Law Council
OF AUSTRALIA

Online Safety Amendment (Digital Duty of Care) Bill 2026: Exposure Draft

Department of Infrastructure, Transport, Regional Development, Communications, Sports and the Arts

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Introduction

1. The Law Council of Australia welcomes the opportunity to comment on the exposure draft of the Online Safety Amendment (Digital Duty of Care) Bill 2026 (the **draft Bill**).

2. The draft Bill would amend the *Online Safety Act 2021* (Cth) (the **Act**) to introduce a 'Digital Duty of Care' (**DDC**). This would be in addition to existing measures in the Act relating to complaint schemes, industry codes, and mechanisms to improve transparency and accountability, aimed at preventing the proliferation of illegal and harmful content online. In addition to the DDC, the draft Bill would add relevant measures to modernises the current framework, encourage a proactive response, to better protect individuals online and by placing greater regulatory responsibility on technology companies.

3. Before commenting on the substantive aspects of the draft Bill, the Law Council takes the opportunity to raise its concern with the consultation process led by the Department of Infrastructure, Transport, Regional Development, Communication, Sport and the Arts.

4. We welcome the public release of the draft Bill, which is an important part of any significant law reform process. However, we take particular issue with the compressed timeframe for consultation and submit that a period of 10 business days in which to respond is restrictive and insufficient to permit fulsome engagement and promote meaningful feedback. Further noting, while an Issues Paper[1] was released in May 2026, the Department did not invite public submissions or engage with peak legal bodies at that time. Further, the Department's request on the consultation homepage to ensure feedback is no longer than 5 pages places an unjustified restriction on stakeholder engagement with an important reform measure.[2] The Bill, which amends five existing acts, itself is 71 pages.

5. The absence of a consultation paper or explanatory memorandum to accompany the release of the draft Bill is also concerning. A consultation paper or some preliminary analysis would have provided stakeholders with a useful understanding of the proposed approaches, international comparisons, and context on how the draft Bill has weighed various considerations.

6. As a membership-based peak organisation, the Law Council consults its constituent bodies, sections and advisory committees in developing law reform positions. The limited timeframe has substantially constrained this process. Accordingly, the views expressed in this submission are necessarily preliminary and should not be taken to identify all issues arising from the draft Bill.

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1 Department of Infrastructure, Transport, Regional Development, Communication, 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) 7 <https://www.infrastructure.gov.au/sites/default/files/documents/digital-duty-of-care-for-australia-developing-duty-of-care-framework-for-online-services-used-by-australians-may2026.pdf>.

2 Department of Infrastructure, Transport, Regional Development, Communication, Sport and the Arts, *Exposure Draft—Online Safety Amendment (Digital Duty of Care) Bill 2026* (Web Page) <www.infrastructure.gov.au/department/media/publications/exposure-draft-online-safety-amendment-digital-duty-care-bill-2026>.

Feedback on Schedule 1: Takedown notices

7. Under Schedule 1 of the draft Bill, if satisfied on reasonable grounds that an app or website was designed predominantly, or is being used predominantly, to generate fake nude material, the eSafety 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.

8. 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 6,000 penalty units.

9. 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.[3] This material has the potential to cause significant and lasting harm, and timely removal is important. At a high level, the powers should continue to operate with appropriate safeguards to ensure they are exercised fairly and proportionately.

Reduced timeframes for compliance with removal notice

10. Measures in Schedule 1 of the draft Bill will reduce the time required to comply with a removal notice from 48 to 24 hours.[4] This implements the findings of the statutory review of the Act which supports prompt action to be taken.[5] However, we submit that the practicalities of such a change should be closely monitored by eSafety Commissioner to examine the success (and any unintended consequences) of this change.

Definition of 'reposted'

11. We note that clause 9 of Schedule 1 of the draft Bill refers to a proposed 'reposted' definition which then refers to Section 65(2E), however, we are unable to locate the proposed drafted section in the Bill or the Act. This appears to be an oversight that will require addressing.

Feedback on Schedule 2: Digital duty of care

12. Schedule 2 of the draft Bill introduces the DDC, applicable to persons responsible for a broadly defined range of online services who are, as far as reasonably practicably, required to provide a safe online environment. A "safe online environment" is defined at proposed section 25B as an online environment that:

    - protects Australians from seriously harmful material and conduct;

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

4 See proposed sections 65(1)(c)(i), 66(1)(c)(i), 88(1)(d)(i), 89(1)(d)(i) and 90(1)(d)(i).

5 Delia Rickard PSM, *Report of the Statutory Review of the Online Safety Act 2021* (October 2024), Recommendation 15.

- protects Australian children from harmful material and conduct, and harms associated with service design features; and
- for social media services, ensures that design features that have negative behavioural impacts do not operate for children under the age of 16.

13. Compliance with the DDC also requires responsible persons to conduct prescribed risk assessments and take effective measures to address identified risks. The Commissioner may publish guidelines concerning compliance.

General comments

14. The Law Council acknowledges concerns about online harms that may 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 and other vulnerable persons.

15. 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 potentially competing rights, such as freedom of expression.[6] 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.

16. Currently, the draft Bill proposes to amend the objects of the Act,[7] however there is no proposal for freedom of expression (or similar terminology) to be included as a consideration in the administration of the Act. We believe this will be an important addition should the proposal for a DDC progress.

17. We also observe that aspects of the DDC applying to children under 16, particularly proposed paragraph 25B(1)(c), may overlap with the social media minimum age framework in Part 4A of the Act. We encourage the Government to consider and clarify how the two frameworks are intended to operate together and to avoid unnecessary duplication of regulatory requirements.

Reliance on Ministerial discretion

18. As a general observation, the Law Council notes that aspects of the draft Bill are broadly defined and reliant on delegated legislation and Ministerial discretion to determine the full scope of the proposed DDC. While we appreciate that this provides flexibility to adapt to a changing technological landscape, we remain concerned that Ministerial discretion exercised through legislative instruments is not subject to the same level of parliamentary scrutiny as primary legislation and can leave stakeholders uncertain about how they may be affected. If this approach is not

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6 Article 19, 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 See Item 1 of Part 1 of Schedule 2.

remedied, it may impede the rule of law, which requires laws to be readily known, available, certain and clear.[8]

19. By way of illustrative examples, the draft Bill allows for Ministerial discretion to:

- determine exemptions for online services from all or some of the operation of the DDC;[9]
- determine that material or conduct is seriously harmful;[10]
- determine that material or conduct is harmful to children;[11] and
- determine that a design feature of an online service has negative behavioural impacts.[12]

20. These are significant matters which would alter the scope and effect of the draft Bill and should be subject to close parliamentary supervision. We note that proposed section 27B would require the Minister to seek (and have regard to) advice from the eSafety Commissioner prior to making a legislative instrument on the above matters, however there is no requirement in the Bill to consult more broadly on determinations prior to making them.[13] These discretions are largely unbound by a restrictive expression of Parliamentary intention and expose the draft Bill and its legitimate policy aims to accusations of "censorship by stealth", which have featured prominently in media discussions of the Bill.[14]

21. If this approach is retained, we submit that there should be additional safeguards to ensure stakeholders can meaningfully engage with an exercise of Ministerial discretion through a mandatory public consultation requirement in primary legislation.

Responsible persons

22. Subsection 25A(2) of the draft Bill outlines who is responsible to meet the DDC, and requires that the person be either:

(a) a person who provides the service; or

(b) a person who is in a position to exercise day-to-day control of the service.

23. We note that the personal nature of the liability imposed by the second limb represents an expansion of scope on the existing Act that places obligations on providers. Given the potential extension of liability, we consider it would be necessary to provide regulatory guidance as to the types of senior operational

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8 Law Council of Australia, *Rule of Law Principles* (March 2011) <https://lawcouncil.au/resources/policies-and-guidelines/rule-of-law-principles>.
9 Subsection 25A(3).
10 Subsection 25C(2).
11 Subsection 25D(2).
12 Subsection 25G(2).
13 We note that s.17 of the *Legislation Act 2003* (Cth) sets out consultation requirements prior to making legislative instruments, though a failure to consult does not affect an instrument's validity or enforceability (s.19).
14 Jay Daniel Thompson, "'Giving people control': Do the proposed digital duty of care laws pose a threat to free speech?", *ABC News* (14 September 2016) <https://www.abc.net.au/religion/do-proposed-digital-duty-of-care-laws-threaten-free-speech/107152728>.

management that may be potentially responsible for meeting the DDC by virtue of the second limb of subsection 25A(2).

Definition of 'online services'

24. Proposed section 25A of the draft Bill defines "online services" by listing a broad range of services that largely mirror current definitions of "online activity" and "sections of the online industry" in sections 134 and 135 of the Act.

25. Those existing provisions fall within Division 7 of Part 9 of the Act, which currently provides for a co-regulatory model for the development of industry codes and standards. It is understood that the proposed DDC would replace the co-regulatory scheme of industry codes and standards in Division 7 of Part 9, as well as the basic online safety expectations (**BOSE**) in Part 4 of the Act.

26. Currently, industry codes and standards apply to providers of different types of services depending on how the service is characterised under the Act. However, in recent years, there has been rapid technological evolution and increasing convergence of features across services. The development of new features may change the statutory characterisation of a service from, for example, a "relevant electronic service" under section 13A to a "social media service" under section 13. We have already seen complexity in the characterisation of different types of services and therefore in determining the correct industry code or standard to be applied.[15]

27. In light of those difficulties, we generally support the proposed application of the DDC to all online services, in that persons responsible for an online service (regardless of the type of service) will be subject to the same principles-based obligation set out in proposed subsection 26(1).

Generators of artificial intelligence

28. We note that proposed paragraph 25A(1)(j) extends the definition of online services to "a service that allows users to… generate material by means of artificial intelligence", however restricts the application of the definition only to such services that also allow users to "share that material by means of [another online service]".

29. The policy basis for this carve-out is unclear, as the safety impacts of online artificial intelligence applications fall within the expanded objectives of the Act in the proposed new section 3.

30. Generative artificial intelligence applications have the potential to cause serious harm, not only to their users of any age, but also others, even if they offer no sharing functionality or other social features. This is illustrated by more than 50 consumer harm cases in other jurisdictions,[16] including wrongful death cases filed by grieving parents against generative AI companies. Leaders of AI labs have recently called for

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[15] See *X Corp v eSafety Commissioner* [2026] FCA 1123.

[16] See, Maggie Harrison Dupre, "OpenAI Is Now Facing Over 50 Consumer Harm and Wrongful Death Lawsuits", *Futurisim*, (September 2026) <https://futurism.com/artificial-intelligence/openai-consumer-harm-wrongful-death-lawsuits>.

a “slowdown” in the pace of development of frontier AI models,[17] demonstrating growing concerns about the safety of generative artificial intelligence applications from their creators themselves.

31. Having regard to the potential harms posed by generative artificial intelligence applications to both adults and children, the proposed approach to confine the definition only to those applications which have sharing features should be reconsidered.

32. To implement this, the second limb of paragraph 25A(1)(j), which reads “… and share that material by means of a service mentioned in paragraphs (a) to (g)” could be deleted, while adding to section 25A(j) words to the effect of “… where that artificial intelligence model is accessed using an internet carriage service”.

Definition of ‘safe online environment’

33. The DDC requires a person responsible to provide a ‘safe online environment’ as defined at section 25B of the draft Bill. This approach creates two layers of expected protections, namely that:

- all persons in Australia are protected from seriously harmful material and conduct; and
- children in Australia are protected from material and conduct that is harmful to children, harms associated with the operation of design features of online services, and for children under 16, design features of social media services that have negative behavioural impacts.

Seriously harmful material and conduct

34. Proposed section 25C defines “seriously harmful material and conduct” by listing 12 types of material or conduct in addition to an ability for the Minister to determine other material or conduct through delegated legislation.

35. While at face value, the material and conduct referred to at section 25C could reasonably be regarded as seriously harmful, we are concerned that there are instances where the drafting could result in unintended consequences. This concern is heightened as the definition of seriously harmful material and conduct in conjunction with the breadth of the definition of “online service” may capture services that publish material for legitimate journalistic, legal, educational or other public-interest purposes, including news reporting and court reporting.

36. For example, in the absence of further refinement or explanatory material:

- It is unclear whether reference to material that promotes or instructs individuals to consider suicide at paragraph 25C(1)(g) is intended to capture medical information and advocacy in relation to a state or territory’s voluntary assisted dying (**VAD**) frameworks. There is a significant risk that this drafting will apply to a broad range of VAD-related material, despite such material communicating or discussing validly enacted legislative frameworks.

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[17] See, Mike Isaac, “Top A.I. Leaders Call for Slowing Down A.I. Development”, *New York Times* (12 September 2026) <www.nytimes.com/2026/09/12/technology/anthropic-dario-amodei-ai-slowdown.html>.

- The proposed reference to material or conduct "relating to" child sexual exploitation or abuse at paragraph 25C(1)(a) or grooming a child for sexual activity at paragraph 25C(1)(b) may capture the sharing of a personal story by a victim-survivor of child sexual abuse on social media, posted for educative, advocacy or therapeutic purposes, or legitimate media reporting on police operations targeting alleged perpetrators of these crimes.
- The proposed reference to material or conduct promoting illicit drug use at paragraph 25C(1)(k) has the potential to capture materials directed to harm minimisation or research published online on the therapeutic use of a prohibited recreational drug to treat a medical condition, or an artistic piece such as a song distributed through online services referencing illicit drug use.

37. These preliminary examples highlight the need for the draft Bill to include exclusions for material that is not intended to be captured by the definition of 'seriously harmful material and conduct'. In this regard, we note that section 8 of the Act already includes reference to the general character of the material (including whether it is of a medical, legal or scientific character) and the literary, artistic or educational merit of content when determining whether material is "offensive". A similar reference in the assessment of what is "seriously harmful" material and conduct should be considered.

38. In addition, there should also be consideration as to whether there needs to be broader exemptions for publishing material online for legitimate journalistic, legal, educational, scientific or other public-interest purposes in relation to the amendments proposed under the Bill, similar to those available under section 104 in relation to material that depicts abhorrent violent conduct.

39. A further option to promote clarity is for the definition of 'seriously harmful material and conduct' to link material to an existing criminal offence. In this regard, we note that all the content currently listed at section 25C has the potential to be linked to proscribed behaviour, and it may provide greater certainty if there is express reference to existing criminal offences so that appropriate content is (or is not) captured.

40. Consistent with our above comments on the draft Bill's reliance on Ministerial discretion, we are concerned about the open-ended ability for the Minister to designate further material or conduct as causing serious harm outside of the primary legislation as pursuant to subsection 25C(2).

Material and conduct harmful to children

41. Section 25D lists a range of content that is deemed to be material and conduct harmful to children. Similar to the above reflections on section 25C, while few would argue that the core content listed has the potential to be harmful to children, there is a need to ensure that definitions are sufficiently targeted and clear.

42. By way of example, the reference to material or conduct that encourages dangerous stunts at paragraph 25D(1)(d) has the potential to capture a broad range of content such as footage of extreme sport events. Further, the reference to material or conduct that encourages or promotes disordered eating at paragraph 25D(1)(b) could apply to content that promotes diets that some may regard as unhealthy but are well

outside the (presumed) intended material that may push a person towards a diagnosed eating disorder.

43. In our view, further work is required to ensure there is clarity and certainty given to these definitions, ideally in primary legislation, to the extent that this is possible.

44. Again, we express concern with the open-ended ability for the Minister to designate material or conduct not referred to in the primary legislation as being harmful to children pursuant to subsection 25D(2).

Design features and negative behavioural impacts

45. Proposed section 25F of the draft Bill defines specific "design features" of online services as including the following:

- a recommender feature;
- a logged-in feature;
- an endless-feed feature;
- a feedback feature; or
- a time-limited feature.

46. Each of these listed design features are "taken to have negative behavioural impacts" pursuant to proposed subsection 25G(1), and pursuant to the definition of "safe online environment" under the proposed framework, must not be made available to children under 16 years of age.

47. The implication seems to be that all the common features of online services listed in section 25F would, automatically and without exception, be deemed to negatively impact the behaviour of users.

48. Importantly, while some of the design features listed in section 25G may have potential to cause harm to users, they may also be of benefit, or assistance, to the user experience. In particular:

- While recommender systems may be used in harmful ways, they may also identify content that is useful and relevant to users; help them discover materials which would have otherwise been invisible to them in a purely chronological feed; and, in the example of social media services, promote content from smaller businesses or creators who may not have the same reach as larger businesses or creators (such as those located outside of Australia).
- Feedback feed features can be useful to users who generate their own material through an online service (whether social media posts or product/service reviews) and obtain value from seeing how others have responded or otherwise engaged with their content. Given the approach that the Government has previously taken to regulating online safety (including Part 4A of the Act), logged-in features – which limit service features to users who use an online service through a logged-in account – may be appropriate in the circumstances.

49. It is acknowledged that deeming these design features as having negative behavioural impacts will only be of relevance to children under 16 years, and we provide in-principle support for limiting such measures features for children.

However, the Bill's approach of designating these features as having an inherently negative behavioural impact, regardless of the end user, fails to appreciate that there may be benefits as listed above.

50. As we have identified earlier in this submission, the Ministerial discretions afforded under the Bill can be broadly exercised, without any reference to Parliamentary intention as an appropriate limitation. We make the same comment in respect of subsection 25G(2), which allows the Minister to determine, through legislative instrument, that a design feature of an online service is taken for the purposes of the legislation to have negative behavioural impacts.

Reasonably practicable

51. The proposed DDC requires those persons responsible for an online service to ensure, so far as is reasonably practicable, a safe online environment. The application of the "reasonably practicable" test is set out in section 25H by way of a non-exhaustive list of matters that a person responsible must take into account and weigh up, amongst all relevant matters.

52. We note these matters broadly align with the matters to be considered under the legal standard set out in other frameworks[18] where there has been extensive judicial consideration. This resulting case law has helped to establish the objective character of the reasonably practicable test in these contexts but does not necessarily extend to providing sufficient guidance with respect to online harms in the context of the DDC.

53. Although the Bill defines a "safe online environment", several elements of the proposed duty remain broad or undefined. In particular, proposed section 25B provides that people must be "protected from" specified material and conduct, but does not explain the degree of protection required. This may make it difficult for service providers to determine in advance what measures are required to discharge the duty, particularly while there is no developed body of judicial authority concerning its application to online services.

54. While we acknowledge there is an intentional degree of flexibility to enable the proposed legislation to accommodate evolving technologies and online environments, the proposed framework appears to confer considerable responsibility on the eSafety Commissioner to shape the practical operation of the duty through enforcement decisions and non-binding guidance. This may initially create regulatory uncertainty and could lead to services excessively restricting content due to an abundance of caution. This may therefore have the unintended consequences of impeding freedom of expression and access to legitimate content.

55. Further, the non-exhaustive list of factors in section 25H that will be relevant to whether an action should be considered "reasonably practicable" for fulfilling the duty of care appears to omit several factors that are likely to be relevant including technical feasibility, impact on the security of the service or for its users, and the nature and functionality of the service.

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[18] See, for example, section 18 of the *Work Health and Safety Act 2011* (NSW).

56. Finally, we note the additional inclusion in the proposed relevant matters of the privacy impacts at subparagraph 25H(e)(ii), requiring consideration of whether the privacy impact is "grossly disproportionate" to the risk. While we support the addition of the consideration of proportionality in relation to privacy impacts, we query why the standard of proportionality should differ from what is implicit in the requirements of the *Privacy Act 1988* (Cth).

User empowerment tools

57. Proposed subsection 26(4) provides that the Minister may, by legislative instrument, require specified online services to provide specified user empowerment tools. Subsection 26(5) clarifies that this may be specified by reference to any matter, without limitation.

58. The Law Council is generally supportive of measures that are proportionately designed to give users greater control over their engagement with online services. However, we are concerned with the approach taken in the draft Bill to allow for the regulation of design features to be delegated to Ministerial discretion without any meaningful limitations.

59. While we appreciate that Ministerial delegation and reliance on legislative instruments allows for flexibility and responsiveness to emerging issues with online services, the Law Council's view is that it will be important for significant user empowerment tools (for example, requiring a user to opt-in for personalised content recommended by an algorithm framework) to be contained in primary legislation and as such, subjected to adequate parliamentary scrutiny.

60. Failing this, we emphasise the need for an agreed process of public stakeholder consultation and adequate opportunities to publicly scrutinise any proposal prior to the introduction of a requirement to implement a specified user empowerment tool to regulate design features. As well as civil society stakeholders, this should include engagement with industry stakeholders to ensure proposals are technically feasible.

Risk assessment framework

61. The Law Council is broadly supportive of the proposed requirement for providers to undertake periodic risk assessments, which must address various material factors as set out in at proposed section 26A.

62. This approach provides a structured and proactive mechanism for identifying, assessing and mitigating risks of harm before those harms occur, rather than relying solely on reactive enforcement measures after harm has occurred. It also provides a greater degree of specificity regarding regulatory expectations than is often seen in principles-based legislation. By prescribing the matters that must be considered as part of the assessment process, the framework provides regulated entities with clearer guidance as to what constitutes an adequate risk assessment and assists organisations in designing compliant governance and risk management processes. This also reduces the uncertainty that may otherwise accompany a broad statutory obligation to maintain a safe online environment.

63. We also support the proposal as it encourages organisations to adopt a risk-based approach that can be integrated into existing governance, compliance and operational frameworks. This approach is broadly consistent with the approach adopted in other contemporary regulatory regimes, including anti-money laundering, workplace health and safety, and cyber security frameworks, which increasingly require organisations to identify, assess and mitigate risks in a structured and ongoing manner.

64. Importantly, the proposed framework recognises that risks associated with online services are dynamic and evolving. Requiring risk assessments to be reviewed and updated on a periodic basis should assist organisations to identify new harms, emerging technologies, changes in service functionality and evolving user behaviours.

65. While we are supportive of the overall framework, we make the following suggestions to further improve its effectiveness, proportionality and clarity.

Clarifying scope of risks to assess

66. To reduce uncertainty and ensure that risk assessments remain focused and effective, we suggest greater clarity that the assessment should be directed towards identifying risks that could undermine a safe online environment or otherwise expose children to harm.

67. As currently drafted, subparagraph 26A(2)(a)(i) refers to a risk assessment having to identify “all reasonably foreseeable risks”. This may be interpreted as extending beyond risks associated with online harms and could create uncertainty as to the intended scope of the obligation. The focus of the assessment should remain on those risks that are relevant to the objectives of the legislation and the safety outcomes sought to be achieved.

68. Helpfully, subsection 26A(1) limits the assessment to risks of harm posed by the service in Australia. For clarity and consistency, we suggest that this limitation be expressly reflected in section 26A(2)(a)(i) when describing the nature or character of the reasonably foreseeable risks that must be identified and assessed. Aligning the wording of these provisions would reduce the potential for differing interpretations.

Independent review

69. We suggest that consideration be given to requiring larger online service providers to obtain periodic independent review or assurance of their risk assessments. Independent review, and/or perhaps reference to the features of a particular suitable Australian or international standard, may improve the quality, consistency and objectivity of assessments and provide both regulators and the public with greater confidence that identified risks have been appropriately evaluated and mitigated.

Materiality threshold

70. The legislation should clarify whether the obligation extends to risks of any harm, regardless of significance, or whether it is intended to focus on material risks of harm. That a risk is “reasonably foreseeable” does not necessarily mean that it is one that is

likely or even somewhat likely to materialise, such that it is proportionate to expect a service provider to take mitigation measures in response.

71. We do not consider it likely that Parliament intends service providers to expend significant resources assessing trivial, remote, hypothetical or highly speculative risks. Rather, the framework should be directed towards identifying and mitigating genuine and material risks of harm that could reasonably arise from the operation of the service.

Proportionality

72. In support of a risk-based and proportionate approach to compliance, the legislation should make clear that the nature and extent of a risk assessment should be appropriate having regard to the nature, size, complexity, functionality, reach and risk profile of the relevant service. A proportionate approach will assist in ensuring that regulatory obligations are targeted towards services presenting the greatest risks while avoiding unnecessary compliance burdens for smaller providers with more limited functionality, reach or influence.

73. Smaller businesses that are only minor participants within the online services ecosystem and have limited ability to influence broader online harms should not be subject to the same compliance expectations as large platforms with substantial user bases, sophisticated functionality and significant control over user interactions.

Alignment with existing risk assessment frameworks

74. Wherever possible, the framework should be aligned with existing regulatory risk assessment obligations. This includes risk assessment frameworks that are currently in place as part of the Online Safety Codes. We note the Issues Paper[19] from May 2026 stated that "*The Duty will incorporate and adapt existing elements of the Act, initially the BOSE and, potentially, over time, the industry codes or standards made under the Online Content Scheme.*" It also indicated that existing codes and standards would serve as a baseline and that current safety standards would not be reduced. However, as we understand it, the Bill would repeal both the BOSE and the statutory framework for the industry codes and standards when the DDC commences, and it is unclear how the specific obligations contained in the codes and standards will be preserved under the DDC.

75. Alignment with established risk management methodologies would reduce regulatory burden, improve consistency across compliance regimes and enable organisations to leverage existing governance processes rather than creating entirely separate assessment frameworks.

76. This is particularly important for organisations already subject to risk assessment requirements under privacy, cyber security, anti-money laundering and workplace health and safety legislation.

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[19] Issues Paper (n 1) 7.

Compliance

77. We support the development of guidelines by the eSafety Commission under section 26E to assist persons responsible for online services to meet their DDC. This approach generally reflects the recommendation of the 2024 statutory review of the Act that the eSafety Commissioner should be empowered to create mandatory rules on how entities can comply with certain aspects of the DDC requirements, including addressing specific online harms.[20]

78. We stress the importance of these guidelines in providing clarity in how the framework is to be applied, noting the significant civil penalties that may be applied for a breach.[21]

79. Importantly, the draft Bill does not propose that compliance with the proposed guidelines would provide any statutory "safe harbour" protection. We query whether the development of Ministerial rules for specifying compliance requirements as initially contemplated in the Issues Paper that was released in May[22] might facilitate a more robust and clearer compliance framework for persons responsible, given the significant transition from a detailed Codes and Standards compliance framework to a broad overarching DDC framework.

Remedial directions

80. Proposed section 26D provides that if the Commissioner reasonably believes that a person has failed, or is failing, to comply with the DDC, a written direction to take specific actions may be issued. Failure to comply with a direction carries a maximum penalty of 60,000 penalty units.

81. As noted throughout this submission, aspects of the Bill are insufficiently defined, vague, ambiguous and drafted unclearly. The ability for the Commissioner to issue directions based on a reasonable suspicion of non-compliance in circumstances where there is a lack of certainty for responsible persons raises a number of challenges. As noted above, significant reliance will be placed on guidelines that are to be developed to ensure that there is sufficient clarity to stakeholders.

82. Noting the significant penalties associated with non-compliance with a remedial direction, consideration should be given to including a defence based on reasonable excuse.

Enforcement of the DDC

83. The Law Council is concerned that without adequate resourcing for the eSafety Commission, it may lack the ability to respond to the volume of potential online harms identified in the draft Bill. It will be critical for the Government to ensure that the eSafety Commission is consulted on its resourcing needs and is equipped to perform the range of functions that will arise under any DDC framework.

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[20] Delia Rickard PSM, *Report of the Statutory Review of the Online Safety Act 2021* (October 2024), Recommendation 9.

[21] Section 26B imposes significant maximum civil penalties for failure to comply with the person's digital duty of care: 60,000 penalty units for an individual.

[22] Issues Paper (n1) 3

84. 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 eSafety Commissioner's regulatory functions. This 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 limitations on a Commissioner-led model, and should focus on ensuring that any thresholds are sufficiently framed to ensure that claims are restricted to the most serious of breaches.

Research and data access

85. The Bill inserts a new Part 14 in the Act titled “Research and data access” that would permit the creation of legislative rules to establish one or more data access schemes requiring providers of online services to give approved researchers access to data for the purposes of undertaking online safety-related research. A provider that contravenes the data access rules would be liable to a civil penalty of 6,000 penalty units.

86. While the Bill contains some safeguards, proposed section 205C permits, but does not require, the data access rules to address the kinds of data that may be accessed, or the privacy, security and confidentiality of that data. As a scheme could involve access to personal or sensitive information, minimum safeguards should be established in the primary legislation. The Bill also does not establish limits on the number or frequency of data requests. Although these matters could be addressed in the data access rules, repeated or technically complex requests may impose an undue administrative burden on smaller service providers.

About the Law Council of Australia

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
- Law Firms Australia.

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
- Ms Jennifer Ball, Executive Member
- Mr Justin Stewart-Rattray, Executive Member
- Mr Ante Golem, Executive Member

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.