

Submission to the Consolidated Industry Codes of Practice for the Online Industry

Class 1C and Class 2 Material

22 November 2024

Introduction

The Draft Consolidated Industry Codes of Practice for the Online Industry (Class 1C and Class 2 Material) (the Codes) are the final piece of *Online Safety Act's* regulatory framework. The Codes will set rules for the way that internet services deal with class 1C and class 2 content, which most people would describe as 'pornography'. However, the Codes will have wide-ranging implications for other online content, including sexuality information and education, sex work advertising, adult retail (e.g. sex toys), and harm reduction information.

List of Submitters

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The Codes must retain natural justice

The *Online Safety Act* enacts a broad-scope regulatory framework for all forms of internet technology, including search engines, apps and app stores, social media services, messaging platforms, and websites. The eSafety Commissioner has been conferred with extensive enforcement powers and significant funding, making it the most well-resourced internet regulator in the world.¹

In combination with the scope of the Act and the resources held by the Commissioner, the Codes will create a chilling effect on online sexual expression, sexuality information and education, and harm reduction information - what researchers refer to as the **'Digital Sexual Ecosystem.'**

To reduce the chilling effect and prevent overcapture, the Codes must contain an obligation for tech services to provide equally weighted transparent appeals processes that comply with procedural fairness expectations already understood in Australian law.²

Recommendation 1: that the Codes include requirements for clear and accessible avenues for challenging malicious or inaccurate reporting under 'reporting and complaints mechanisms' (see e.g. Schedule 1 Social Media Services Online Safety Code, MCM 1.8).

Recommendation 2: that the Codes' Head Terms include a statement on upholding human rights principles and compliance with state/territory anti-discrimination law.

We recommend that the following text be included in the Codes' Head Terms:

Service providers subject to these Codes must promote human rights and equitable digital access and are obliged to comply with relevant Commonwealth and state/territory human rights and anti-discrimination legislation.

¹ Senator the Hon. Katy Gallagher, Minister for Finance, Minister for Women, Minister for the Public Service, ['Tackling online harms'](#) Media Release, 1 May 2024

² See: Australian Law Reform Commission, ['The common law'](#), *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (ALRC Interim Report 127)*, 31 Aug 2015.
Justice Alan Robertson, ['Natural Justice or Procedural Fairness'](#), *Federal Court of Australia*, 04 Sept 2015.

The Codes must use clear and consistent terminology.

The Act uses 'Class 1C' and 'Class 2A' to define the content regulated by this phase of the Codes. These terms should be used consistently throughout the Codes and related guidance material. To avoid confusion about the application of the Codes, we recommend that service providers should only use terms from the Act and not have the discretion to use or come up with new terms for the Australian market.

The Codes introduce two new terms; 'high impact pornography' and 'seriously harmful material'. These new terms serve no practical function. No 'impact test' exists for content rated X18+ and higher within the existing Classifications Scheme. There is also no legislated or regulated meaning to the words 'seriously harmful material'.

These terms create a false distinction between existing porn regulation for non-online materials, and the new Codes for regulating online content. Further, the new terms are not in use by public servants, academics, sex workers, sexual health practitioners, adult content producers or any current online regulation in practice in so-called Australia. There exists no agreed definitions of what these terms might mean in the Australian market. Debates about their meaning will distract from the practical application of the Codes.

Recommendation 3: that the term 'high impact pornography' is removed from the Codes.

Recommendation 4: that the term 'seriously harmful material' referring to class 1C material is removed from the Codes' Head Terms para 1.1.

Recommendation 5: that the discretion allowing '[i]ndustry participants [to] use different terminology to describe class 1C and class 2 material for different audiences' (clause 3(e)) is removed from the Codes' Head Terms.

The Codes must protect rights to lawful sexual expression

The *Online Safety Act* has significantly expanded limitations on what content internet users can post online, monetise and/or consume without also releasing one's identity to the platform and third party companies, or having to take the activity off-shore to circumvent regulation.

As most sexual content (for both educational and entertainment purposes) now exists online, the role of the Classification Board has been unintentionally superseded, making the eSafety Commissioner the de-facto moderator of all adult content produced and consumed in unceded Australia.

The eSafety Commissioner has a partisan position on adult content, stating that the majority of adult content consumed in Australia is 'mainstream pornography' and is associated with 'attitudes and behaviours which can contribute to gender-based violence', that pornography is associated with 'harmful...risky or unsafe sexual behaviours' and that pornography may be responsible for 'normalising depictions of sexual violence and degrading sexual scripts about women.'³ These claims were not reflected in an Australian-based academic review of international pornography research.⁴

Both globally and in Australia, academic research is moving towards a model of '**digital sexual literacy**' which recognises that it is important for young people and adults to learn both how to safely engage with sexual representations online, including education around pornography; and also to be able to represent themselves as sexual beings in appropriate ways.

Recommendation 6: that an additional clause be inserted in the Codes' Head Terms recognising the right of adults to participate in lawful sexual expression in online spaces.

The Guidelines for the Classification of Films 2012 open with the following set of principles:

- (a) adults should be able to read, hear, see and play what they want;*
- (b) minors should be protected from material likely to harm or disturb them;*
- (c) everyone should be protected from exposure to unsolicited material that they find offensive.⁵*

The Codes' Head Terms should contain similar principles recognising the right of adults to access adult material in online spaces, the right for young people to participate in online spaces without being exposed to harmful content, and the right for people of all ages to participate in online spaces without being exposed to unsolicited offensive material.

³ eSafety Commissioner, *Roadmap for Age Verification and Complementary Measures to Prevent and Mitigate Harms to Children from Online Pornography* (Report, March 2023) 24.

⁴ Alan McKee et al, [*What Do We Know About the Effects of Pornography After Fifty Years of Academic Research?*](#) (Routledge, 2022).

⁵ [Introduction to the Guidelines for the Classification of Films 2012: The Code.](#)

The Codes must be future-proof

The *Online Safety Act* and these Codes are based on the National Classifications Scheme, which has been the subject of controversy and review since its inception. In particular, the category of class 1C currently captures the majority of lawful ‘fetish’ material, and disproportionately captures trans adult content.⁶ The Codes must be future-proofed to ensure that any changes to the National Classifications Scheme’s content categories are reflected in future versions.

Recommendation 7: that an additional clause be inserted in the Codes’ Head Terms to future-proof the Codes by incorporating amendments to the National Classification Scheme Guidelines. We recommend the following:

The classification of material within these Codes is based on the National Classification Scheme. Acknowledging the ongoing work on classifications review, any changes to the classification system will be reflected in future versions of these Codes.

The Codes must not mandate untested technology

The ‘appropriate age assurance measures’ listed in the Codes generate significant privacy and safety concerns.

The current lack of feasibility of age assurance mechanisms is well-understood by tech service providers. Given the current flux state of the government’s age assurance pilots, the Codes should remain high level.

Recommendation 8: that the list of ‘appropriate age assurance’ measures be removed from the Codes’ Head Terms section 5.1(c)(vi).

⁶ Josh Taylor, [‘How Buck’s Transsexual Adventures shaped John Howard’s porn policy’](#), *Crikey* (online, 28 April 2016). We note that the advocacy described in the article centres around ‘revulsion’ towards trans porn and sexuality.