

Digital Duty of Care Exposure Draft Bill

Submission to the Department of Infrastructure,
Transport, Regional Development,
Communications, Sport and the Arts

23 September 2026

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**Australian
Human Rights
Commission**
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Acknowledgement of Country

The Australian Human Rights Commission acknowledges the Traditional Custodians of Country throughout Australia, and recognise their continuing connection to land, waters and culture. We pay our respects to their Elders – past and present.

About the Australian Human Rights Commission

Our vision for Australia is one where everyone can live free and equal in dignity and rights as part of a strong, healthy democratic society.

We have 4 core functions under our legislation:

- Access to justice: We help people to resolve complaints of discrimination and human rights breaches through our complaint handling services.
- Fairer laws, policies and practices: We review existing and proposed laws, policies and practices and provide expert advice on how they can better protect people's human rights. We help organisations to protect human rights in their work. We publish reports on human rights problems and how to fix them.
- Education and understanding: We promote understanding, acceptance and public discussion of human rights. We deliver workplace and community human rights education and training.
- Compliance: We are the regulator for the positive duty requiring employers and others to address workplace sexual harassment, sex discrimination, sexist conduct and related victimisation.

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Overview

This section provides an overview of the Australian Human Rights Commission's overarching position on a digital duty of care and related measures.

1. The Australian Human Rights Commission (Commission) welcomes the release of the Exposure Draft of the Online Safety Act Amendment (Digital Duty of Care) Bill (Bill) which would amend the *Online Safety Act 2021* (Cth).
2. The Commission has consistently called for a legislative digital duty of care (DDC) to protect Australians from online harm.¹ By shifting responsibility for identifying and addressing online harms from individuals to the providers that design and operate online services, a DDC would promote a proactive, safety-by-design approach to reducing harm.²
3. An effective DDC will promote human rights including the right to safety, children's rights, the right to privacy and the right to equality. There are also risks that a DDC, if it is not carefully calibrated and supported by robust safeguards, may unjustifiably restrict human rights such as freedom of expression and privacy. Accordingly, it is critical that the legislation is carefully drafted.
4. This submission focuses on 3 key areas where further consideration would strengthen the framework and better support its objectives:
 1. the scope and clarity of definitions of harm
 2. the breadth of the Minister's delegated law-making powers, and
 3. further clarity in relation to the operation of risk assessments.
5. Given the breadth and complexity of the Bill, further scrutiny of other aspects of the proposed framework is essential. Genuine consultation on the proposed regulatory framework - with adequate time, and an opportunity for impacted groups to participate - should be provided through, for example, ensuring that the Bill is referred to a parliamentary committee for inquiry.³
6. Beyond the DDC, the Commission supports the provisions in the Bill which would strengthen the eSafety Commissioner's powers to remove and reduce the spread of fake nude material, cyberbullying material targeted at a child, and intimate images of a person.⁴

1 Digital Duty of Care

This section discussed the Commission's concerns and recommendations regarding the:

- scope and nature of definitions of harm
- breadth of the Minister's powers
- design features
- risk assessments
- compliance and enforcement tools
- eSafety Commissioner's broad powers of investigation

Safe online environments

7. The Bill would require a person responsible for online services to ensure, so far as is reasonably practicable, a 'safe online environment'.⁵ This differs for adults and children, with adults protected from 'seriously harmful material and conduct'⁶ and children protected from a broader range of 'harmful' material, conduct and design-related harms.⁷
8. The Commission accepts that a bifurcated approach can support better calibrated protections reflecting adults' capacity to manage online risks and the vulnerabilities of children to certain harmful content.⁸ We continue to be concerned, however, about the accuracy of age assurance systems, and implications for data collection and the right to privacy.⁹

Definitions of harm

9. The effectiveness of the DDC will depend significantly on the definitions of harm in the Bill and legislative instruments made under it. The Commission is concerned about the current scope of 'seriously harmful material and conduct' under section 25C and 'harmful to children' under section 25D.¹⁰ The calibration of these provisions is particularly important given the central role they play in defining the scope of the obligations imposed under the DDC.
10. The Commission's two principal concerns relate to the breadth of the Minister's power to prescribe additional categories of material and conduct through delegated legislation, and the extent to which the risk assessment framework accounts for cumulative and contextual factors that may contribute to harm. These issues are discussed in greater detail below.
11. The Commission is concerned about aspects of the current definition of material and conduct that is 'harmful to children'.¹¹ While the objective of protecting children from online harm is important, several categories are framed in broad terms. This includes material or conduct that 'encourages or promotes hostile attitudes towards women or gender equality' or 'encourages dangerous stunts

or harmful practices'.¹² There will need to be guidance on interpretations of these as they can be interpreted in a variety of ways.¹³

12. The Commission is further concerned by the low threshold adopted in section 25D(1)(f)(i), which captures material or conduct that 'could' inflict serious harm on a child. The use of the word 'could' creates a particularly broad threshold, potentially extending the provision to material where the risk of harm is remote, speculative or highly dependent on context.
13. This concern is compounded by the Minister's power to prescribe additional categories of material or conduct where satisfied that they 'may cause harm' to children. Consideration should be given to whether the current drafting appropriately balances the objective of protecting children with the need for legal certainty and predictability.
14. The consideration of children's views, and consultation with children and experts is essential to appropriately formulating the scope of definitions of content that is 'harmful to children' under the Bill.
15. The proposed framework risks both applying the specified harm categories too broadly whilst also failing to capture other harmful material. It is important to note that the DDC in the Bill is broader than the requirement in s26(1) to ensure, so far as reasonably practicable, a safe online environment defined by reference to categories of harm. Section 26(2) requires online services to also;
 - manage design features appropriately including by providing user empowerment tools
 - conduct risk assessments around the risk of harm posed by the service, and
 - take effective measures to address those assessments.

Failure to comply with this is a breach of the DDC.

16. The Bill should clarify how the operation of these provisions requires risk and mitigation measures to be assessed by reference to both content and design features, and criteria that address context, cumulative exposure, severity, and proportionality.

Risk-based approach

17. Noting the complexities that arise with defining harms in online spaces and balancing rights, further consideration could be given to a strengthened risk-based approach.¹⁴ This approach should apply obligations on online services, proportional to their size, to conduct risk assessments and mitigate systemic risks of foreseeable or actual negative effects, such as on the exercise of human rights (see section on risk assessments).¹⁵

Rulemaking powers of the Minister are too broad

18. The Commission recognises the rationale for a degree of regulatory flexibility in a rapidly evolving technological environment.¹⁶ The Bill, however, confers extensive delegated law-making powers on the Minister on matters at the core of the regulatory scheme. This includes powers to make legislative instruments that:
- determine material and conduct that is seriously harmful¹⁷
 - determine material and conduct that is harmful to children¹⁸
 - require specified online services to provide specified user empowerment tools.¹⁹

The Bill does not require public consultation on these legislative instruments.

19. Legislative instruments under the DDC will be subject to parliamentary scrutiny as disallowable instruments, must include a Statement of Compatibility with Human Rights, and will require the Minister to seek advice from the eSafety Commissioner before they are made. While these mechanisms provide safeguards, they are not equivalent to scrutiny through the primary legislative process.
20. Statements of Compatibility have in the past failed to adequately consider rights engaged by digital regulation.²⁰ While the requirement to seek advice from the eSafety Commissioner is a valuable safeguard, it does not provide the range of perspectives that would ordinarily be achieved through broader public consultation. Questions relating to harm, children's access to information, freedom of expression, equality and dignity, privacy and platform design engage a diverse range of affected stakeholders and expertise that cannot be adequately reflected through consultation with a single regulator alone.

The need for more explicit safeguards

21. One of the critical features of the Bill is creating powers to require certain services to provide 'user empowerment tools'. We support calls to require online services to design their products so that people have greater choice and control, such as opt-in requirements for algorithmic recommender systems. Unfortunately, the Bill leaves the detail on how this will be achieved to delegated Ministerial powers.
22. Significant policy measures that form a central component of a regulatory scheme should ordinarily be set out in primary legislation rather than delegated law-making.
23. The Government has signalled that it will publicly consult on an empowerment tool when the Bill is formally introduced to Parliament.²¹ The Commission emphasises that genuine consultation be undertaken on any proposed empowerment tools.²²

24. Greater statutory clarity regarding the breadth of these powers would assist to ensure that they remain proportionate to their intended purpose. The Commission is particularly concerned where delegated powers may be used to determine substantive aspects of the regulatory scheme, including the scope of harmful content and the nature of mandated user empowerment measures.

Design features

25. The Commission supports requiring online services to address design features that drive online harm.²³ As a preventative measure, the DDC should complement the social media minimum age framework by addressing risks before harm occurs. The DDC should apply with respect to children under 16 who continue to access relevant services, including where minimum age restrictions are ineffective in practice. Further clarification would assist as to how the DDC is intended to operate alongside the social media minimum age framework, including how that interaction is reflected in the obligations imposed by the Bill.
26. Design features can also contribute to harm experienced by adults. However, measures directed at adults should be carefully calibrated so as not to unnecessarily restrict individual autonomy and freedom of expression which includes access to information. The Bill states only that online services must manage design features ‘appropriately’ (including through empowerment tools) but provides no specific detail or criteria as to what this entails. The Bill allows the eSafety Commissioner to publish guidance to support compliance with the DDC, however there is currently no obligation to do so. Greater clarity would assist regulated entities to understand how these obligations are intended to operate in practice and what forms of intervention are contemplated by the framework.
27. Any guidance issued by the eSafety Commissioner should establish broad, human rights-based criteria for determining whether design features are managed appropriately. Those criteria should require consideration of the full range of human rights engaged, recognising that measures intended to reduce harm may also affect rights including privacy, equality and non-discrimination, children’s rights and freedom of expression (which includes the right to seek and receive information).

Risk assessments

28. The Commission supports the requirement for online services to conduct risk assessments and implement mitigation strategies to address risks of harm posed by the service in Australia.²⁴ These will require proactive approaches to preventing harms. The requirements to document and provide assessments to the eSafety Commissioner should improve transparency around online harms.

29. Unlike the provisions defining harm, s 26A requires consideration of broader factors, including the content, design features, systems and processes that give rise to risks, and the people affected by them. This supports online services to make more nuanced decisions about how to mitigate risk. However, the framework does not expressly incorporate human rights considerations. As a result, services are not required to identify or balance the impact of mitigation measures on rights such as equality and non-discrimination, privacy, or freedom of expression.²⁵
30. The Bill should be amended to require that risk assessments must address cumulative and contextual factors that may contribute to harm, including the interaction between content, amplification mechanisms and platform design features. Human rights-based criteria or principles should guide proportionate risk mitigation, including respect for privacy, safety and freedom of expression (which includes the right to seek and receive information).

Compliance and enforcement mechanisms

31. We support the obligations in the Bill for online services to provide accessible and robust complaint and dispute processes around their implementation of the DDC²⁶ – noting that this should require the timely and effective management of complaints and disputes.
32. We support the Bill's graduated enforcement toolkit for the eSafety Commissioner that encompasses formal warnings, remedial directions, infringement notices and civil penalties.²⁷

Matters for further consideration

33. The Commission notes the following two issues are not addressed in the Bill and may warrant further consideration:
- The specified categories of harmful material and conduct in the Bill do not include hate speech.
 - The Bill does not provide for people to take legal action if they suffer harm because a tech company breaches the duty.
34. The Commission would welcome the opportunity to discuss these in more depth with the Department. The Commission acknowledges that these are complex issues, involving practical implementation considerations. There will be different views on these issues – including within the Commission – such as on the balancing of human rights considerations and on the suite of regulatory powers that should be available to support compliance with the digital duty of care.

Endnotes

- ¹ See e.g. Australian Human Rights Commission, A Digital Duty of Care for Australia (Submission, 22 July 2026).
- ² Australian Human Rights Commission, A Digital Duty of Care for Australia (Submission, 22 July 2026) [1]-[3].
- ³ Australian Human Rights Commission, A Digital Duty of Care for Australia (Submission, 22 July 2026) [12]-[18].
- ⁴ Exposure Draft of the Online Safety Act Amendment (Digital Duty of Care) Bill (Exposure Draft Bill) sch 1 part 1.
- ⁵ Exposure Draft Bill s 26(1).
- ⁶ Exposure Draft Bill s 25C.
- ⁷ Exposure Draft Bill s 25D.
- ⁸ Australian Human Rights Commission, A Digital Duty of Care for Australia (Submission, 22 July 2026) [62].
- ⁹ Australian Human Rights Commission, A Digital Duty of Care for Australia (Submission, 22 July 2026) [63]; Australian Human Rights Commission, Privacy (Children's Online Privacy) Code 2026 (Submission, 5 June 2026) [19]-[27].
- ¹⁰ Exposure Draft Bill ss 25C, 25D.
- ¹¹ Exposure Draft Bill s 25D.
- ¹² Exposure Draft Bill s 25D(1)(c) and (d).
- ¹³ Australian Human Rights Commission, A Digital Duty of Care for Australia (Submission, 22 July 2026) [65].
- ¹⁴ Australian Human Rights Commission, A Digital Duty of Care for Australia (Submission, 22 July 2026) [52]-[54].
- ¹⁵ See, for example, the Digital Services Act 2022 (EU).
- ¹⁶ Australian Human Rights Commission, A Digital Duty of Care for Australia (Submission, 22 July 2026) [19].
- ¹⁷ Exposure Draft Bill ss 25C(1)(m), s 25C(2).
- ¹⁸ Exposure Draft Bill ss 25D(1)(f), 25D(2).
- ¹⁹ Exposure Draft Bill s 26(4).
- ²⁰ Australian Human Rights Commission, A Digital Duty of Care for Australia (Submission, 22 July 2026) [33]-[35].
- ²¹ The Online Safety Act Amendment (Digital Duty of Care) Bill 2026 (Explainer to support consultation) 4.
- ²² See e.g. Prime Minister Anthony Albanese, My Feed, My Way (Media Release, 8 September 2026) <<https://www.pm.gov.au/media/my-feed-my-way>>.

²³ Exposure Draft Bill ss 25F, 25G.

²⁴ Exposure Draft Bill s 26A.

²⁵ See similar concerns raised in Australian Human Rights Commission, A Digital Duty of Care for Australia (Submission, 22 July 2026) [59].

²⁶ Exposure Draft Bill sch 2, s 26F.

²⁷ Exposure Draft Bill ss 26C, 26D, s26B.