



21 June 2024

## Statutory Review of the Online Safety Act

Thank you for the opportunity for the **Australian Child Rights Taskforce** (the Taskforce) to make a submission to this Review. The Taskforce<sup>1</sup> is a coalition of over 100 organisations, networks and individuals committed to the protection of the rights of children in Australia.

### The Australian Child Rights Taskforce and its work

One of the key roles of the Taskforce is to assess the implementation of the **United Nations Convention on the Rights of the Child** (the Convention) in Australia. 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.

Since 2004, the Australian Child Rights Taskforce has published a series of reports (most recently 'The Children's Report')<sup>2</sup>, that have examined the implementation of the Convention in Australia. These reports have assisted the **United Nations Committee on the Rights of the Child**<sup>3</sup> in its review of Australia's child rights implementation. They have also informed the UN Committee's recommendations<sup>4</sup> over a broad range of policy areas where improvements are necessary, including in health, mental health, business, services, access to justice and online safety policy and practice.

The Taskforce's Policy Working Group has prepared this submission. It does not purport to exhaustively reflect the detailed views of all organisations, networks and individuals who constitute the broad membership of the Taskforce. However, the submission is based on previously debated and endorsed collaborative and collective work of the Taskforce. Our processes are consultative and draw on the experiences of children and young people and those who work with them across a range of sectors and communities.

This submission is built on an understanding of the Convention and a child rights approach and on our knowledge and experience in translating this understanding and approach into policy and practice. The Taskforce has been working with **Reset. Tech** and other civil society organisations including **Child Fund Australia**, **the Alannah and Madeleine Foundation**, **Save the Children / 54 reasons** and **the Institute of Child Protection Studies** on understanding the best approach to provide for online safety for children and young people and to prepare this submission.

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<sup>1</sup> <https://childrightstaskforce.org.au/about-us/>

<sup>2</sup> <https://apo.org.au/node/200771>

<sup>3</sup> <http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx>

<sup>4</sup> [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/AUS/CO/5-6&Lang=En](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/AUS/CO/5-6&Lang=En)

## Key Messages

The Taskforce believes that:

- The work of creating child safe online environments is challenging and requires ongoing and shared commitment, and a collective understanding of the opportunities and harms. The protection of personal information and privacy and the prevention of harm are all important features of a safe online environment for children and adults alike. **Responsibility for this should be shared by government, industry, families, and the communities that comprise civil society** with appropriate emphasis on the role of government in regulation and industry in implementation.
- **Involving children and supporting their involvement** in creating and maintaining safe online environments is essential. This must include **recognition of their rights and views** and ensuring that they can participate meaningfully, safely and actively in setting and maintaining regulatory settings for access, use and privacy.
- Given constant developments in online environments, **evolving and ongoing scrutiny** should be given to the **effectiveness of past and proposed regulatory reforms** including in protecting children, their data and privacy, and in creating child safe environments.
- Regulatory measures can and should align with international child rights principles and best practice; with existing child safety and child protection laws and obligations; and with national policies including the **National Strategy to Prevent and Respond to Child Sexual Abuse**, and the ongoing implementation of the recommendations of the **Royal Commission into Institutional Response to Child Sexual Abuse**.
- In the context of online environments, the guidance of the **UN Child Rights Committee** should lead to ongoing attention and efforts to ensure **appropriate regulation of companies operating in Australia** including to monitor for violations of children’s rights, full public disclosure of the impacts of business activities on children and their rights and measures and responses to prevent, mitigate and address adverse impacts.
- The **UN Child Rights Committee** is also expecting efforts to expand access to online information to children in rural or remote areas; children with disabilities; children in need of mental health services and to ensure that children and communities are taught appropriate online behaviour, including **preventive strategies against online abuse and/or exploitation services**.

## The Child Rights Approach

**The Convention** reflects a fundamental shift that occurred during the 20<sup>th</sup> Century to understanding children as autonomous human rights holders with agency and evolving capacities, who have distinct rights, views and interests to those of adults. This shift is increasingly reflected in domestic legal systems as well as international law. **The Convention** sets out this understanding in a range of ways, including through its requirement that processes in law, policy, practice, and review support the implementation of the rights set out in **the Convention** for every child. The child rights approach emphasises the strengths of each child, and the need for adults to develop the capacity to meet their obligations to respect, protect and uphold children’s rights.



## International Best Practice

The child rights approach also guides the development of international best practice in supporting children and their rights. In recent years, this has included the importance of recognising, understanding, guiding, and supporting children’s online experiences. The application of the **‘best interests’ principle** (as set out in **article 3 of the Convention**) calls for consideration of the full circumstances of a child’s experience and circumstances, as well as ongoing assessment and attention to the most effective protection and support for each child.

The **‘best interests’ principle** allows for balancing the rights of access to information, learning and expression with the protections for safety and privacy. It recognises that the Internet provides increased opportunities for information and education to children, including for those often otherwise disadvantaged in access. This includes children in rural and remote locations and children with different abilities. It recognises the evolving capacities of a child and calls for monitoring, support, guidelines and where necessary, restrictions which reflect and respect children’s developmental stages, and to allow for mechanisms that provide opportunities for children and address issues of harm, disadvantage, and discrimination.

We note that the developing body of knowledge in international child rights principles includes:

- The **UN Child Rights Committee’s** [General Comment 14](#) (Best Interests)
- The **UN Child Rights Committee’s** [General Comment 25](#) (Rights in a Digital World)
- The Report of the [UN Special Rapporteur on the Right to Privacy, Artificial Intelligence and Privacy, and Children’s Privacy \(UN Doc A/HRC/46/37, 25 January 2021\)](#)

## Areas for Attention in Australia

Among the recommendations already made by the **UN Child Rights Committee** to the **Australian Government**<sup>5</sup> are the following relating to online environments:

- *Ensure the legal accountability of Australian companies ... for violations of children’s rights ... and establish mechanisms for the investigation and redress of such abuses [and] require companies to undertake assessments, consultations, and to make full public disclosure of the environmental, health-related and children’s rights impacts of their business activities and their plans to address such impacts (Paragraph 17)*
- *Expand access to information, including via the Internet ..., to children in rural or remote areas; promote children with disabilities’ access to online information through making available audio description and captioning; ensure that children, their parents, and other caregivers are taught appropriate online behaviour, including preventive strategies, against online abuse and/or exploitation services, in particular, those under 14 years (Paragraph 27)*
- *Increase the availability of online mental health services and web-based counselling, while making in-person mental health services child-friendly and accessible to children, including those under 14 years (Paragraph 38)*

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<sup>5</sup> <https://www.ohchr.org/en/documents/concluding-observations/committee-rights-child-concluding-observations-combined-fifth-and>

## Recent Concerns and Considerations

Over the last few years, as the internet tech industry's case for self-regulation has lost ground and support for stronger external regulation has built, a campaign for a ban on the use of social media by children and young people under the age of 16 has also emerged. There is no doubt that children and young people face risks online. There is considerable anxiety felt by children and parents in how best to respond to these risks. It is our view that a broad-brush ban would be ineffective and counterproductive. As we have stated above, creating safe online environments is a shared responsibility that requires appropriate emphasis on the role of government in regulation and industry in implementation. We hope that this well-funded campaign will not distract from the need for comprehensive, coordinated and targeted measures that regulate and monitor environments and more effectively reduce the risks of harm.

The Taskforce wishes to ensure that monitoring and regulation will support and protect children's rights in the digital world. This can be achieved by a consistent focus of identifying risk, addressing harms, enabling prevention of harm, and creating child-safe environments online. This should include supporting the development of ongoing and evolving capabilities to detect and report material and activities that facilitate harms including child sexual abuse and exploitation.

Given that reporting evidence of harm to children in physical environments is generally accepted in Australia (and legislated in many jurisdictions), **online environments** and particularly social media communications providers **should meet the same community standards** and share this responsibility.

Standards of transparency and accountability and a duty of care should be required. Risk assessments should anticipate, review, and assess to reduce and respond to the risk of harms. We should adopt an expansive conception of safety which incorporates and addresses issues of privacy and expression<sup>6</sup> and the issues and experiences that can impact on the health and welfare of children and young people. There is a clear demand in the community to understand and address experiences of online bullying and harassment and mental health impacts.

The social media codes recently proposed by the industry focused on 'child sexual exploitation material and pro-terror content'. To some extent, this was due to the framing of the existing Online Safety Act. However, this has produced notable gaps such as the need to limit **access to online sales of harmful products**. The sale of e-cigarettes (Vapes) is an example of a product given access via social media platforms.<sup>7</sup>

At a time when the protection of personal data is a key public concern, there is little evidence of a proactive and preventive approach from industry. There must be enhanced community and industry awareness of and attention to the rights of children and support in balancing their participation, protection and privacy. The increased risks of exposure to harms to health (such as junk food, alcohol, gambling, and tobacco), the lack of support for respect in relationships and the impacts of advertising and socialisation by commercial interests, that are permitted by internet technology industry players, are well-recognised. **A more comprehensive understanding of risk, safety and harm would recognise and begin to address the impacts of online advertising, targeting and sales and the socialising of dangerous behaviours and exposure to unsafe environments.**

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<sup>6</sup> <https://fairplayforkids.org/wp-content/uploads/2022/07/design-discriminations.pdf>

<sup>7</sup> <https://www.nhmrc.gov.au/health-advice/public-health/electronic-cigarettes>

## The Australian Child Rights Taskforce and the Review

The Australian Child Rights Taskforce welcomes the *Statutory Review of the Online Safety Act*. The Taskforce supports the goal of ensuring an effective regulatory framework. The Taskforce and key members have been working closely with **Reset. Tech** in recent years and share concerns about the need for significantly enhanced accountability.

We acknowledge and support the work of the **eSafety Commissioner** in this space over the years. We welcome the shift away from industry self-regulation (and co-regulation) to a more coordinated and effective independent monitoring regime.

We support the introduction of a duty of care as a mechanism to drive accountability and planning.

We support the introduction of a requirement to proactively drive consideration of the rights of and protections for children and young people using internationally recognised and shared child rights principles (such as the ‘best interests’ principle in the **UN Convention on the Rights of the Child**).

We encourage attention to international models of best practice, and coordination with effective enforcement across national boundaries.

We note that a general duty of care is more likely to support a systemic approach to managing risks. Attempting to list specific online harms is unlikely to remain relevant and ahead of emerging technologies and associated developing risks. A systemic approach also is more likely to capture not only deliberate actions and actors but also accidental or incidental harms and risks that may arise in a rapidly developing technological space.

We support **Reset. Tech’s** 5 key elements of a **systemic and comprehensive approach**:

1. A general duty of care
2. A broad approach to risk assessment
3. An entrenched requirement for identified and effective risk mitigations
4. Extensive and evolving requirements for transparency and accountability
5. Strong and coordinated enforcement and compliance.

## Responses to Issues Paper Questions

We provide responses to some of the specific questions and issues set out in the Issues Paper.

### Part 2 – Regulation

We highlight the importance of coordination in enforcement internationally, given the operation of the online environment across national boundaries. We prefer the proactive mechanisms of risk assessment and mitigation which shift the onus from individual users and appropriately recognise the power imbalance inherent in most terms of use. In the same context, it is inappropriate for industry to play a formative role in drafting regulatory codes.

On Question 7, we are unconvinced at this stage by shaping statutory obligations of service providers around risk or reach. A discretionary approach to enforcement should be left to the regulators once knowledge and experience around protection, responses to risk and compliance have developed.

### Part 3 – Protection from Harm

Children do not complain using adult-designed formal mechanisms. Lessons from reviews such as the **Royal Commission into Institutional Responses to Child Sexual Abuse** teach us that much more work must be done to build effective monitoring and prevention for children. Trust and relationships are critical to a child’s ability to complain. An understanding of a child’s need for safety and respect for their views should form an integral part of the environment in which a complaint system operates. Complaints systems must be radically re-designed with children to support children. Those systems must be child-centric, flexible and capable of evolving and responding to improved knowledge and understanding of a child’s world.

The value of designing mechanisms specifically for children can be seen in the work of agencies such as **Kids Helpline** and **Youth Law Australia**. These agencies can build understanding of the harms to children and young people, the extent and impacts of those harms and the barriers to more formal reporting. At the same time, the responses from mainstream agencies are often limited and inadequate.

We need to be wary of mechanisms that lack an understanding of a child’s perspective, the discretion to respect individual circumstances and offer too many opportunities for avoidance by skilled and unscrupulous providers and other agents. Initiatives such as calls for bans avoid the work that is required to provide meaningful protection, accountability, and redress. The *Online Safety Act* must provide a platform for further research and investigation to slowly build effective mechanisms. The platform must allow for this work and frame it with key principles of respect for a child’s rights to privacy, access, and protection and to build effective systems for transparency and accountability.

### Parts 4 and 5 – Penalties, Powers, and Systemic Approaches

The Taskforce supports comparable and coordinated powers and penalties to those in Europe and the UK. We note that these should include powers to request information, conduct inspections and audits and undertake reviews. Coordinated attention with other national and international regulatory bodies will be required to address non-compliance with international or cross-border operations.

We support the introduction of a duty of care as a mechanism to drive accountability and planning. We note that a general duty of care is more likely to support a systemic approach to managing risks. Attempting to list specific online harms is unlikely to remain relevant and ahead of emerging technologies and associated developing risks. A systemic approach also is more likely to capture not only deliberate actions and actors but accidental or incidental harms and risks that may arise in a rapidly developing technological space.

We support **Reset. Tech**’s proposed systemic and comprehensive approach to compliance and enforcement that imposes a duty of care which creates the requirement for risk assessment and mitigation that can be reviewed and revised to address developments and new evidence of harms.

In that regulatory context, we support the introduction of a requirement to proactively drive consideration of the rights of and protections for children and young people using internationally recognised and shared child rights principles (such as the ‘best interests’ principle in the **UN Convention on the Rights of the Child**).

We encourage ongoing attention to international models of best practice, and coordination with effective enforcement across national boundaries.

We support the ability of a regulator to drive for specific attention to areas without limiting the scope of a duty and the responsibility for comprehensive risk assessments and responses. These could include illegal and harmful materials associated with health, the environment and cultures of violence, risks to human rights and public and political integrity.

The current level of transparency of decision-making by industry is inadequate. We support the statutory requirement of publication (and resourced monitoring by appropriate regulatory authorities) of regular and required targeted risk assessments and responses, audits and content moderation metadata. We agree that researcher access is integral to transparency and improving accountability such as required in the European Union.

We support a comprehensive and ongoing review of dispute resolution and redress mechanisms. We reiterate our comments from Part 3 about the need for child-friendly systems for complaints in the context of dispute resolution and redress. Human rights protections and meaningful accessibility should be fundamental features of these systems.

#### Part 6 – Responding to Emerging Technologies and Harms

There should be a systemic approach based on a general duty of care that includes a platform for ongoing research and the development of knowledge and evidence around risk and harms for regulators, researchers, and the public. This will require adequate resourcing. Cost recovery mechanisms from industry, such as the use of penalties would be welcome, but should not be linked to the provision of proper funding for regulation and accountability.

We thank you for the opportunity to contribute to this Review.

We are committed to ongoing engagement with public policy discussions to provide appropriate regulation and protection and support for the rights of children and young people online.

Yours sincerely

On behalf of the **Australian Child Rights Taskforce**

The Australian Child Rights Taskforce Policy Working Group

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For more information about this submission:

