Law Council
OF AUSTRALIA

30 September 2026

Digital Duty of Care Team
Department of Infrastructure, Transport, Regional Development,
Communications, Sport and the Arts
GPO Box 594
CANBERRA ACT 2601

By email: digitaldutyofcare@communications.gov.au

Dear Department

Exposure draft - Online Safety Amendment (Digital Duty of Care) Bill 2026

1. Further to the Law Council's submission dated 23 September 2026, we invite the Department to have regard to this supplementary submission on the exposure draft of the Online Safety Amendment (Digital Duty of Care) Bill 2026 (the **draft Bill**).

2. This further submission is informed by the views of the Victorian Bar (the **Vic Bar**) and focuses on matters arising from Schedule 2, which concerns the introduction of a proposed "digital duty of care" (**DDC**). Due to the truncated consultation period, the Vic Bar's input was received after, and therefore not incorporated into, the Law Council's primary submission.

Risks of incoherence

3. The Vic Bar considers that care ought to be taken in the drafting of the proposed DDC to ensure consistency and avoid "incoherence" with other established areas of the law (both common law and statute law). Incoherence in this context is the risk that recognising a new duty of care would conflict with other established areas of law that have already developed their own principles to balance competing interests.

4. By way of example, the High Court has observed the need to maintain a rigid distinction between conduct actionable in *negligence* and conduct actionable as *defamation*, in order to maintain coherence in the common law.[1]

5. In S*ullivan v Moody,*[2] the High Court held that medical practitioners, social workers and departmental officers investigating allegations of child sexual abuse did not owe a duty of care in negligence to persons suspected of committing abuse as this would be inconsistent with the proper and effective discharge of their professional and statutory responsibilities. The Court further identified that there was an intersection

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1 *Sullivan v Moody* (2001) 207 CLR 562, [53]–[54]; *Tame v NSW* (2002) 211 CLR 317, [28] (Gleeson CJ), [58] (Gaudron J), [122]-[126] (McHugh J), [323], [325] (Callinan J).
2 *Sullivan v Moody* (2001) 207 CLR 562, [53]-[54], [60]–[62].

with the law of defamation, observing that a claim in negligence would resolve the parties' competing interests on a different basis and permit recovery for damages where the law of defamation would not.

6. The principle of coherence was subsequently applied in a number of superior court decisions in Australia to dismiss or strike-out negligence claims where the underlying conduct concerned was the communication of defamatory material.[3] A similar approach is taken by the courts in New Zealand.[4]

7. As these cases point out, the law of defamation has been adapted over centuries to balance the public interest in preservation of reputation with the countervailing public interest in free speech. In so doing, both the common law and the legislature have developed defences that are peculiar to the tort of defamation, and which aim to achieve an appropriate balance between these competing interests.

8. Proposed section 26 would impose a DDC on all persons responsible for providing an "online service". The DDC is a duty to ensure, so far as is reasonably practicable, a "safe online environment". The duty includes certain mandatory requirements in relation to the management of "design features" and the conduct of risk assessments: subsections 26(3) and 26A. A person who fails to comply with their digital duty of care is liable to a civil penalty (section 26B) and/or remedial directions from the Commissioner (section 26D).

9. Proposed section 25B defines "safe online environment" as an online environment in which (relevantly):

   (a) persons in Australia are protected from seriously harmful material and conduct; and

   (b) children in Australia are protected from conduct that is harmful to children and also from harms associated with the operation of design features.

10. The Vic Bar considers that a risk of incoherence in the law may arise from the breadth of the material and conduct that may be captured under "seriously harmful material and conduct" and "harm":

    (a) the definition of "harm" in proposed section 25E does not include any limitation on what might constitute "harm" for the purposes of the DDC. The definition is broad enough to include harm in the nature of reputational harm and/or invasion of privacy;

    (b) "seriously harmful material and conduct" includes any material or conduct determined by the Minister by legislative instrument, if the Minister is satisfied that the material or conduct may cause "serious harm";[5] and

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[3] See e.g. *Griffith v Australian Broadcasting Corporation* [2004] NSWSC 582, [31]-[32] (Cripps AJ); *Gacic v John Fairfax Publications Pty Ltd* [2005] NSWSC 1210, [32]-[40] (James J); *Chan v Sellwood; Chan v Calvert* [2009] NSWSC 1335, [44]-[47] (Davies J); *Norris v Gittos* [2011] WASC 295, [46]-[51] (Kenneth Martin J).

[4] *Bell-Booth Group Ltd v Attorney-General* [1989] 3 NZLR 148; *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd* [1992] 2 NZLR 282; *Balfour v Attorney-General* [1991] 1 NZLR 519.

[5] Exposure Draft Bill, Sch 2, part 1, cl 7 (proposed ss 25C(1)(m), 25C(2)).

(c) the definition of "safe online environment" requires children to be protected from "harms" associated with "design features". This too picks up the broad definition of "harm" and is also capable of including reputational harm or invasion of privacy.

11. Accordingly, the Vic Bar considers that the DDC in the form currently proposed has the potential to overlap with existing causes of action for defamation (at common law) and serious invasion of privacy (in Schedule 2 to the *Privacy Act 1988* (Cth)).

12. As presently drafted, the draft Bill does not contain sufficient exceptions, defences or exemptions to the DDC equivalent to those that exist at common law and in statute in relation to the causes of action for defamation, and serious invasion of privacy. For example, the DDC is not subject to:

    (a) 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

    (b) defences[6] and exemptions[7] 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.[8]

13. The Vic Bar considers that the draft Bill therefore carries a risk of introducing incoherence to the law in that conduct that might not be actionable under existing civil causes of action (due to the availability of defences or exemptions) may nonetheless be susceptible to civil penalties for failure to comply with the DDC.

14. The Vic Bar recommends that further consideration be given to the risks of incoherence that potentially arise from the introduction of the DDC. It may be that such risks could be ameliorated or excluded in a number of ways, including by:

    (a) replicating in the Online Safety Act relevant defences/exceptions that exist elsewhere in the common law or in statute in relation to certain types of conduct that might constitute contravention of the digital duty of care; and/or

    (b) excluding certain types of harm from the proposed definition of "harm".

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15. The Vic Bar also holds general concerns about the breadth of the following examples of:

    (a) "seriously harmful material and conduct", as currently defined:

        (i) material or conduct that encourages, promotes, incites or provides instruction for the commission of a criminal offence;[9]

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6 *Privacy Act 1988 (*Cth*),* Sch 2, cl 8.
7 Ibid s 7B and Sch 2, cll 15-18.
8 Ibid Sch 2, cl 15.
9 Exposure Draft Bill, Sch 2, part 1, cl 7 (proposed s 25C(1)(j)).

(ii) material or conduct that counsels, promotes, encourages, urges or praises a terrorist act[10] (noting that whether a particular act meets the definition of a "terrorist act" within the meaning of the *Criminal* Code *Act 1995* (Cth) is an increasingly vexed question in the current global political environment and one that the provider of an online service is unlikely to be in a position to adequately and reliably assess for itself);

(iii) material or conduct that encourages, promotes, urges or instructs illicit drug use;[11]

(b) "harmful to children", as currently defined:

(i) material or conduct that glorifies crime or encourages dangerous stunts or harmful practices.[12]

16. The Vic Bar is concerned that the use of words such as "promote", "praise" and "glorifies" in the above definitional examples may result in overly broad definitions that capture matters that ought not be the subject of the digital duty of care—for example, genuine artistic or political expression.

Contact

17. Thank you for considering this supplementary submission. If you require further information or clarification, please contact Nathan MacDonald [redacted]

Yours sincerely

Elizabeth Shearer
President-Elect

[10] Ibid (proposed s 25C(1)(i)).
[11] Ibid (proposed s 25C((1)(k).
[12] Ibid (proposed s 25D(1)(d)).