Law Council
OF AUSTRALIA

5 November 2026

Department of Infrastructure, Transport, Regional Development,
Communications, Sport and the Arts
GPO Box 594
Canberra ACT 2601

By email: UERules@infrastructure.gov.au

Dear Sir / Madam

***Online Safety (User Empowerment Tools) Determination 2026* (Exposure Draft)**

The Law Council of Australia welcomes the opportunity to provide feedback to the Department of Infrastructure, Transport, Regional Development, Communications, Sport and the Arts (**the Department**) on the exposure draft of the *Online Safety (User Empowerment Tools) Determination 2026* (**the draft Determination**). In preparing this letter, the Law Council acknowledges feedback provided by the Law Society of New South Wales and the Law Institute of Victoria.

The draft Determination intends to give effect to the Australian Government's "My Feed, My Way" initiative by requiring online platforms to let users select their preferred feed, and requiring that one option for a preferred feed must be one made up of only other accounts which the user follows.[1]

Proposed section 27A of Schedule 2 of the *Online Safety Amendment (Digital Duty of Care) Bill 2026* (the **Bill**) provides the Minister with the requisite power to compel an online service to provide users with a specified "user empowerment tool", under which this Determination is proposed to be made. The Law Council considers the draft Determination to be broadly consistent with the power provided for in proposed subsection 27A(1) of the Bill, subject to the matters raised below. We take the opportunity to highlight several matters for the Department's further consideration.

Identification of harms targeted by the draft Determination

Subsection 27A(3) of the Bill requires that before specifying a user empowerment tool, the Minister must "be satisfied that the tool is necessary to protect users of the service in Australia from harms associated with access or exposure to a design feature of the service".

It is unclear from the draft Determination which specific harms the proposed user empowerment tool is designed to address. We acknowledge that this matter will likely be

[1] *Online Safety (User Empowerment Tools) Determination 2026* (Exposure Draft) s 6 ("*Online Safety Determination*").

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addressed in explanatory material accompanying the Determination once finalised. However, given that the Minister's satisfaction is a statutory precondition for the exercise of the power to make the Determination under section 27A(1) of the Bill, we strongly encourage the Department to identify and articulate the nexus between the harm and the proposed tool introduced in the Determination both as part of the present consultation process, and in any explanatory material accompanying the Determination.

Clearly articulating the rationale for the introduction of the tool proposed in the Determination will not only enhance the consultation process, it will also ensure that the requirement for the making of the Determination in subsection 27A(3) of the Bill is satisfied.

Reference to "age-restricted social media platforms"

Subsection 27A(1) of the Bill provides that a "specified online service" may be directed to provide users of a service with a specified user empowerment tool as prescribed by a Determination. The present draft Determination requires the implementation of the preferred feed feature by reference to "social media services" and "age-restricted social media platforms".[2] We note that only the former category, but not the latter, is included within the definition of an "online service" under proposed subsection 25B(1) of the Bill.[3]

The *Online Safety Act 2021* (Cth) provides a meaning of “social media service" (at section 13) and “age-restricted social media platform” (at subsection 63C(1)). Note 2 to subsection 63C(1) provides that an age-restricted social media platform may be, but is not necessarily, a social media service under section 13. It is therefore not clear that an "age-restricted social media platform" would be understood as a "social media service" for the purposes of subsection 25B(1) of the Bill. The result is an inconsistency between the meaning of a "specified online service" towards which a user empowerment tool may be directed under subsection 27A(1) of the Bill, and the services towards which the "preferred feed" tool is directed in the Determination.

If the intention of the Bill is to enable an “age-restricted social media platform” to be required to provide a specified user empowerment tool, as is suggested by the drafting of the Determination, then consistency of terminology would be achieved by clarifying in the Bill that an "age-restricted social media platform" falls within the meaning of an "online service" under subsection 25B(1). However, if the intention is to exclude “age-restricted social media platforms” from the category of “online services” of which the provision of a user empowerment tool may be required, then harmonisation will be achieved by removing references to “age-restricted social media platforms” from the proposed Determination.

Prompting users to select preferred feed

Section 7 of the draft Determination requires a service to prompt a user to choose their preferred feed, if they have not already done so, when the user "next accesses the service in a logged in state".

This provision creates some ambiguity as it is not clear whether users who do not make a choice of preferred feed immediately must be prompted each time they access the service

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2 Ibid, s 6(1).
3 *Online Safety Amendment (Digital Duty of Care) Bill 2026* ss 25B(1)(b).

until a choice is made, or whether access to the service will be restricted until the user makes a choice.

In this regard, the Law Council encourages the Department to clarify the obligations of platforms in prompting users to select their preferred feeds, in order to facilitate compliance with the policy objectives of the tool introduced by the Determination.

Default position where no preferred feed selected

Further to the above, in cases where a user may be able to access an online service's functionalities without selecting a "preferred" feed (for instance, where the user declines to or otherwise does not select a "preferred" feed when prompted by a service, but is nonetheless not restricted from accessing the service), the Determination does not prescribe a "default" feed.

Allowing online services to retain the discretion to revert to an algorithmic default where a user does not select a "preferred" feed when prompted, may run contrary to the objectives and standards for the "preferred" feed tool provided for by the Determination.[4] We therefore encourage the Department to clarify a "default" setting to which services must revert when users evade or ignore prompts to select a "preferred" feed, to ensure overall consistency with the aims of the reform package.

Contact

Thank you again for the opportunity to provide feedback on the draft Determination. To discuss further, please contact Nathan MacDonald [redacted]

Yours sincerely



Tania Wolff
President

[4] See, eg. Online Safety Determination section 5(g) ("use of user empowerment tools must not be discouraged, whether explicitly or implicitly").