that mechanism should be an internal to, or independent of government.

In terms of the issues and expertise that should be represented in a Classification Advisory Panel (or similar) it is important to note that under the OSA, any revisions to the Guidelines will be automatically applicable to determinations by industry or the eSafety Commissioner that material is Class 1 or Class 2 material. As such, any Classification Advisory Panel (or similar) should include industry representation reflecting the broad range of providers impacted by the OSA, as well as those directly impacted by classification obligations under the Classification Scheme.

In addition, more generally, any move to frequently revise the Guidelines will have significant impacts on providers who are themselves undertaking classification functions. In particular, the OSA including its Basic Online Safety Expectations and Industry Codes (as well as anticipated Industry Standards) extends positive obligations with respect to management of online content (including online material classified or likely to be classified RC, X18+ or R18+ under the Classification Scheme) to all organisations operating online services (including the majority of websites and apps) that are available to end-users in Australia. There are a range of obligations in place that require some providers to identify and manage online material at scale by reference to the Guidelines. Significant work is being undertaken by industry to develop and implement policies, processes, and technologies to enable this to occur in a meaningful way – underpinned by the current Guidelines. Therefore, any move to frequently change those Guidelines will have significant flow on effects each time that occurs. This needs to be factored in when considering the viability of frequent change. We would support a review process every four years recommended by the Stevens Review so that the updates take place at a cadence that is workable for industry to implement[8].

[7] *Consultation Paper* p.11.
[8] *Review of Australian classification regulation Report,* Neville Stevens AO, May 2024 p.14.

The paper asks for input on which aspects of the current Guidelines the Classification Advisory Panel (or similar) should consider. A key aspect of the current Guidelines that should be considered is their application to material (including user generated content) under the OSA. Key points include:

- ➔ As any changes will be automatically applied under the OSA, the Guidelines need to work both for films, publications and computer games under the Classification Scheme as well as *all forms of material* subject to the Online Content Scheme in the OSA

- ➔ The positive obligations placed on providers under the OSA with respect to management of online content include obligations that require providers to identify and manage online material at scale by reference to the Guidelines. Whilst questions of how this should be done are a matter for the OSA Review, they are also matters that are relevant to any consideration of the Guidelines themselves.

- ➔ Further, Guidelines originally developed for application to individual pieces of content by the Classification Board after contextual review are required under the OSA to be applied to high volumes of content at speed. This means that the application of the Guidelines is likely to involve more blanket prohibitions online due to the blunt nature of decision making when it needs to occur at speed/at scale. The Guidelines will also be applied to a range of activity that is not necessarily itself illegal offline (such as an individual holding a copy of material in online storage without any intent to distribute or publicly exhibit the material, which is not illegal for all relevant categories of content). While the workability of applying the Guidelines in this way is a matter for the OSA Review, to the extent this remains the approach, the Guidelines need to be reviewed in light of this context to ensure workability, as well as consistency in approach between offline and online material.

D. Fit-for-purpose regulatory and governance arrangements for classification.

As the Consultation Paper notes, the spreading of responsibility for classification decisions across multiple regulators is "inefficient, fragmented and creates an unequal regulatory regime for the same material when it is delivered physically or virtually"[9]. We think it is important that decision-making on issues such as the suitability of material for different ages is as far as possible consistent for offline and online media in all formats. We note that there are considerable discrepancies between how State and Territory governments enforce the Scheme through their own complementary legislation. Optimally, there should be consistency with enforcement powers, penalties to provide certainty and reduce the regulatory burden on business.

Consolidation of classification functions into a single national regulator is therefore, in our view, a sensible step, provided the set-up of the regulator is fit-for-purpose and includes appropriate governance and oversight. The paper poses the model of the ACMA or the eSafety Commissioner as possible approaches that could be applied to a new single national regulator. It is unclear at present exactly which functions would sit with the proposed new national regulator. However, it seems unlikely that those functions would directly match either the functions of the ACMA or the eSafety Commissioner. As such,

[9] Ibid, Recommendation 8-2, pp.13, 124.

we suggest it is more likely that a separate fit-for-purpose regulatory and governance arrangement would be appropriate.

E. Other

The Stevens Review recommended that the relevant Australian Government Minister should have the power to authorise the use of alternative classification systems where they provide the necessary classification information for the Australian community[10]. We think this recommendation is worthy of consideration as part of this process.

Summary of DIGI recommendations

A. We support the proposed scope of material that is subject to the National Classification Scheme being limited to professionally produced materials as outlined in the Stevens Review[11].

B. We suggest that obligations to classify professionally produced content online should be limited to creators and publishers of content and should not apply retrospectively.

C. We support the exclusion of user-generated content from classification requirements.

D. We recommend that the drafting of the definitions of professionally produced, and user-generated content take into account the complexity of the process of distributing and commercialising materials online as outlined in this submission.

E. We support the introduction of a mechanism that facilitates the provision of advice to the Commonwealth and State and Territory Governments on possible updates to the classification criteria in the Classification Guidelines. We recommend that updates to the Guidelines should be made every four to five years as recommended in the Stevens review.

F. We support changes to the Scheme that would consolidate classification and enforcement functions under a single regulator.

G. We suggest that consideration be given to giving the relevant Australian Government Minister the power to authorise the use of alternative classification systems where they provide the necessary classification information for the Australian community as recommended in the Stevens review.

[10] *Review of Australian classification regulation Report,* Neville Stevens AO, May 2020 Recommendation 6-2 p.123
[11] Ibid p.9.