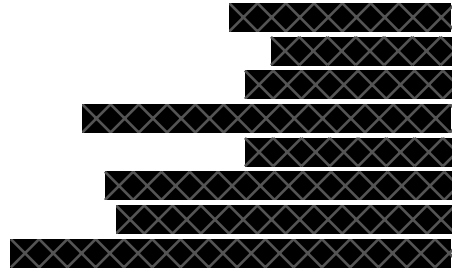




**Australian  
Sex Workers  
Association**



22 November 2024

To the *Online Safety Act* Industry Associations Steering Group

**Re: Consolidated Industry Codes of Practice for the Online Industry (Class 1C and Class 2 Material)**

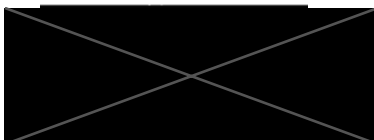
Thank you for the opportunity to provide feedback on the Draft Consolidated Industry Codes of Practice for the Online Industry (Class 1C and Class 2 Material) (the Codes).

Scarlet Alliance is Australia's national peak sex worker organisation. Formed in 1989, our membership includes state and territory-based and national sex worker organisations and individual sex workers across unceded Australia.

Scarlet Alliance advocates for equality, justice and the highest level of health for past and present workers in Australia's sex industry. We achieve our goals and objectives by using best practices including peer education, community development and community engagement. Through our work and the work of our member organisations and projects, we have the highest level of contact with sex workers and access to sex industry workplaces throughout Australia. Scarlet Alliance also represents sex workers on a number of government and non-government committees and advisory mechanisms.

Scarlet Alliance has maintained consistent engagement throughout the development and implementation of the *Online Safety Act 2021*. Our advocacy has focused on the risks presented by Australia's eSafety framework, which classifies any sexual content in online spaces as inherently 'harmful'. This approach positions sex workers and other marginalised communities as being *perpetrators of harm*, while ignoring our legitimate privacy and safety concerns and undermining our avenues for digital participation and access, sharing vital health and safety information and conducting our businesses.

Yours faithfully,



Chief Executive Officer



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## Introduction

Throughout the implementation of the *Online Safety Act 2021*, sex workers and our allies have provided consistent evidence that Australia's eSafety framework generates tangible risks for marginalised communities.<sup>1</sup>

The Draft Consolidated Industry Codes of Practice for the Online Industry (Class 1C and Class 2 Material) (the Codes) are the final piece of regulation under the *Online Safety Act* left to be completed. The Codes will set rules for the way that internet services deal with class 1C and class 2 content, covering what most people would describe as 'pornography'. However, the

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<sup>1</sup> See: Scarlet Alliance, Submission to the Department of Infrastructure, Transport, Regional Development and Communications, [Consultation on a Bill for a new Online Safety Act](#) (14 February 2021); Scarlet Alliance, [Submission No 36 to the Senate Standing Committees on Environment and Communications, Online Safety Bill Inquiry](#) (3 March 2021); [Evidence to Senate Standing Committees on Environment and Communications](#), Canberra, 5 March 2021, 19-22 (Jules Kim and Gala Vanting, Scarlet Alliance); [Evidence to Senate Standing Committees on Environment and Communications](#) (answers to questions taken on notice), Canberra, 9 March 2021 (Jules Kim and Gala Vanting, Scarlet Alliance); Scarlet Alliance, [Submission to the eSafety Commissioner on the Restricted Access System Declaration \(Online Safety Act 2021\)](#) (20 September 2021); Scarlet Alliance, [Submission to the eSafety Commissioner on the Call for Evidence on Age Verification for Online Pornography](#) (20 September 2021); Scarlet Alliance, [Submission to the Department of Infrastructure, Regional Development and Communications on the Draft Basic Online Safety Expectations](#) (15 November 2021); Scarlet Alliance, [Submission to the eSafety Commissioner on the Draft Consolidated Industry Codes of Practice for the Online Industry \(Class 1A and Class 1B Material\)](#) (23 March 2023); Scarlet Alliance, [Submission to the eSafety Commissioner on the Draft Online Safety Industry Standards 2024- \(Relevant Electronic Services- Class 1A and 1B Material\) and \(Designated Internet Services- Class 1A and 1B Material\)](#) (21 December 2023); Scarlet Alliance, [Submission to the Department of Infrastructure, Transport, Regional Development, Communications and the Arts on the Online Safety \(Basic Online Safety Expectations\) Amendment Determination 2023](#) (16 February 2024); and Scarlet Alliance, [Submission to the Department of Infrastructure, Transport, Regional Development, Communications and the Arts on the Statutory Review of the Online Safety Act 2021](#) (21 June 2024).

Codes will have wide ranging implications for other online content, including sex education and harm reduction information.

Porn performers are sex workers. Porn performers and digital content creators have always been part of the sex worker community, both internationally and in unceded Australia. The increasing precarity of the gig economy, the emergence of new online platforms (e.g. OnlyFans) and the COVID-19 pandemic have led many 'in-person' sex workers to also participate in digital forms of sex work, including live camming/streaming, self-produced and distributed adult content creation, and studio-produced porn.

The market for porn in Australia is small, and the Australian industry consists of a handful of small studios and independent performer-producers.<sup>2</sup> While this content is hosted lawfully offshore and marketed internationally, it is often consumed by Australian audiences.

The Codes will not inherently prevent Australian-based producers from self-publishing their content to international markets, nor from using large overseas platforms (e.g. Pornhub). However, local producers will be disproportionately affected because they cannot bear the cost of implementing specific age assurance technologies required by the Act's framework. This will mean that almost **all Australian-based producers** will be reliant on third party distribution platforms complying with the Codes to maintain viable and lawful distribution networks to access the Australian market. This reliance on large overseas platforms to distribute content will also further concentrate market power within a handful of dominant companies. Should no overseas platforms comply, Australian pornography will no longer be accessible to Australian audiences.

In addition to inhibiting the choice of Australian audiences to consume locally-produced and other forms of independent pornography, the Codes are likely to overcapture other forms of lawful adult content, information and education. This will affect the advertising of in-person sex workers, and the participation of sex workers, sex worker peer organisations, sex educators and harm reduction advocates in online spaces.

These concerns are not hysteria. Sex workers are the canary in the coal mine when it comes to the consequences of poorly executed internet regulation, particularly for assessing potential impact on other marginalised communities.<sup>3</sup> During the past decade, sex workers in Australia and internationally have experienced increasing loss of access to digital services, including web-hosting, administrative and financial products and services, social media, and app-based platforms.<sup>4</sup> The government also openly acknowledges that 'digital exclusion is increasingly a

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<sup>2</sup> eSafety Commissioner, [Age Verification Roadmap Consultations: Round 1](#) (Report, May 2022) 9.

<sup>3</sup> [Canaries in the Coal Mine: Sex Workers are Fighting Censorship](#) (Woodhull Freedom Foundation, 2024).

<sup>4</sup> See, e.g., Amber Schultz, [It's sex discrimination: banks strip brothels and escort agencies of their rights](#), *Crikey* (online, 20 May 2020);

Julie Fenwick, [Australian Sex Workers Have Been Removed From Linktree. What They Are Doing Is Not Illegal](#), *Vice* (online, 21 January 2022);

Asia Grace, [Dominatrix claims DoorDash banned her over sex work: "It's dehumanizing"](#), *New York Post* (online, 6 April 2022);

Olivia Snow, [Sex Workers Have Been Banned From Airbnb for Years. Will You Be Next?](#), *The Nation* (online, 26 November 2022).

driver of inequality' and 'choosing not to be online is no longer a practical option for most Australians'.<sup>5</sup>

Public speculation by the Codes' drafters that providers of adult content will be forced to 'withdraw from the market'<sup>6</sup> is highly distressing for our community. Our livelihoods, safety and wellbeing cannot be treated as collateral damage in the effort to draft 'acceptable' regulation. Our experiences form a vital contribution to understanding how regulatory frameworks impact income, health promotion, community and culture, political engagement, sexuality and business in online spaces. This consultation represents the last opportunity to have our concerns understood and heard.

## 'Not new restrictions' - increased content regulation in the *Online Safety Act*

In previous public dismissals of sex worker concerns during the implementation of the *Online Safety Act*, the eSafety Commissioner has stressed that the Act would not impose 'new restrictions' on adult content affecting sex workers.<sup>7</sup> This statement does not stand up to scrutiny. At the same time as businesses are increasingly relying on internet technologies, the scope of internet regulation has broadened. The *Online Safety Act* has increased regulation affecting sex workers' by:

- **Increasing categories of restricted material** - previous versions of the Online Content Scheme responded to complaints about illegal (class 1A and class 1B) and restricted (class 1C and class 2A) material. The *Online Safety Act* also restricts the *depiction* and *description* of class 2B and 2C material, 'self-harm material' and 'simulated gambling material'.
- **Increasing regulatory scope** - The *Online Safety Act* applies to all internet technologies, including search engines, app stores, and sms/messaging communications.
- **Increasing enforcement powers** - The *Online Safety Act* gives the eSafety Commissioner proactive investigative powers. Funding for the eSafety Commissioner was quadrupled in this year's federal budget, making it the best-resourced internet regulator in the world.<sup>8</sup>

The Codes generate **three major risks**:

1. Restriction of lawful and consensual adult sexual expression
2. Overcapture of content, including vital sexual health and sexuality education
3. Age assurance requirements mandating flawed technologies.

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<sup>5</sup> Department of Infrastructure, Transport, Regional Development, Communications and the Arts, [Statutory Review of the Online Safety Act 2021](#) (Issues Paper, 29 April 2024) 9-10.

<sup>6</sup> Quote attributed to Jennifer Duxbury, DIGI Director for Policy and Regulatory Affairs: Josh Taylor, ['Adult content sites without age checks may be blocked from Australian search results under draft code'](#) *The Guardian* (online, 22 October 2024).

<sup>7</sup> Lisa Visentin, ['Sex industry 'not my concern': eSafety Commissioner defends proposed new powers'](#) *The Sydney Morning Herald* (online, 4 March 2021).

<sup>8</sup> Sen the Hon. Katy Gallagher, Minister for Finance, Minister for Women, Minister for the Public Service, ['Tackling online harms'](#) (Media Release, 1 May 2024).

# Risk 1: Restriction of lawful and consensual adult sexual expression

The *Online Safety Act* implements the categories used in Australia's National Classification Scheme. These include:

- **'Class 1C material'** (Classification Scheme term: RC) - sexual material depicting 'specific fetish practices or fantasies' including 'consensual depictions which purposefully demean anyone...body piercing, application of substances such as candle wax, golden showers, bondage, spanking or fisting' as well as content involving 'adult persons who look like they are under 18 years'.
- **'Class 2A material'** (Classification Scheme terms: X18+ or category 2 restricted) - material depicting unstimulated sexual activity that does **not** include any of the above.
- **'Class 2B material'** (Classification Scheme terms: R18+ or category 1 restricted) - description or depiction of 'high-impact sexually explicit material' that is **not** class 2A material. For example, this category would likely apply to the online advertising of in-person sex workers.

The Codes use the terms **'high impact online pornography'** to describe all **class 1C and class 2A** material.

The Online Content Scheme empowers the eSafety Commissioner to:

- Put an online service provider (e.g. a social media platform) on notice that there is class 1, class 2A or class 2B material in breach of the provider's terms of service.
- Order the removal of class 1C material if it can be accessed by a person in Australia.<sup>9</sup>
- Order deletion (removal from search results) of links if they can be used by a person in Australia to access class 1C material.
- Order the removal of apps from app stores if they 'facilitate the posting' of class 1C material.
- Order the removal of class 2A material if it can be accessed by a person in Australia, and 'the service is provided from Australia'.<sup>10</sup>
- Order a service provider to either remove class 2B material or place it behind a 'restricted access system.'

While the eSafety Commissioner insists that it 'prioritises the investigation of complaints about the most harmful class 1 material',<sup>11</sup> in fact **all adult content accessed in Australia** is

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<sup>9</sup> To be clear, we are not arguing against the existence of removal powers in relation to class 1A and 1B content.

<sup>10</sup> It is clear that the word 'provided' has a wider meaning than the word 'hosted': see *Online Safety Act 2021* s 114 and *Online Safety Act 2021* s 115. The scope of this power is unclear, and arguably could be used to remove class 2A content hosted lawfully overseas service on the basis that the performers have Australian accents.

<sup>11</sup> eSafety Commissioner, [Online Content Scheme Regulatory Guidance](#) (eSC RG 4, December 2023) 7.

subject to the Online Content Scheme,<sup>12</sup> enforced by an unelected regulator with minimal transparency obligations.

**Adults in Australia must retain the choice about whether they want to access class 1C or class 2 content.** As the Discussion Paper notes, the **viewing** of class 1C and class 2 material by adults in Australia is lawful in most circumstances.<sup>13</sup> Likewise, the **creation** of this material (separate from restrictions around its sale and/or distribution) by consenting adults in Australia is also usually lawful.<sup>14</sup>

The National Classification Scheme's categories have been the subject of ongoing controversy and review since their inception. Much of this controversy has centred around treatment of class 1C-type materials. Expert academics have criticised the categories for pathologising sex acts commonly practised within BDSM and LGBTQIA+ communities, and inhibiting depictions of consent negotiation and safer sex practices.<sup>15</sup> In 2012, the Australian Law Reform Commission recommended that the government 'review current prohibitions in relation to the depiction of sexual fetishes',<sup>16</sup> noting that 'it is not clear why [the Classifications Scheme] refers to the particular fetishes that it does'.<sup>17</sup>

Former Prime Minister John Howard has been described as being 'personally responsible' for restricting pornography depicting female ejaculation, for being too similar to 'golden showers' prohibited in X18+ (class 2A) material.<sup>18</sup> Despite this prohibition, in 2021 the ABC produced multi-format content dedicated to the question of 'what is it about pee that some people find so hot?'<sup>19</sup> It is clear that adults in Australia hold divergent opinions on what should be considered 'fetishes or practices which are offensive or abhorrent'.<sup>20</sup>

The eSafety Commissioner has a clear position on sexual content; that 'mainstream pornography' is associated with 'attitudes and behaviours which can contribute to

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<sup>12</sup> Unsurprisingly, the Online Content Scheme has essentially replaced the role of the National Classification Scheme in categorising pornography. The Classification Board's last review of a commercial pornographic video was in 2015-2016.

<sup>13</sup> The 'RC' classification is broad, and some content is unlawful to possess. However, the possession of 1C material (consensual fetish content) is lawful in all Australian jurisdictions except Western Australia and some parts of the Northern Territory: Australian Law Reform Commission, [National Classification Scheme Review](#) (Discussion Paper 77, September 2011) 164-5.

<sup>14</sup> We note the Discussion Paper poses the question 'Should providers of most relevant electronic services that allow users under 18 (such as email and private messaging services) be required to scan all Australian user's communications and messages to detect and remove lawful Class 1C and Class 2 materials?' On behalf of every adult in Australia who has ever engaged in any form of consensual intimate communication, our answer is a resounding 'no'.

<sup>15</sup> Zahra Stardust, ["Fisting is not permitted": criminal intimacies, queer sexualities and feminist porn in the Australian legal context](#) (2014) 1(3) *Porn Studies* 242, 244-50.

<sup>16</sup> Australian Law Reform Commission, [Classification: Content Regulation and Convergent Media](#) (Report No 118, February 2012) 276.

<sup>17</sup> Ibid.

<sup>18</sup> 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.

<sup>19</sup> Dee Salmin, ['Golden Showers 101: Everything you wanted to know about watersports but were too afraid to ask'](#), ABC (24 November 2021).

<sup>20</sup> RC - REFUSED CLASSIFICATION (SEX), [Guidelines for the Classification of Films 2012](#).

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.'<sup>21</sup> These claims were not reflected in an Australian-based academic review of international pornography research.<sup>22</sup>

In contrast, Australian research indicates that 84% of men and 54% of women have viewed pornography at least once in their lives, with most agreeing that pornography can enhance the pleasure of masturbation and improve sexual relationships.<sup>23</sup> We believe that eSafety's position is out of step with the attitudes of the majority of adults in Australia.

## What can the Codes do to protect the choice to access lawful and consensual adult content?

The Codes cannot solve the problems of content categories or the unfettered powers of the eSafety Commissioner. However, they can lessen the effects towards sex workers and the wider community by implementing less stigmatising language and attitudes towards adult content, and by using clear and consistent definitions.

### **1. Remove the term 'high impact pornography'.**

The term 'high impact' is used throughout the Guidelines for the Classification of Films 2012, except for in the case of X18+ and RC material.<sup>24</sup> There is no criteria or precedent for applying an 'impact test' to pornography in Australia. The introduction of this term within the Codes generates stigma towards those who produce and consume pornography. The term 'impact' also has a specific meaning within the BDSM community,<sup>25</sup> which may generate confusion among content creators as to the types of material subject to restrictions. The terms 'class 1C' and 'class 2A' material should be defined and used consistently.

### **2. Remove the term 'seriously harmful material' when referring to class 1C material in the Head Terms para 1.1.**

This is inappropriate and stigmatising language to describe class 1C material. The terms class 1C and class 2 material should be defined and used consistently throughout the Codes.

### **3. Remove '[i]ndustry participants may use different terminology to describe class 1C and class 2 material for different audiences' (clause 3(e)) from the Head Terms.**

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<sup>21</sup> eSafety Commissioner, *Roadmap for Age Verification and Complementary Measures to Prevent and Mitigate Harms to Children from Online Pornography* (Report, March 2023) 24.

<sup>22</sup> Alan McKee et al, [What Do We Know About the Effects of Pornography After Fifty Years of Academic Research?](#) (Routledge, 2022).

<sup>23</sup> Chris Rissel et al, [A Profile of Pornography Users in Australia: Findings From the Second Australian Study of Health and Relationships](#) (2016) 54(2) *Journal of Sex Research* 227.

<sup>24</sup> Using the Guidelines: Essential principles, [Guidelines for the Classification of Films 2012](#).

<sup>25</sup> The terms 'impact' and 'impact play' are used by BDSM practitioners to refer to activities involving striking a person's body with a hand or implement.

The use of different terminology by industry participants will generate confusion and risks of overcapture. The terms class 1C and class 2 material should be defined and used consistently throughout the Codes.

**4. Remove 'filtering high-impact online pornography...out of news and discovery feeds by downlisting, deprioritising or quarantining, so that it is not brought to the attention of child end-users' as an example of 'appropriate measures to prevent child end-users from accessing or being exposed to high-impact online pornography or self-harm material' (see e.g. Schedule 1 Social Media Services Online Safety Code, MCM 1.3).**

The list contains 5 other measures to prevent people under the age of 18 from viewing restricted material. There is no mandate to prevent adult users from accessing lawful material of their choice, and this measure will likely lead to the [overcapture](#) of sex worker content.

**5. Insert an additional clause in the Head Terms to future-proof the Codes to incorporate amendments to the National Classification Scheme Guidelines.**

We recommend inserting the following clause:

*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.*

**6. Insert an additional clause in the 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.<sup>26</sup>

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.

## Risk 2: Overcapture of content, including sexuality education

The eSafety Commissioner insists that:

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<sup>26</sup> Ibid, Introduction to the Guidelines: The Code.



*[[It is unlikely that sexual health education content, information about sexuality and gender, or health and safety information about drug use and sex will be considered illegal or restricted online content by eSafety.<sup>27</sup>*

However, inaccurate decisions regarding inappropriate content and breaches of terms of use are a common experience for sex workers, harm reduction advocates and other health promotion organisations.

During our submission on *Safe and Responsible AI in Australia*, Scarlet Alliance received the following reports from our member organisations in relation to posts made across all major social media platforms (Facebook, Instagram and X, formerly Twitter):

- A health promotion social media account run by a sex worker peer organisation being temporarily barred from posting after sharing a health promotion post about condom use.
- Paid advertisements for health promotion events and community events run by sex worker organisations being blocked prior to publication for 'breaching community standards'.
- Posts advertising job vacancies for sex worker peer positions for service delivery and advocacy at state/territory and national sex worker organisations (funded by government and payable under the Social, Community, Home Care and Disability Services Industry Award) being deemed as breaching community guidelines.
- Posts sharing sex worker COVID-19 safety plans referenced on government websites being deemed as breaching community guidelines.
- Posts sharing legislation relating to sex work, such as the *Sex Industry Act 2019* (NT) and the *Anti-Discrimination Act 1992* (NT) being deemed as breaching community guidelines.
- Sex worker organisations' social media accounts being permanently 'closed' because the platform deems sexual health promotion as being inappropriate content and/or in breach of terms and conditions.<sup>28</sup>

Research has demonstrated that algorithmic technologies deployed to detect 'harmful' content rate images of 'women [as] more racy than images containing men',<sup>29</sup> and disproportionately miscategorise images of LGBTQI+ people and people of colour.<sup>30</sup> A survey of more than 200 sex workers and adult entertainment performers in the United States identified shadowbanning and algorithmic bias as having negative impacts on mental health, as well as a chilling effect on the sharing of health and safety information and engagement in political speech.<sup>31</sup>

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<sup>27</sup> [Online Content Scheme Regulatory Guidance](#) (n 18) 5.

<sup>28</sup> Scarlet Alliance, [Submission to the Department of Industry, Science and Resources on Safe and Responsible AI in Australia](#) (26 July 2023) 6.

<sup>29</sup> Gianluca Mauro and Hilke Schellmann, "[There is no standard": investigation finds AI algorithms objectify women's bodies](#)", *The Guardian* (online, 8 February 2023).

<sup>30</sup> Zahra Stardust and Alan McKee, "[Age verification for pornography access? Our research shows it fails on many levels](#)", *The Conversation* (online, 11 June 2024).

<sup>31</sup> Hacking/Hustling, [Posting into the Void](#) (Report, October 2020) 52-3.

The Codes cannot overcapture:

- Advertising for in-person sex work services
- Sex worker organising and the sharing of health and safety education
- Other sexuality and harm-reduction educational materials.

The Codes must also not inhibit industry compliance with Commonwealth and state/territory anti-discrimination law. In Queensland, it is unlawful to discriminate against a person due to their **sex work activity**.<sup>32</sup> In Victoria, discrimination on the basis of **'profession, trade or occupation'** (including sex work) is unlawful.<sup>33</sup> In the Northern Territory, it is unlawful to discriminate against a person due to their **'employment in sex work or engaging in sex work, including past employment in sex work or engagement in sex work.'**<sup>34</sup> The Codes must not explicitly or implicitly encourage service providers to discriminate against sex workers by mandating shadowbanning, content deprioritisation or denial of services for sex workers in Australia.

## What can the Codes do to prevent overcapture?

The Codes cannot solve the problems of algorithmic bias and shadowbanning, however they can promote compliance with anti-discrimination law.

- 1. 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).**

Services have extensive obligations in relation to complaints mechanisms, but no obligations in relation to appeals processes for miscategorised or maliciously reported content. Given the high risks of overcapture in relation to class 2 content, the Codes should create equal obligations for both complaints mechanisms and appeals processes.

- 2. Include a statement in the Codes' Head Terms 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.*

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<sup>32</sup> *Anti-Discrimination Act 1991* (Qld), s 7(l).

<sup>33</sup> Victorian Equal Opportunity and Human Rights Commission, [Profession, Trade or Occupation](#) (Web Page, July 2023).

<sup>34</sup> *Anti-Discrimination Act 1992* (NT), s 19(1)(ec).

## Risk 3: Age assurance clauses mandate flawed technologies

As the Discussion Paper notes, 'the question of when and where age assurance should take place is inextricably linked with the question of how age assurance should be implemented'.

It is common ground that the list of 'appropriate age assurance measures' in the Codes generate significant privacy and safety concerns:

- **matching of photo identification** - requires the collection/storage of a significant identity document (e.g. passport or drivers licence)
- **facial age estimation** - current technology is not sufficiently reliable to determine whether or not a person is over the age of 18
- **credit card checks** - merely 'assure' that a user has access to credit card information
- **digital identity wallets or systems** - require the collection/storage of significant identity documents and/or collection of biometric information
- **attestation by a parent or guardian of age or whether an Australian end-user is a child** - has no more reliability than the current practice of users declaring their own age
- **third-party age assurance mechanisms** - require the collection/storage of information and reliability of the technology deployed by the third-party.

Not only is the current feasibility of age assurance mechanisms well-understood by tech service providers, but so too are the consequences. These failable mechanisms are easily bypassed by young people (for instance by using a VPN to access content), but the cost of implementation will be unfeasible for the producers and distributors of the vast majority of sexual content (porn, advertising for in-person sex work and other sex industry businesses, sexuality education) in Australia required to be behind a 'restricted access system'.

### What can the Codes do about age assurance?

The Codes cannot remove age assurance and restricted access systems from Australia's eSafety framework, but they can do more than treat the loss of nearly all Australian adult content online as collateral damage in a bid to draft acceptable regulation. Given the current flux state of the government's age assurance pilot, the Codes should remain high level.

#### **1. Remove the list of 'appropriate age assurance' measures from the Codes Head Terms section 5.1(c)(vi).**

What should be considered 'appropriate' age assurance mechanisms cannot be determined until completion of the age assurance pilot and the Children's Privacy Code currently being developed by the Office of the Australian Information Commissioner. The Codes should remain high level and avoid deeming mechanisms as 'appropriate' before these have been tested by the pilot or assessed for compliance with the Children's Privacy Code.

# Summary of recommendations

## Protecting adults' choice of material

The Codes should protect the rights of adults to choose what content they access. They should avoid using stigmatising and discriminatory language when describing sexual content by:

- Removing the term 'high impact pornography'
- Removing the phrase 'seriously harmful material' from the Head Terms
- Removing the clause that '[i]ndustry participants may use different terminology to describe class 1C and class 2 material for different audiences' from the Head Terms
- Removing 'filtering high-impact online pornography...out of news and discovery feeds by downlisting, deprioritising or quarantining' from the list of 'appropriate measures to prevent child end-users from accessing or being exposed to high-impact online pornography or self-harm material'
- Inserting an additional clause in the Head Terms to future-proof the Codes to incorporate amendments to the National Classification Scheme Guidelines
- Inserting an additional clause in the Head Terms recognising the right of adults to participate in lawful sexual expression online.

## Minimising overcapture

The Codes should minimise overcapture and promote compliance with human rights and anti-discrimination law by:

- Including requirements for clear and accessible avenues for challenging malicious or inaccurate reporting under 'reporting and complaints mechanisms'
- Including a statement in the Head Terms on upholding human rights principles and compliance with state/territory anti-discrimination law.

## Preventing implementation of flawed age assurance technologies

The Codes should avoid mandating the use of flawed and untested age assurance technologies by:

- Removing the list of 'appropriate age assurance' measures from the Head Terms.

# Scarlet Alliance member endorsement

The following Scarlet Alliance Member organisations have endorsed this submission:

- Magenta Sex Worker Project - Western Australia
- Respect Inc - Queensland
- Lutruwita/Tasmania Sex Worker Project
- SIN - Sex Industry Network South Australia
- SWEAR - Sex Work; Education, Advocacy & Rights Western Australia
- SWOP ACT - Sex Worker Outreach Project Australian Capital Territory
- SWOP NT - Sex Worker Outreach Program Northern Territory
- SWOP NSW - Sex Worker Outreach Program New South Wales
- Vixen - Victoria's peer-only sex worker organisation