Law Council
OF AUSTRALIA

Online Safety Amendment (Digital Duty of Care) Bill 2026

Environment and Communications Legislation Committee

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Introduction

1. The Law Council of Australia welcomes the opportunity to provide a submission to the Senate Environment and Communications Legislation Committee's inquiry into the Online Safety Amendment (Digital Duty of Care) Bill 2026 (the **Bill**).

2. The Law Council acknowledges growing concerns about online harms that impact mental health and wellbeing. Certain forms of online content, online abuse, image-based abuse, algorithmic amplification and self-harm-related content can contribute to adverse mental health outcomes, particularly for children. Measures aimed at reducing foreseeable online harm promote important human rights and public interest objectives.

3. As set out in this submission, the Law Council supports a balanced regulatory framework that is implementable and enforceable, and we welcome the reforms contained in the Bill. Where concerns are raised, these are directed at ensuring the measures contained in the Bill are effective, certain and durable, with the objective of arriving at a regulatory framework can address the real damage caused by harmful content, and promote a safe online environment for users, especially children.

4. A key feature of the Bill is the proposed amendments to the *Online Safety Act 2021* (Cth) (the **Act**) that introduces a Digital Duty of Care (**DDC**), intended to protect Australians from serious online harm. The Bill also contains a range of additional measures relating to the regulation of online content. The three Schedules to the Bill can be summarised as follows:

    - **Schedule 1** allows the eSafety Commissioner (the **Commissioner**) to issue a removal notice to an app distribution service or internet search engine where an app or website is deemed (on reasonable grounds) to be designed predominantly, or is being used predominantly, to generate fake nude material. This notice may require an app-distribution or internet search engine service to remove the app, links to it, or advertising, information or access relating to it.

      Schedule 1 also expands removal notice powers and introduces link deletion notices for cyber-bullying material targeted at an Australian child, non-consensual intimate images, and cyber-abuse material targeted at an Australian adult. Part 4 of Schedule 1 proposes to increase penalties across a range of provisions of the Act.

    - **Schedule 2** introduces the DDC, applicable to persons responsible for a range of online services who must take appropriate action to ensure a safe online environment. This includes:

        - protecting Australians from seriously harmful material and conduct;
        - protecting Australian children from material and conduct that is harmful to children, and harms associated with access or exposure to design features of online services; and
        - for social media services, ensuring that design features that have negative behavioural impacts do not operate for children under the age of 16.

Schedule 2 also introduces transparency measures including powers for the Commissioner to require persons responsible for an online service to provide transparency reports, and specified classes of providers to publish online safety information. It further allows for 'sock-puppet identities' to be used by approved researchers for the purposes of conducting online safety research, and by the Commissioner for the purposes of performing their functions or exercising their powers.

- **Schedule 3** repeals provisions in relation to online content scheme industry codes and standards.

5. The Law Council's submission focusses only on Schedules 1 and 2 to the Bill.

General comments

Consultation timeframes

6. On 23 September 2026, the Law Council provided a submission to the Department of Infrastructure, Transport, Regional Development, Communications, Sports and the Arts in response to an earlier Exposure Draft of the Bill. The Law Council's feedback on the Exposure Draft highlighted deficiencies in the consultation process, most notably the 10 business-day period provided for feedback. Submissions received by the Department have not been published in full, with the Department publishing only a summary of key themes on 26 October 2026.

7. The form of the Bill introduced to Parliament diverges from the Exposure Draft in a number of key areas. Despite this, stakeholders are again faced with a truncated timeframe in which to provide feedback. In this regard, the Bill was referred to the Committee on 15 October 2026, with a closing date for submissions of 30 October 2026 giving stakeholders 12 business days in which to prepare a submission. In the interim period, a number of amendments have been made to the Bill since its initial referral to the Committee.

8. These timeframes are problematic for peak body organisations such as the Law Council, who are obligated to consult with members before preparing a submission. The Law Council is concerned that the short scrutiny process will constrain opportunities to improve the Bill before it is further progressed. In our view, neither the public commentary nor the explanatory material accompanying the Bill has justified the apparent urgency of these reforms, which are well-intentioned and represent an important shift in the regulation of online content.

9. The Law Council recognises the importance of acting promptly to address serious online harms. However, the compressed timeframes limit the opportunity for careful scrutiny of a significant and complex reform, and risk unintended consequences that may later need correction.

Schedule 1

10. Pursuant to Schedule 1 to the Bill, if the Commissioner is satisfied on reasonable grounds that an app or website was designed predominantly, or is being used predominantly, to generate fake nude material, the Commissioner may require an

app distribution or internet search engine service to remove the app, links to it, or advertising, information or access relating to it.

11. Schedule 1 also expands removal notice powers and introduces link deletion notices for cyberbullying material targeted at an Australian child, non-consensual intimate images, and cyber-abuse material targeted at an Australian adult. Failure to comply with these requirements may attract a civil penalty of 6000 penalty units.

Take down notices

12. The Law Council is generally supportive of the proposed strengthening of take-down and removal powers, particularly for fake nude material and non-consensual intimate images, noting that this was a recommendation of the 2024 statutory review of the Act.[1] This material has the potential to cause significant and lasting harm, and timely removal is important.

13. We particularly welcome the introduction of section 86B relating to the removal of fake nude material, noting that:

    - Proposed paragraph 86(2)(d) would include replica or identical app and websites as the one being targeted within the remit of the removal notice. This would ensure that duplicate apps or websites will also be required to comply with the removal notice and avoids loopholes.
    - Proposed subsection 86B(3) requires the Commissioner, where possible, to identify the app or website on which the information is hosted for compliance with the removal notice.

Waiving the requirement for a complaint to be made

14. Proposed amendments in Schedule 1 will permit the Commissioner to waive the requirement that a complainant first report the material to the online service if:

    - the service does not have a functional or accessible complaints mechanism; or
    - making of the complaint would create a foreseeable risk of further harm.

15. The Law Council supports this measure, noting that it implements a recommendation of the 2024 statutory review.[2] We also note, however, that the Explanatory Memorandum does not provide adequate guidance as to how this is to be applied in practice, including in relation to what a "functional or accessible" complaints mechanism is, and what constitutes a "foreseeable risk of further harm". We support regulatory guidance addressing the specific circumstances in which the Commissioner may waive this requirement.

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1 Delia Rickard PSM, *Report of the Statutory Review of the Online Safety Act 2021* (October 2024) ('Online Safety Act Review'), Recommendation 27.

2 Ibid Recommendation 16.

Reduced timeframes to respond

16. We note that measures contained in Schedule 1 to the Bill propose to reduce the time required to comply with a removal notice from 48 to 24 hours.[3] This proposal implements the findings of the statutory review of the Act, which supports prompt action being taken.[4]

17. While generally supportive of timeframes to encourage prompt action, we note that feedback received by the Law Council has suggested that the 24-hour timeframe may in some cases be unrealistic. We submit that the practicalities of such a change (including the feasibility of compliance within a 24-hour period) should be closely monitored to examine the success (and any unintended consequences) of this change.

Increased penalties

18. Part 4 of Schedule 1 to the Bill significantly increases the civil penalties across a range of provisions. For failure to comply with a suite of notices and rules, the Bill proposes to increase civil penalties to 6000 penalty units (up from 500). For non-compliance with industry codes and standards, the Bill doubles the existing maximum penalties from 30,000 to 60,000 penalty units.

19. These are substantial increases, however they appear to reflect the finding of the statutory review of the Act that more significant penalties are needed, to act as a deterrent and to enable appropriate enforcement action.[5]

20. As with the Law Council's comments against other aspects of Schedule 1, the impact of these changes should be closely monitored to examine the success (and any unintended consequences) of this change.

Recommendations

- **Regulatory guidance is needed to provide clarity as to when the eSafety Commissioner may waive the requirement for a complainant to first report the material to the online service.**
- **The effect of Schedule 1 should be closely monitored, especially the impact of reduced timeframes to respond to notices, and increased penalties.**

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3 See Online Safety Amendment (Digital Duty of Care) Bill 2026 ('the Bill'), ss 65(1)(c)(i), 66(1)(c)(i), 88(1)(d)(i), 89(1)(d)(i) and 90(1)(d)(i).
4 Online Safety Act Review, Recommendation 15.
5 Ibid 16.

Schedule 2

21. Schedule 2 to the Bill introduces the DDC, applicable to persons responsible for online services who must take appropriate action to ensure a safe online environment. A "safe online environment" is defined in section 25C as an online environment in which:

    - persons in Australia are protected from seriously harmful material and conduct;
    - children in Australia are protected from material and conduct that is harmful to children, and harms associated with design features of online services; and
    - for social media services, children in Australia under the age of 16 do not have access to (and are not exposed to) design features that have negative behavioural impacts.

22. In addition to the need to take appropriate action to ensure a safe online environment, compliance with the DDC also requires a person responsible for an online service to take effective measures to mitigate identified risks through a risk assessment framework. Proposed section 26A sets out the matters to be taken into account when determining what measures will be considered "appropriate and effective" for the purposes of complying with the DDC.

23. The Law Council acknowledges concerns about online harms that may impact mental health and wellbeing. There is no doubt that certain forms of online content, online abuse, image-based abuse, algorithmic amplification and self-harm-related content can contribute to adverse mental health outcomes, particularly for children and other vulnerable persons. Measures aimed at reducing foreseeable online harm promote important human rights and public interest objectives. Importantly, any reforms in this area must consider and have regard to interrelating rights, such as freedom of expression.[6]

24. Such an assessment must take place through a principled proportionality framework that balances competing rights and interests. To this end, we support the preservation of subsection 233(1) of the Act, which makes explicit that the Act does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication.

25. As noted in the Statement of Compatibility with Human Rights, the Bill engages a wide range of human rights, including the rights to freedom of expression, privacy, access to information and freedom from discrimination. We note that, unlike the *Online Safety Act 2023* (UK), the Bill does not expressly require duty holders to have regard to users' rights to freedom of expression and privacy when complying with their online safety obligations.[7] Accordingly, we suggest that the impact of the DDC on those rights and interests, together with other human rights engaged by the reform measures, should be closely monitored following implementation and taken into account in any future statutory review of the regime.

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6 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) Art 19.

7 *Online Safety Act 2023* (UK).

Definition of "online services"

26. Online services are defined in section 25B of the Bill to include a broad range of services. We acknowledge that the drafting is intentionally broad and technologically neutral to avoid limiting the scope of application. However, as set out below, this breadth gives rise to implementation challenges and raises concern as to whether it is practical for the Commissioner to enforce.

Person responsible for an online service

27. Subsection 25B(2) of the Bill defines a person responsible for an online service as:

    - the person who provides the service; or
    - the person who exercises the greatest degree of day-to-day control over the service—except for services defined under subsection 25B(1)(i).

28. The Explanatory Memorandum to the Bill states:

    > *This provision is important to determine who holds responsibility for a duty of care. The person responsible, by providing or controlling the service, is expected to have an appropriate knowledge of systems and processes that would be necessary for compliance with a duty of care.*[8]

29. The drafting of paragraph 25B(2)(b) refers to "the person who exercises the greatest degree of day-to-day control" over an online service. If this subsection seeks to hold individuals who exercise operational control over the service responsible (for example, directors or officers, in the case of a body corporate), it may be difficult to identify a person who exercises the "greatest" degree of control. The use of the word "greatest" requires a comparative evaluation of the degrees of control exercised by, potentially, many persons.

30. For example, in companies with multiple directors or senior executives, it will often be the case that more than one individual exercises a substantial degree of day-to day control over the online services' operations. To assist, consideration should be given to clarifying the phrase "greatest degree of day-to-day control". In this regard, the definition of "officer" in section 9AD of the *Corporations Act 2001* (Cth) may provide a useful model for articulating an appropriately identified degree of influence or control exercised by an individual.

31. The Explanatory Memorandum identifies a focus on systemic issues and states that it is not intended that the presence of specific instances of harmful material will create a breach risk (although they might be evidence of a systemic issue).[9] The types of operational decisions that cause systemic issues are typically informed by the work of many different people within the business. Corporate liability is logical in appropriate circumstances, and if liability for individuals is to remain, there must be a high degree clarity as to who may be liable, noting the significant penalties for any breach.

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8 Online Safety Amendment (Digital Duty of Care) Bill 2026 Explanatory Memorandum ('Explanatory Memorandum'), 52.

9 Ibid 72.

Application to media entities

32. Changes to the Bill from the exposure draft have meant that media organisations are largely exempt from the DDC, as the Bill now contains carve-outs for seriously harmful material and conduct, and material and conduct that is harmful to children, if it is "excluded material". "Excluded material" is defined by section 25F to include material produced for entertainment, professional news material, and material that is in the public interest.

33. However, despite media content now being exempt from the DDC as a result of excluded material in proposed section 25F, there remains uncertainty as to whether the other requirements of Division 4 of the Bill will apply to media organisations more generally. For example, proposed section 27 of the Bill requires an online service to conduct annual risk assessments for the purposes of complying with their DDC. Further, a person responsible for a "prescribed online service", as determined by the Commissioner, must maintain a complaint and dispute process.

34. Media entities that fall within the definition of an online service in section 25B, but which solely publish material that is excluded from the DDC pursuant to section 25F, require further clarification of their obligations. The Law Council suggests that Division 4 could be amended to make it clear that it does not apply to online services that predominantly publish excluded material in proposed section 25F.

Exposure Draft of the Online Safety (User Empowerment Tools) Determination 2026

35. The Department is also concurrently consulting on an Exposure Draft of the Online Safety (User Empowerment Tools) Determination 2026 (the **draft Determination**). The draft Determination is in anticipation of the powers that may be provided to the Minister under section 27A of the Bill to require a specified online service to provide users of that service in Australia with a specified user empowerment tool.[10]

36. Subsection 6(1) of the draft Determination indicates that the Minister could direct a specified "social media" or an "age restricted social media platform" to provide a user empowerment tool. While a "social media service" is explicitly referenced as an "online service" in subsection 25B(1) of the Bill,[11] an "age restricted social media platform" is not. For consistency and clarity, we suggest there is consideration of specifically referencing an "age restricted social media platform" in subsection 25B(1).

Recommendations

- **There should be further clarity as to when a person exercises the "greatest degree of day-to-day control" over an online service.**
- **Clarification is needed as to whether online services publishing material excluded under section 25F are required to undertake requirements under Division 4 of Schedule 2.**

[10] The Bill, para 27A(1)(a).
[11] See the Bill, para 25B(1)(b).

Compliance with the digital duty of care

37. The Bill expresses the obligation for online services to comply with the DDC in section 26 in the following terms:

> *A person responsible for an online service must take appropriate action to ensure a safe online environment, including by taking effective measures to mitigate risks identified in risk assessments conducted in accordance with section 27.*

38. It will be important for online services to have, to the greatest extent possible, certainty and clarity on how to comply with the DDC. To this end, the development of guidelines by the Commissioner under section 28 of the Bill will be critical, especially in relation to what "appropriate action" looks like in practice.

39. We note that the Bill does not propose that compliance with the proposed guidelines would provide any statutory "safe harbour" protection or deemed compliance with the DDC. We consider that the development of Ministerial rules for specifying compliance requirements as initially contemplated in the Issues Paper released in May[12] could facilitate a more robust and clearer compliance framework for persons responsible. This may be particularly helpful given the significant transition from a detailed Codes and Standards compliance framework to a broad overarching DDC framework.

40. The Explanatory Memorandum clarifies that "individual instances of harmful material and conduct on a service will not necessarily be a breach of the digital duty of care".[13] It explains that the relevant question is that the focus is on risk mitigation, and "systemic breach". This is not necessarily reflected in the drafting of the relevant provisions. It would be preferable for this important clarification to be expressed in the provisions of the amendments, rather than left to the Explanatory Memorandum.

Departure from the "reasonably practicable" test

41. The DDC as set out in the Bill departs in some respects from the earlier Exposure Draft, which required that "a person responsible for an online service must ensure, so far as is reasonably practicable, a safe online environment". The term "reasonably practicable" was defined in section 25H of the Exposure Draft. This approach closely resembled the articulation of the primary duty of care under section 19 of the *Work Health and Safety Act 2011* (Cth) (**WHS Act**) and the definition of "reasonably practicable" in section 18 of the WHS Act.

42. On one hand, the use of a legislative framework which is well established in another Commonwealth legal context has practical benefits. For example, courts and practitioners tasked with interpreting and advising on the DDC could draw upon an established body of judicial authority and academic commentary to inform the meaning of the provision.

43. However, we acknowledge that there are significant departures from the WHS regime in the DDC provided for by the Bill. Notably, subsection 26A(3) of the Bill expressly

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[12] Department of Infrastructure, Transport, Regional Development, Communications, Sport and the Arts, *A Digital Duty of Care for Australia—Developing a duty of care framework for online services used by Australians* (Issues Paper, May 2026), 3.

[13] Explanatory Memorandum, 72.

prohibits consideration of the cost of actions and measures when determining whether they are appropriate or effective for the purposes of complying with the DDC, whereas subsection 18(3) of the WHS Act expressly requires consideration of cost. We query whether the policy objectives underpinning the DDC differ sufficiently from those underlying the primary duty of care under the WHS Act to justify departing from that tested legislative framework. It should be recognised that the proposed approach is likely to provide less legal certainty, at least in the short term, until a body of guidance and jurisprudence develops around the new provisions.

Determining what is appropriate and effective

44. Proposed section 26A outlines the matters that must be taken into consideration by duty holders in determining what is "appropriate" and "effective" for the purposes of complying with the DDC.

45. Section 26A of the Bill has notable differences from the earlier Exposure Draft, which required consideration of both the costs associated with compliance, and the impacts on privacy.[14] Feedback to the Law Council has particularly queried the appropriateness of the Bill's approach to excluding the cost of any action or measure when assessing what is appropriate and effective.[15] In particular, this approach has the potential to disproportionately impact smaller and emerging online services in Australia. It is unclear whether this consideration has been taken into account.

46. We are of the view that the statutory test in section 26A should include a provision to consider the human rights engaged by the material when assessing what is appropriate and effective, for example, by reference to the principal human rights engaged by the Bill as set out in the Statement of Compatibility with Human Rights.[16] If such rights may be impacted, the appropriate action or measure taken ought to be proportionate, and consistent with businesses' responsibility to respect human rights as set out in the UN Guiding Principles on Business and Human Rights.[17]

Ministerial discretion

47. The Law Council welcomes the reduction in Ministerial discretion since the Exposure Draft consultation, including removal from the definition of "serious harmful material and conduct" and "harmful to children". We acknowledge these amendments seek to provide greater certainty to the operation of the DDC.

48. Nevertheless, we reiterate our concern with the overall retention of Ministerial discretion in aspects of the Bill. Reliance on Ministerial instruments to determine aspects of the DDC prevents sufficient parliamentary scrutiny, may be easily amended, and leaves stakeholders uncertain about the application of the legislation. The Bill retains Ministerial discretion in the following provisions:

- proposed subsection 25B(3)—Exemptions for online services;
- proposed subsection 25C(2)—Social media services covered;

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14 Exposure Draft of the *Online Safety Amendment (Digital Duty of Care) Bill 2026*, para 25H(e).
15 The Bill, s 26A(3).
16 Explanatory Memorandum, 9.
17 UN Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, UN Doc HR/PUB/11/04 (2011).

- proposed subsection 25G(2)—Design features that have negative behavioural impacts; and
- proposed section 27A—User empowerment tools.

49. While we appreciate that permitting the Minister to make determinations in the above areas provides flexibility for the operation of the DDC framework, we suggest that the Government adopt a framework that provides the minimum statutory criteria when using Ministerial determinations, such as mandatory consultation requirements, publication of reasons, procedural fairness protections, human rights compatibility statements, and consideration of expert evidence.

Interaction with existing causes of action and statutory regimes

50. The Law Council's supplementary submission to the Exposure Draft consultation identified concerns with the risk of incoherence between the DDC and existing causes of action, including defamation, serious invasion of privacy, and racial discrimination.[18] While there have been amendments to the scope and application of the DDC since its earlier iteration, these concerns remain.

51. In particular, we note that there remains a risk of incoherence with the definition of "seriously harmful material or conduct" in proposed subsection 25D(1) of the Bill. Notably, this definition includes:

- posting, or threatening to post, an intimate image of another person without their consent;[19]
- material or conduct that is reasonably likely to cause serious harm by menacing or harassing an individual;[20]
- material or conduct that advocates for or supports a listed terrorist organisation;[21] and
- material or conduct that counsels, promotes, encourages, urges or praises a terrorist act.[22]

52. The Bill does not contain exceptions or defences of the kind which exist at common law and in statute in relation to actions such as defamation, serious invasions of privacy and racial vilification. For example, the DDC is not subject to:

- defences of justification, honest opinion or privilege which exist in the common law of defamation and in the various uniform defamation law statutes in the states and territories of Australia: e.g. *Defamation Act 2005* (Vic); or
- defences[23] and exemptions[24] that correspond with those that exist in the Privacy Act for the statutory tort of serious invasion of privacy. The Vic Bar particularly notes that the DDC does not appear to have an exemption for journalists equivalent to Schedule 2 to the Privacy Act.[25]

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18 See Law Council of Australia, *Supplementary Submission: Online Safety Amendment (Digital Duty of Care) Bill 2026* (30 September 2026).
19 Para 25D(1)(e).
20 Para 25D(1)(i).
21 Para 25D(1)(k).
22 Para 25D(1)(l).
23 *Privacy Act 1988* (Cth), Sch 2, cl 8.
24 Ibid s 7B and Sch 2, cl 15-18.
25 Ibid Sch 2, cl 15.

53. These exceptions or defences do not form part of the consideration of whether any action or measure is "appropriate" for the purposes of compliance with the DDC. As such, a platform deciding whether to remove material to comply with the DDC is not required to consider whether the publisher of that material would have a complete defence at law.

54. At the same time, any exceptions or exclusions from the DDC must also remain coherent with existing legal frameworks designed to protect individuals from racial and religious vilification. It will be important to ensure that existing protections from vilification are not undermined by broadly framed exclusions from the DDC.

55. Concerns have also been raised about the potential incoherence between the proposed regime and the social media minimum age provisions in Part 4A of the Act. The Explanatory Memorandum describes the DDC as "complementary",[26] but we note the potential overlapping nature of that regime with the DDC.

56. We therefore suggest that further consideration should be given to this issue of incoherence, including whether there should be the insertion of relevant defences that exist elsewhere in the common law or statute to certain types of conduct that might also constitute a contravention of the DDC.

Provision of information about an online service

57. Section 28A empowers the Commissioner to compel a person responsible for an online service to provide information about the service or allow a "nominated person" access to the service. A nominated person is determined by the Commissioner pursuant to subsection 28A(2). The Law Council supports the policy intent of this provision, and welcomes attempts to promote greater transparency in the delivery of online services.

58. To ensure these powers function effectively, we recommend that further consideration be given to how information obtained under section 28A can be adequately protected from potential misuse. In this regard, we are concerned that a broad power to require that information be provided or accessed is not accompanied by safeguards relating to the handling and use of that information, including matters such as privacy and confidentiality.

Recommendations

- **Section 26A should be amended to include cost and human rights considerations when determining what actions or measures are appropriate or effective for the purposes of complying with the DDC. Consideration of cost should prioritise the disproportionate impacts on smaller and emerging online services.**
- **The Bill's reliance on Ministerial discretions should include consultation requirements, publication of reasons, procedural fairness protections, human rights compatibility statements, and consideration of expert evidence.**

[26] Explanatory Memorandum, 11.

- **Consideration should be given to the risk of incoherence, including whether there should be the insertion of relevant defences that exist elsewhere in the common law or statute to conduct that might constitute a contravention of the DDC.**
- **Section 28A should be subject to information handling requirements, particularly in relation to preserving privacy and confidentiality in material provided to the Commissioner.**

Seriously harmful material and conduct

59. Concepts of "serious harm" and "harmful content" are central to the operation of the DDC framework and need to be carefully defined.

60. The Law Council's earlier submission to the Exposure Draft of the Bill raised concerns with the definition of "seriously harmful material and conduct", with a focus on the potential for it to capture material beyond what was intended, including material published for legitimate journalistic, legal, educational or other public interest purposes, such as news reporting and court reporting.[27]

61. We welcome the insertion of section 25F into the Bill, which sets out excluded material that might otherwise fall within the definitions of "seriously harmful material and conduct" and material and conduct "harmful to children"'. We do, however, maintain some concern with references to "serious harm" focussed primarily on the need for greater certainty and clarity, as set out below.

Serious harm

62. Paragraphs 25D(1)(i), 25D(1)(m) and 25E(1)(f) each deploy the concept of "serious harm". Serious harm is currently defined in section 5 of the Act as serious physical harm or serious harm to a person's mental health, whether temporary or permanent. Serious harm to a person's mental health includes serious psychological harm, and serious distress, but does not include mere ordinary emotional reactions such as those of only distress, grief, fear or anger.[28] There is no further guidance in the Bill as to what "serious harm" means, or how it will be interpreted in the context of the DDC.

63. Online service providers and their users are entitled to understand fully what is or is not covered by the provisions of this Bill, noting the substantial penalties for non-compliance.

64. In our view, precise objective criteria should be used to provide a clear definition of the term "serious harm", including in respect of what combination of material and conduct may constitute "serious harm". Without such a definition, the vagueness and potential width of the term "serious harm" increase the risk of misuse and of unintended consequences.

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[27] Law Council of Australia, *Supplementary Submission: Online Safety Amendment (Digital Duty of Care) Bill 2026* (30 September 2026), 8-9.

[28] *Online Safety Act 2021* (Cth), s 5.

"May" cause serious harm

65. The potentially broad interpretation of serious harm is of concern when considering proposed paragraph 25E(1)(f), which includes the following catch-all clause as a part of the definition of "harmful to children":

> *[A]ny other material or conduct, or combination of material and conduct, that may cause serious harm to children.*

66. The word "may" in this paragraph requires no more than a bare possibility of serious harm. That contrasts with paragraphs 25D(1)(i) and (m), each of which requires that the material or conduct be reasonably likely to cause "serious harm". The Law Council considers that paragraph 25E(1)(f) should be amended to apply to material 'reasonably likely' to cause serious harm to children. Ideally, this is confined by objective criteria which identify precisely the material or conduct it is intended to capture.

Excluded material

67. The Law Council welcomes the insertion of section 25F to exclude certain material from the definitions of material or conduct that is seriously harmful, or harmful to children. We note, however, that several aspects of the "excluded material" list could benefit from further clarification.

68. For example, the list of excluded material does not include a carve-out for material produced for the predominant purpose of expressing opinion or debate on political or electoral issues consistent with the implied freedom of political communication. While there is a broad exclusion for "material that is in the public interest" in proposed paragraph 25F(1)(i), no guidance in the Bill or Explanatory Memorandum is provided as to what this means or how this is to be applied. We note that any exclusion for political commentary or material in the public interest should not extend to material that is subject to prohibitions under anti-discrimination laws across Australian jurisdictions, including material that is reasonably likely to offend, insult, humiliate or intimidate another person or a group of people because of their race or ethnic origin consistent with section 18C of the *Racial Discrimination Act 1975* (Cth), with an approach to exemptions similar to those found at section 18D.

69. Further, material that is "produced, performed or disseminated for a literary, artistic or educational purpose" is now proposed to be "excluded material" pursuant to paragraph 25F(f), however that material must not be contrary to the public interest. No guidance is provided as to what may or may not be in the public interest and how a court is to interpret those words. In the absence of greater clarity, there is likely to be significant uncertainty about how this exclusion is to apply in practice.

Recommendations

- **Precise objective criteria should set out a clear definition of the term "serious harm", including in respect of what combination of material and conduct may constitute "serious harm".**

- **Paragraph 25E(1)(f) should apply to material that "is reasonably likely to" cause serious harm to children, rather than "may", ideally confined by objective criteria which identify precisely the material or conduct it is intended to capture.**
- **Further guidance is required as to what constitutes the "public interest" for the purpose of excluded material in section 25F. This should include reference to material produced for the predominant purpose of expressing opinion or debate on political or electoral issues, while ensuring consistency with anti-discrimination laws across Australian jurisdictions.**

Increased penalties

70. Schedule 2 to the Bill imposes a civil penalty of up to 60,000 penalty units for failures to comply with the DDC, failures to conduct and retain risk assessments, failures to provide a user empowerment tool, and failures to implement age assurance measures.

71. Penalties of that order, combined with the absence of a clear understanding of terms such as "serious harm" and "public interest", have the potential to create a chilling effect for online content. The likely effect will be that online service providers will have a strong commercial incentive to err on the side of removing or restricting lawful material in order to avoid enforcement action.

72. We note, however, the opposite risk of underenforcement or a lack of financial incentive to comply with the DDC, and the effect that this will have on individuals that would otherwise seek to rely on the DDC to provide a safe online environment.

Sock puppet identities

73. Proposed section 205J would permit the Commissioner to assume "sock puppet" identities for the purposes of performing their functions or exercising their powers. The identities may be used only for the activities listed in section 205K; engagement with users is limited to what is necessary to prevent closure of an account; and the Commissioner must publish an annual statement of activities under section 205M.

74. The Law Council supports the policy intent of these powers, and welcomes attempts to promote greater compliance by online services, and make the following comments with the view to ensuring the "sock puppet" provisions operate effectively and with adequate oversight.

75. Subsection 205K(3) requires the Commissioner, in consultation with the Commissioner of the Australian Federal Police, to determine and maintain policies to be followed in using sock puppet identities. This requirement recognises the sensitivity of the power, however the Bill does not require the policies to be published or to be made by legislative instrument.

76. The Law Council recommends that they be made by legislative instrument or, at the least, published, so that the limits on the use of the power are publicly known.

77. Further, the risk of misuse is increased by the immunity of the Commissioner or approved researchers from civil proceedings conferred by section 205L. At a

minimum, section 205L should require that the relevant act was done, or the omission made, both reasonably and in good faith. That would impose an objective standard of reasonableness, in addition to the subjective requirement of good faith, before the immunity is engaged.

Recommendations

- **Policies developed between the Commissioner and Australian Federal Police under section 205K on the use of sock puppet identities should be made by legislative instrument or, at the least, published.**
- **Section 205L should require that the relevant act was done, or the omission made, both reasonably and in good faith before the immunity from civil proceedings is engaged.**

Enforcement of the digital duty of care

78. Feedback to the Law Council has expressed concern that the current resourcing of the Commissioner may be insufficient to respond to the potentially wide-ranging enforcement functions arising from the DDC as currently framed. It will be critical for the Government to ensure that the Commissioner is consulted on its resourcing needs and is equipped to perform the range of functions that will arise under any DDC framework.

79. The Law Council suggests that a two-year statutory review of the operation of the DDC should be added to the Bill to identify the effects of the framework, including the ability of the Commissioner to effectively administer the scheme, the impact on online services, and the extent to which the DDC is protecting children, young people and minority communities. This statutory review should also take account of any relevant recommendations the Royal Commission on Antisemitism and Social Cohesion may make, along with any related reforms.

80. Further consideration should also be given to a private right of action available to individuals experiencing serious harm as a result of a platform's failure to meet its DDC obligations, as a complement to the Commissioner's regulatory functions. Providing access to an effective remedy for human rights violations is an international legal obligation and the right to an effective remedy is itself a human right that States have a duty to fulfil.[29]

81. Further consultation could take place at a point in time after the DDC has been implemented, when there is a clear understanding about the effectiveness and

[29] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 2.3; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 14; *Convention of the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) art 2; *Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) art 6. See also *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008; entry into force for Australia 16 August 2008) Art 4.

limitations on the Commissioner-led model. Such a consultation could include consideration of the necessity of a private right of action, and if this is to be pursued, appropriate thresholds for claims

Recommendation

- **A two-year statutory review of the operation of the DDC should be added to the Bill to identify the effects of the framework, including the ability of the Commissioner to effectively administer the scheme, the impact on online services, and the extent to which the DDC is protecting children, young people and minority communities.**

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The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its constituent bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice, and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its constituent bodies:

- the Australian Capital Territory Bar Association;
- the Law Society of the Australian Capital Territory;
- the New South Wales Bar Association;
- the Law Society of New South Wales;
- the Northern Territory Bar Association;
- the Law Society Northern Territory;
- the Bar Association of Queensland;
- the Queensland Law Society
- the South Australian Bar Association;
- the Law Society of South Australia;
- the Tasmanian Bar;
- the Law Society of Tasmania;
- the Victorian Bar Incorporated;
- the Law Institute of Victoria;
- the Western Australian Bar Association;
- the Law Society of Western Australia; and
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Through these bodies, the Law Council represents more than 110,000 Australian lawyers.

The Law Council is governed by a board of 23 Directors: one from each of the constituent bodies, and six Executive members elected by Directors. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President. In 2026, the Law Council Executive comprises:

- Ms Tania Wolff, President
- Ms Elizabeth Shearer, President-elect
- Mr Lachlan Molesworth, Treasurer
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The Chief Executive Officer of the Law Council is Dr James Popple.

The Law Council's Secretariat is based in Canberra. Its website is www.lawcouncil.au.