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Client Alert

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Australia: Evolving Online Safety – Duty of Care

Government responds to the Statutory Review of the Online Safety Act

Australia's Government has responded to the OSA Statutory Review, backing a digital duty of care, higher penalties and stronger eSafety powers.

In brief

Australia was an early mover on online safety, and since 2021 has rolled out a complex and significant set of regulatory schemes. The *Online Safety Act 2021* (Cth) (OSA) required a statutory independent review ("**Statutory Review**") of its operation within three years of commencement, which was brought forward. You can read our previous alert on the Statutory Review here. The final report ("**Report**"), presented to the Minister on 31 October 2024 and tabled in Parliament on 4 February 2025, made 67 recommendations.

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On 14 April 2026, the Government published its response to the Statutory Review. On 26 May 2026, the Government published an issues paper on a proposed digital duty of care.

Key takeaways

- The Government stated that it intends to implement, wholly or partially, or further consider, 64 out of 67 of the recommendations made in the Statutory Review.
- Despite this, the Government has described some significant changes to what was initially proposed, so the eventual outcome on many of the proposals remains unsettled.
- The Government has committed to reforms that incentivise harm prevention – including most significantly the implementation of a digital duty of care and other reforms that address some of the operational challenges of the OSA.
- The Government has also demonstrated support for expanding the powers of the eSafety Commissioner in relation to investigation, information gathering, and enforcement mechanisms, whilst also expressing in principle support for a move from a single Commissioner to a multi-member Commission model of governance.
- The maximum civil penalty that a court can impose will be increased to the greater of 5% of global annual turnover or AUD 50 million. Civil penalties for non-compliance with removal notices will be increased to a maximum of AUD 10 million for companies. This builds upon the substantial penalty increases that have already been legislated under the Online Safety Amendment (Social Media Minimum Age) Act 2024 (Cth), which the Government has since flagged will be further increased from AUD 49.5 million to AUD 99 million.
- The Government does not support recommendations to automatically classify services used by more than 10% of Australians as the highest regulatory tier, require major platforms to maintain a local presence in Australia to facilitate enforcement action, or introduce a licensing scheme for major services as a condition of operation. The Government described these measures as either unnecessary within its proposed risk-based approach or inconsistent with broader constraints (including international trade obligations).
- A further statutory review of the updated OSA will be conducted by the earlier of three years of commencement of the new legislation or 2029.

In depth

The Australian Government published its response to the independent review of the OSA on 14 April 2026.

The Government stated that it intends to implement, wholly or partially, or further consider 64 out of 67 of the recommendations made in the Statutory Review. Recommendations addressing the operational challenges and limitations of the OSA and harm prevention, including the implementation of a digital duty of care, will be prioritised.

The Government has noted that where it has supported recommendations "in principle" this should be taken to indicate that while the Government "generally supports the intent or merit of the recommendation" it "considers that there are other more effective ways to deliver on the intent or where further consideration is required to consider … options." Therefore, while broad support for the recommendations is apparent, it is clear that many recommendations remain in flux and subject to further development.

Digital Duty of Care
A key aspect of the Statutory Review was the recommendation for Australia to adopt a singular duty of care that encompasses due diligence, underpinned by safety by design principles, risk assessments and mitigation by digital service providers. The Government announced strong support for the duty in late 2024, very shortly after receiving the Report.

Legislating a digital duty of care is an immediate priority for the Government. Key elements of the Government's response include:

- Duty would be a statutory obligation to take reasonable steps and exercise diligence in maintaining systems and processes to prevent harm.
- Duty would extend to all digital service providers.
- In recommendation 5, the Statutory Review proposed some possible harm categories to be addressed via the duty. The Government provided its support in principle, although highlighting the need to balance priorities of public safety and rights of freedom expression, as well as consistency with other laws.
- The Government has also indicated its support in principle for recommendation 6, which proposed that high risk entities be required to conduct risk assessments (at least annually) and when making significant changes to the service, as well as provide an accompanying annual report to the regulator.
- To complement this, in relation to recommendations 1 and 2, the Government supports amendment of the OSA's objects and will consider further incremental definitional reform to the "online industry sections".
- Further, the Government left open the question of whether there could be support for the role of online-safety service and technology providers (see recommendation 3).
- This duty of care will be drafted so as to complement criminal offences in the *Criminal Code Act 1995* and will not affect existing statutory obligations under current legislation, including the *Racial Discrimination Act 1975*, *Sex Discrimination Act 1984*, *Disability Discrimination Act 1992* or the *Age Discrimination Act 2004*.
- The Government did not support the recommended automatic tiering for services used by over 10% of Australians on the basis that the duty of care will be risk-based and proportionate where a risk of harm to Australians exists.
- The Government also supported in principle the recommendation to create mandatory rules on how entities may comply (see recommendation 9). However, the Government has signaled a model where Government-made rules support the duty of care as opposed to regulator-made codes (as initially proposed) – meaning that rules will likely be subject to some form of parliamentary scrutiny.
- Pursuant to recommendations 10, 11 and 13, the Government has supported in principle:
  - Retaining broad transparency reporting powers under the Basic Online Safety Expectations (BOSE)
  - Requiring top-tier service providers to maintain well-resourced internal compliance functions
  - Improving transparency to support research.

The recent commentary at the Royal Commission on Antisemitism and Social Cohesion has highlighted the need for a Duty to strengthen online protections, especially in relation to hate speech. This commentary may increase the likelihood of the duty progressing more quickly.

Framework for a Digital Duty of Care
On 26 May 2026, the Government released an issues paper on a proposed framework for legislating the digital duty of care ("**Issues Paper**").

The Issues Paper indicates that the duty will require all online services currently defined as within the scope of the OSA to:

- Maintain effective systems and processes that, as reasonably practicable, provide a safe online environment for all Australians
- Prevent, monitor and appropriately address content and activity that is illegal or harmful to young people

- Ensure the safety of services features, including AI and algorithmic content systems.

Examples of such systems and processes could include things like content classification or moderation systems and processes which engage with law enforcement and public authorities concerning illegal activity.

Importantly, the BOSE is intended to be incorporated and adapted into the duty of care and, over time, potentially also the current mandatory codes and standards registered under the Online Content Scheme. This suggests that the current codes and standards (some of which have been in force for less than 6 months) may be transitioned out over time.

The duty is intended to capture all services throughout the "tech stack", including social media services, designated internet services, and relevant electronic services right through to equipment and operating systems services, and will place a proactive obligation on service providers.

Core obligations proposed in the Issues Paper include:
- Conducting risk assessments at least annually (or when a significant change is made to the service)
- Implementation of mitigation strategies, and regular review and evaluation of these strategies
- Designing and operating services in consideration of the best interests of the child
- Transparent reporting to the eSafety Commissioner.

It is intended that services would not be liable for individual instances of harmful content or activity, as the duty is focussed on ensuring the implementation of effective systems and processes which are reasonable, risk-based, and proportionate, and mitigate the risk of foreseeable serious harm to a user. However, frequent or recurrent instances of harmful content or activity may indicate a failure of these systems and processes, and may constitute a breach of the duty.

The paper proposes a 12-month period after the legislation is passed before commencement of the duty, during which it is expected that guidance to support the implementation of the duty will be developed and published. Compliance with the duty is intended to be enforced by the eSafety Commissioner, which would be able to issue formal warnings, remedial directions, infringement notices, and enter into enforceable undertakings or apply for civil penalty orders.

Supporting victims of online harms
In addition to the duty of care, the Government's response to the Statutory Review covered a number of additional areas of potential reform.

The Government has reiterated its commitment to supporting Australians who have been harmed online by supporting Statutory Review recommendations that proposed streamlining the process by which eSafety issues removal notices and promoting improved internal dispute resolution mechanisms for online services to improve support.

The Government has reserved recommendation 18 (which recommended lower the threshold for the adult cyber abuse scheme) for further consideration, stating that this could be operationally burdensome and counterproductive.

The Government has also 'noted' other recommendations for further consideration including additional powers to require an end-user to stop posting cyber abuse material in an end-user notice (recommendation 20) and a definition of online hate material (recommendation 21), given they suggest a different approach to the Government's preferred systemic duty of care approach.

In response to recommendation 22 (requiring reasonably proximate cumulative harm to be considered in interpreting the adult cyber abuse scheme), the Government indicated it will address this in duty of care obligations as opposed to embedding it within the threshold of harm for adult cyber abuse. The development of a duty of care could also address recommendations 23 and 24, which proposed defining a "volumetric attack" and providing regulatory powers to address it, and will be considered in that context.

The Government has indicated its support in principle for several other recommendations, such as the legality of informal takedown requests (recommendation 14), the "no wrong door" approach to supporting individuals seeking help to address online harms (recommendation 17), and the convening of multi-stakeholder "fusion cells" to address "wicked problems" (recommendation 28), suggesting reform will be considered further including through non-regulatory means.

The Government has also backed recommendations to retain current complaint schemes while amending the OSA to give the eSafety Commissioner power to require service providers to maintain clear, accessible complaint mechanisms for users (recommendation 25). In parallel, it will continue its industry engagement to curb search engine and app store access to 'nudify' services and undetectable stalking apps (recommendation 27).

Relationship between the OSA and the National Classification Scheme
All five of the recommendations relating to the National Classification Scheme (NCS) and its interaction with the OSA have been 'noted' by the Government, flagging that further legal consideration is required for the Government to reach a position. Recommendations in this category relate to:

- Decoupling the OSA from the NCS
- Creating new class 1 and class 2 definitions
- Clarifying the regulatory remit of eSafety in relation to regulated content.

The Government acknowledged the forthcoming stage 2 reforms to the NCS and their likely impact on interoperability, and indicated it would consider interim measures to address any short-term issues affecting the eSafety Commissioner's current operations.

Penalties and enforcement powers
The Government has agreed with recommendations to strengthen and align penalties for non-compliance with other comparable Commonwealth legislation by increasing the maximum civil penalty that a court can impose to the greater of 5 per cent of global annual turnover or AUD 50 million, and to increase the maximum civil penalty for companies which do not comply with removal notices to AUD 10 million (recommendations 34 and 35). A number of the penalty increases recommended in the statutory review have already been implemented pursuant to the *Online Safety Amendment (Social Media Minimum Age) Act 2024* (Cth) ("**SMMA Act**"), which introduced maximum penalties of AUD 49.5 million for the failure of an age-restricted social media platform to take reasonable steps to prevent Australians under the age of 16 from having social media accounts. On 28 June 2026, the Australian Government indicated that the maximum penalty under the SMMA Act would be doubled to AUD 99 million and that information-gathering powers would be strengthened by the introduction of new legislation. The bill giving effect to these amendments to the SMMA Act has been referred to a parliamentary committee on 1 July 2026, which is due to report on 25 August. The report is expected to inform the final form of the amendments and the timing of their commencement.

The Government has also supported recommendations to ensure consistent regulatory powers across existing complaint and content-based removal schemes, including for removal and link-deletion notices (recommendations 37 and 38).

The Government has 'noted' that it will continue to investigate and consider:

- The inclusion of consistent powers across schemes within the OSA to require end-users to remove content and refrain from posting abusive material in future
- The expansion of access restriction powers against services for seriously harmful non-compliance to determine the impact on Australian users and businesses
- Business disruption powers for seriously harmful non-compliance.

The Government has rejected recommendations to require major platforms to maintain a local presence (citing potential inconsistency with Australia's international trade obligations) and to introduce a licensing scheme for major services (recommendations 43 and 45).

Reforms to the regulator
The Government reiterated its commitment to supporting an efficient and responsive online safety regulator. Noting the success of a collective decision-making model in other digital regulatory environments (such as the ACCC and ACMA), the Government has supported in principle recommendations proposing the transition to a commission-based governance model with diverse members and strong governance processes, and how it should be structured (recommendations 58 to 61).

The Government also noted the recommendation for a cost recovery mechanism to resource regulatory powers as requiring further analysis.

Investigations and compliance monitoring
The Statutory Review proposed strengthening eSafety's investigations and monitoring powers by importing further provisions from the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) ("**Regulatory Powers Act**") into the OSA, expressly enabling eSafety to initiate investigations into compliance with the proposed duty of care and enabling investigations into reposted material that had previously been reported and taken down (recommendation 46). The OSA already triggers a number of

provisions of the Regulatory Powers Act, particularly Part 4 (civil penalty provisions), Part 5 (infringement notices), Part 6 (enforceable undertakings) and Part 7 (injunctions).

The Government supported in principle and foreshadowed that the detail of these powers will be carefully examined, noting proportionality and the rights of end-users as relevant constraints. Relatedly, the Government also gave support in principle for the recommendation to give eSafety greater flexibility in how it conducts investigations, suggesting that it is open to expanding investigatory methods that will be developed through more detailed planning (recommendation 47).

For end-user information, the Statutory Review proposed materially expanding eSafety's ability to obtain user information under Part 13 of the OSA (recommendation 48). The Government's 'support in principle' response indicates acceptance of the objective for investigation and enforcement purposes, subject to refinement of the approach to align with proportionality and user rights. The Government also supported in principle the need for clearer and more enforceable notice mechanics in relation to the regulator's ability to set time periods for compliance (recommendation 49).

Further consideration will be given to recommendations requiring service providers to inform the regulator of actions taken in response to requests and actions from eSafety (recommendation 51) and to allow the regulator to disclose information to non-government organisations who assist with regulatory activities (recommendation 54).

What is next

Key reforms arising from the Statutory Review, such as the duty of care and related recommendations, will be prioritized for implementation with legislation expected later this year.

In support of recommendation 66, the Government has noted its intention to include provisions for further statutory review of the OSA within three years of the commencement of new legislation.

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