

December 13th, 2023

Office of the eSafety Commissioner
65 Pirrama Rd,
Sydney 2009
NSW
Email: codes@esafety.gov.au



Dear Commissioner,

Re: Prioritising children’s best interests in determining default age of privacy-by-default protections

This short submission addresses a specific proposal in the *Industry Standards for Class 1A & 1B Material for Designated Internet Services and Relevant Electronic Services* currently open for consultation. Specifically, we are concerned that the minimum age of default privacy settings violate children’s rights and these decisions do not appear to be made in children’s best interest.

We appreciate that these issues have been raised previously, including in both the initial Code consultation process¹ and communications with the Commissioner directly.² However, we wish to restate them here clearly because we are concerned that the gravity of the violations from a child rights perspective may have been overlooked in the complex decision-making process regarding the Standards. As we describe below, overlooking these harms could also additionally be a further violation of children’s rights.

Both the right to protection, and the right to have all decisions made in children’s best interests, are enshrined in the UN *Convention on the Rights of the Child*.³ Australia is a signatory to this Convention and the Office of the eSafety Commissioner frequently sets out their commitment to promote human rights, including children’s rights. For example:

- The foundation of the Office’s groundbreaking Safety-By-Design approach rests on human rights and draws influence from the Convention, stating that “a child’s right to safety lies at the heart of the Convention on the Rights of the Child”;⁴
- On the auspicious launch of the UN Committee on the Rights of the Child’s *General comment number 25 on children’s rights in relation to the digital environment*, the Office notes “eSafety’s work is heavily influenced, informed and guided by human rights principles”;⁵
- As the founding member of the Global Online Safety Regulators Network, for example, the Office expresses their “shared commitment to championing a human rights-based approach to online safety regulation and harm prevention”;⁶
- The Office’s internal child safety policy affirms the Office’s desire to meet “our international responsibilities under the United Nations *Convention on the Rights of the Child*”.⁷

¹See for example Reset.Tech 2023 *Response to the revised Online Safety Codes consultation* <https://onlinesafety.org.au/wp-content/uploads/wpforms/31-9e10405917e4c106e4ec5e69a7bc86/Reset.Tech-Australia-Revised-Codes-Reset-Submission-Google-Docs-869c0da1775d8d037a97b1a1db860d5.pdf> or the Australian Child Rights Taskforce 2023 *Submission to the revised Online Safety Codes consultation* <https://onlinesafety.org.au/wp-content/uploads/wpforms/31-9e10405917e4c106e4ec5e69a7bc86/ACRT-submission-to-the-Revised-Online-Safety-Codes-March-2023-aa7fb069cf093dc4ef7ad245ec3423aa.pdf>

²Australian Child Rights Taskforce 2023 *Online Safety Codes for children, currently under consideration for registration* <https://childrightstaskforce.org.au/wp-content/uploads/2023/01/Online-Safety-Codes-ACRT-letter-to-eSafety.pdf>

³UN General Assembly (1989) *Convention on the Rights of the Child*, <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>

⁴Office of the eSafety Commissioner 2019 *Safety by Design Overview* <https://www.esafety.gov.au/sites/default/files/2019-10/SBD%20-%20Overview%20May19.pdf>

⁵Office of the eSafety Commissioner 2021 *UNCRC General Comment: Children’s rights in the digital world* <https://www.esafety.gov.au/newsroom/blogs/uncrc-general-comment-childrens-rights-digital-world>

⁶Global Online Safety Regulators Network 2023 *Position Statement: Human Rights & Online Safety Regulation* <https://www.esafety.gov.au/sites/default/files/2023-09/Position-statement-Human-rights-and-online-safety-regulation.pdf>

⁷Office of the eSafety Commissioner and ACMA 2022 *Child Safety Policy* https://www.esafety.gov.au/sites/default/files/2021-01/ACMA%20and%20eSafety%20Child%20Safety%20Policy_Jan%202021.pdf

However, the proposals regarding the minimum age requirements of protections for privacy-by-default settings presents both a substantive conflict with children's rights to protection *and* a procedural conflict regarding children's right to have their best interests taken as a primary consideration.

1. Substantive concerns: the proposals violate children's right to protection and to privacy through privacy-by-default settings

The *UN Convention on the Rights of the Child* affords all children under 18 the right to recognition as children, stating that:

*"A child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."*⁸

The relevant law in question here is the *Online Safety Act*, which defines a child which is "an individual who has not reached 18 years."⁹

Under the Convention, all children are afforded the right to protection, with State parties obliged to ensure the protection of children under 18 years of age with regards to their wellbeing.¹⁰ Children are also afforded the right to privacy under article 16 of the Convention up until their 18th birthday.¹¹ This right to protection and privacy applies in the digital world, and explicitly to privacy-by-design settings. The *UN General Comment on Children's Rights in Relation to the Digital Environment* states that: "states parties should require the integration of privacy-by-design into digital products and services that affect children"¹² and applies to all people under 18 years old.

At the time of the General Comments launch, the Office of the eSafety Commissioner reaffirmed this, stating that "*the General Comment ... clarifies the roles and responsibilities of all stakeholders – from children through to businesses to achieve this objective. It also sets expectations for businesses to adhere to the highest standards of ethics, privacy and safety in the provision of their services. We cannot overstate the importance of this.*"¹³ (emphasis added)

However, the proposals in the Industry Standards for Class 1A & 1B Material for Designated Internet Services and Relevant Electronic Services include a definition of 'young Australian child' and 'Australian child'. This category of 'young Australian child' appears only to create a ceiling age of 16 for certain protections. That is, this arbitrary distinction is used to propose setting a minimum age for privacy setting to default to private at 16, and violates children's right to be protected right up until their 18th birthday.

The proposals to cap protections at 16 violate children's rights. Privacy-by-default advances children's right to privacy, and realises their right to protection from harm. For example, at one stage Meta found, 75% of all 'inappropriate adult-minor contact'—or as it is more commonly called, grooming—on Facebook was a result of their 'People You May Know' friends recommendation system.¹⁴ The PYMK feature did/does not function when accounts are private.

⁸UN General Assembly 1989 *Convention on the Rights of the Child*, <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>, Article 1

⁹ *Online Safety Act 2021* Sec 5

¹⁰UN General Assembly 1989 *Convention on the Rights of the Child*, <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>, Article 6

¹¹UN General Assembly 1989 *Convention on the Rights of the Child*, <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>, Article 16

¹²UN Committee on the Rights of the Child 2021 *General comment No. 25 (2021) on children's rights in relation to the digital environment*.

<https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-25-2021-childrens-rights-relat> ion, para 70

¹³Office of the eSafety Commissioner 2021 *UNCRC General Comment: Children's rights in the digital world*

<https://www.esafety.gov.au/newsroom/blogs/uncrc-general-comment-childrens-rights-digital-world>

¹⁴As made public in *Alexis Spence et al. v. Meta*, U.S. District Court for the Northern District of California, Case No. 3:22-cv-03294 (filed June 6, 2022) p. 11-12, *Growth, Friending + PYMK, and Downstream Integrity Problems*.

<https://pugetstaffing.filevineapp.com/s/9eb2BZcUfhdtXkxlfV45CJnlivYHhdWcRRuQVwSMz120RVs7ATmxn9r5>

2. Procedural concerns: the decision regarding the proposals needs to prioritise the best interests of children

We understand from the consultation on December 8th 2023 that two key concerns may have driven the Office to put forward the proposals to cap protections at age 16. Both of which warrant further scrutiny.

Firstly, we understand that the Standards' central aim is to reduce the spread of Class 1A and 1B materials, so the age of privacy-by-default settings may seem liminal. We are unclear about why this is a concern for the Office or the eSafety Commissioner, and why it led to a decision to cap protections at 16. Age of default settings are a factor in preventing Class 1A and 1B materials, if they were not, age limits would not have been mentioned in the Codes and Standards at all. As a factor, a precautionary approach would suggest they are set at 18. Put plainly, if default privacy age settings are worth addressing, they are worth addressing properly. Moreover, we are concerned about the precedent that could be set. If lower protections can be established in Codes—and then Standards—by including them where they appear liminal, this opens up the potential for abuse of process. Issues that are important to online safety, for example, might in turn be 'lowered' by Codes being developed in the competition or privacy spaces, and vice-versa. Given Australia's flawed co-regulatory approach, this creates the conditions for Code shopping. It would be disappointing if the narrowness of the focus of these Codes and Standards would effectively reduce protections for Australian 16 and 17 year olds in practice and sets an unwelcome precedent for future Code and Standard setting processes.

Secondly, we also appreciate that there is a desire to harmonise the Standards with comparable Codes for other industries. We suspect this may be the underlying reason why this issue did not warrant maximum levels of precaution. However, this somewhat defeats the purpose of the Standards. The Office of the eSafety Commissioner rejected initial industry-authored Codes precisely because they were inadequate and moved to a process of Standard making to improve them. The purpose of the Industry Standard setting process, as we understand it, was to drive up protections from those proposed in the Codes. It is unclear why minimum ages for privacy-by-design protections also can not be driven up.

More importantly, regardless of the validity of either concern, **neither trumps children's right to have this decision made in a way that sees their best interest as a primary concern.** This is precisely what article 3 of the Convention on the Rights of the Child assures children. Under the UN *Convention of the Rights of the Child*, all young people under the age of 18 have the right to have all administrative decisions—including decisions set by regulators—place their best interests as a primary consideration:

*"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*¹⁵ (emphasis added)

The UN Committee on the Rights of the Child, in *General Comment 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration*¹⁶ acknowledges that the best interests of the child can be complex and dynamic and that balancing efforts may be needed when, for example, one child's best interests clash with the rights of another child or adult. However, children's best interests are clearly intended to be given higher priority, not just treated as one of many considerations.

This best interests principle also applies in the digital world. The UN Committee on the Rights of the Child, in their *General comment number 25 on children's rights in relation to the digital environment*, states:

¹⁵UN General Assembly 1989 *Convention on the Rights of the Child*, <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>

¹⁶ UN Committee on the Rights of the Child 2013 *General Comment 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* https://www2.ohchr.org/english/bodies/crc/docs/gc/crc_c_gc_14_eng.pdf

“States parties should ensure that, in all actions regarding the provision, regulation, design, management and use of the digital environment, the best interests of every child is a primary consideration.”¹⁷ (emphasis added)

Advancing a human rights based approach to online regulation requires difficult decisions to be made, and this is a situation where the Office has a powerful opportunity to take a lead to advance children’s rights. The alternative would be a baffling and retrograde step. For example, we note that the review of the BOSE¹⁸ proposes introducing a requirement that online services providers prioritise the best interest of children, as do proposals around reforms of the *Privacy Act* and a Children’s Privacy Code.¹⁹ Given the broader movement towards embracing children’s best interests within digital regulation, a decision that prioritised industry concerns would represent an unwelcome reversal.

In summary, we are concerned that proposals regarding the minimum age of default privacy settings violate children’s rights and that these decisions may not be considering children’s best interest as a primary consideration.

We would be happy to chat further with you about these concerns although we appreciate the consultation deadline is looming, as is the holiday season, so we leave this as an offer rather than a request for a meeting. We look forward to your response via the consultation process.

Regards,



Dr Rys Farthing, Reset.Tech Australia &



Sarah Davies, Alannah Madeline Foundation

¹⁷UN Committee on the Rights of the Child 2021 *General comment No. 25 (2021) on children’s rights in relation to the digital environment*.
<https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-25-2021-childrens-rights-relation, para 12>

¹⁸Department of Infrastructure, Trade, Regional Development, Communication and the Arts 2023 *Online Safety (Basic Online Safety Expectations) Amendment Determination 2023*

<https://www.infrastructure.gov.au/have-your-say/online-safety-basic-online-safety-expectations-amendment-determination-2023>

¹⁹Office of the Attorney General 2023 *Privacy Act Review Report*

<https://www.ag.gov.au/rights-and-protections/publications/privacy-act-review-report>