CHILDREN & MEDIA AUSTRALIA

Thriving in a digital world

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Committee Secretary
Senate Standing Committees on Environment and Communications
PO Box 6100
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Canberra ACT 2600

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SUBMISSION ON *ONLINE SAFETY AMENDMENT (DIGITAL DUTY OF CARE) BILL 2026*

Thank you for the opportunity to provide a submission on the proposed amendments to the *Online Safety Act 2021* (Cth).

Who we are

Children and Media Australia (CMA) is the national peak not-for profit body representing the interests of children as media consumers. Its mission is to support families, industry and decision makers in building and maintaining an enjoyable media environment that fosters the health, safety and wellbeing of Australian children. Its membership includes major national education, welfare and parent organisations.

CMA's core business is to collect and review research and information related to children and the media; to provide information and advice on the impact on children of print, electronic and screen-based media; to provide reviews of movies and apps from a child development perspective; to advocate for the needs and interests of children in relation to the media; and to conduct and act as a catalyst for relevant research.

This submission is based to some extent on the one we made about the Exposure Draft. Further information can be obtained from CMA's President, Professor Elizabeth Handsley, at president[at]childrenandmedia.org.au.

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General support

CMA has been a strong supporter of the online safety reforms introduced up until now, and would like also to express our general support for the current Bill. CMA welcomes, in particular, the repeal of the BOSE provisions, for the reasons outlined in the Explanatory Memorandum: 'The code making process is cumbersome, parts of the framework are not enforceable and it is unable to address continually emerging harms and harms relating to online service and activity features.' (page 16)

Children's rights

CMA believes that the Bill has the potential to enhance support and protection for the rights of Australian children, referring in particular to the following provisions of the United Nations Convention on the Rights of the Child (UNCRC):

- Article 13, on the child's right to freedom of expression and information
- Article 16, on the child's right to privacy
- Article 17, on the child's right to access a variety of material via the mass media (subject to protection from injurious content)
- Article 18, on parents' right to assistance in raising their children and protecting their rights

Since the drafting of the UNCRC, a consensus has emerged on the proposition that modern children have a right to access the online world safely.[1] This right requires attention to both of the key elements: access and safety. It is not enough simply to expect children to keep away from the internet because it is unsafe for them. There are positive obligations to make it safe, to which these proposals make an important contribution.

Children's rights and interests

CMA is pleased to see the addition of 'protecting, and acting in the best interests of, Australian children online' as an object of the Act **(cl 3(b)**). The Australian public – and indeed the world – has come to a clear realisation of the range of significant risks children face when they go online, and it is only fitting that these be given express recognition. However, CMA would like to see more detail on how the 'best interests' concept is to be given content. Among other things, it could be built into some of the substantive requirements of the DDOC scheme. It would also be helpful to have some means of determining what children's best interests are in a given situation, as this is not always obvious or uncontroversial.

[1] See eg Committee on the Rights of the Child, *General Comment No. 25 (2021) on children's rights in relation to the digital environment* (CRC/C/GC/25).

The Bill seeks to protect children from **'material and conduct that is harmful to'** them (**cl 25C(1)(b)(i)**). CMA suggests that this would be better framed as a matter of what risks causing harm to children. The use of the term 'harmful' tends to imply that harm must be inevitable, and the legislation should close off any opportunity for providers to resort to this kind of thinking, which is likely to limit the effectiveness of the amendments in protecting children's interests.

Another reason to frame the protection in terms of risk is that this is what **research evidence** on children's wellbeing as media users tends to identify: risk factors, rather than inevitable harm. The use of the same language in the statute will facilitate reliance on research to shape practices and decision-making under the Act. This is a matter that CMA sees as highly desirable, if not imperative. Assertions about material and conduct that harm, or risk harming, children should not be a matter of impression, or morality, but founded on rigorous, high-quality research. This is not just a sound policy approach, it should also immunise the legislation from constitutional challenge under the implied freedom of political communication.

CMA has no objection to the list of matters in **cl 25E(1)** of **material and conduct that is harmful to children**, provided it retains the catch-all in para (f).[2] However, for the reasons set out above, we suggest replacement of 'may cause serious harm to children' with 'risks causing serious harm to children'. The use of the word 'risks', as explained above, would underline the link back to research evidence, and facilitate the use of such evidence in the implementation of the Act. We welcome the replacement of 'a child' from the Exposure Draft with 'children', to maintain the population-level focus, and avoid any suggestion that there is any need to prove harm, or even risk, to a particular person or persons.

CMA believes further that **'harmful to children' should be expressly defined** in such a way as to refer to interference with their healthy physical, mental, spiritual, moral and social development, in keeping with the provisions of the UN Convention on the Rights of the Child (UNCRC; see especially articles 6 and 27).[3] We note also that many of the matters listed in **cl 25E(1)** echo those listed in article 29 of the UNCRC, as matters to which children's education should be directed. Article 29 could be incorporated by reference into the legislation, in order to guide providers' actions and decisions under the Digital Duty of Care (DDOC).

In **cl 25E(1)(c)**, we suggest repeating the word 'towards' before **'gender equality'** in order to make it clear that the item is identifying hostile attitudes towards gender equality as harmful, not suggesting that it is harmful to encourage or promote gender equality.

More generally on the question of 'harm', as the point of a DDOC is to place the responsibility on providers to identify risks and mitigate harms, this is one reason CMA is

[2] However, we argue below for the inclusion of scary content as a separate category of harmful material.
[3] Such a definition could usefully form a precedent for the introduction of UNCRC-based concepts into all legislative efforts to protect children's interests as media users, for example the *National Classification Scheme* and the *Broadcasting Services Act 1992* (Cth).

pleased to see the inclusion of **paragraph (f)**, allowing for the identification of other kinds of harm beyond those listed in paragraphs (a) to (e). However we have two reservations about this paragraph. First, we challenge the need to **include the word 'serious' to qualify 'harm**'. This implies that non-serious harm in the specific categories of the first five paragraphs falls for consideration under the DDOC; if so, there is no warrant for requiring that harm under the catch-all be 'serious'. CMA submits that the word should be removed from that provision.

Second, we wonder what the **procedure** would be leading to the identification of material under paragraph (f), and could foresee a good deal of subjectivity and self-interest creeping in if it were left to the providers themselves. CMA would see significant value in establishing a **panel of experts**, including developmental psychologists and professional educators, to advise on such matters. Such a group could also advise on whether a design feature has 'negative behavioural impacts' within the meaning of **cl 25G(2)**, and the content of the 'public interest' catch-all in **cl 25F(1)(f)** (see below).

One matter we would wish to see identified as harmful to children is **scary content**, which will not necessarily fit into one of the categories already listed. There is ample evidence that such content can be seriously harmful to children, and this would ideally be included expressly in **cl 25E(1)**.

Excluded material

CMA was dismayed to see the addition, in the Bill, of a list of 'Excluded material' in **cl 25F**. As there was no such list in the Exposure Draft, this is our first opportunity to comment on the list itself or the general approach. As we understand it, providers will have no need to consider the impact of the kinds of material listed in cl 25F when they are assessing risks or otherwise attempting to comply with their DDOC, irrespective of how harmful that material is. And this is the case equally whether the material falls under the 'seriously harmful' list in cl 25D or the 'harmful to children' list in cl 25E. The impact of the exclusions is potentially huge.

Yet CMA has had difficulty determining what the rationale is for the exclusions. The Explanatory Memorandum states only that the list excludes **'lawful and legitimate communications'**. (page 59) With respect, there will in principle be other communications that are 'lawful and legitimate' but still subject to consideration under the DDOC, because they carry risks of harm to children, but do not fall into one of the cl 25F categories. No explicit justification is given for singling out these particular types of communication.

There does seem to be an implication that some of the communications listed should be excluded because they are subject to some **other kind of regulatory control**. These controls are listed for 'news material' in the Explanatory Memorandum (at page 61, in some cases purely self-regulatory), and for entertainment material in the Bill itself, at cl 25F(1)(c). However there is a serious question as to whether those other regulations can achieve

what the DDOC is seeking to achieve (see below, especially in relation to paragraph (c)). Nor does any double regulation rationale explain the other matters on the 25F list.

It may be that there is some kind of underlying rationale to cl 25F, relating to the **public interest** in keeping some kinds of information and communication flowing freely, for example 'material that is necessary for, or of assistance in, protecting or promoting public health and safety' (cl 25F(1)(g)). CMA accepts that such considerations may, at times, need to be weighed against children's interests in protection from a risk of harm relating to the content they consume. However, such a rationale is not advanced in any of the documentation that we have seen. Moreover, it is possible to interpret the bulk of the list as not being based on public interest considerations, because these are expressly mentioned in one paragraph (cl 25F(1)(f), stating that literary, artistic and educational material is excluded only if it is not contrary to the public interest). Unless the drafters mean to imply that literary etc material can be contrary to the public interest, but the kinds of content described in paras (a) to (e) and (g) to (h) cannot, one could infer that this has the effect of excluding those other categories of content from the DDOC, even if the material in question is contrary to the public interest. In other words, for all those other matters, the public interest is not a consideration. Therefore, a public interest rationale for these limitations on children's rights would not be convincing.

We note further the positive (and in our view overly broad) category in **para (i)** of 'material that is in the public interest'. As with cl 25E(1)(f), we are troubled by the idea of inclusions in this category being decided by the providers themselves and we would urge the Parliament to put in place a more **objective procedure** for determining such matters (see further below).

Of all the exclusions from the DDOC, the one that troubles CMA most is that in **cl 25F(1)(c)**. This is because of its great potential to have an impact on children's experiences, but also because of the extent of the illogic underlying it. Some television and VOD material, and certainly films and games classified under the *National Classification Scheme* (*NCS*), are by definition harmful to children, which is why the ratings of MA15+, AV and R18+ exist.[4] It is illogical to seek to limit children's access in other contexts (for example at the cinema) but to not even require online providers to turn their minds to it when considering how much care to take for children's protection. Indeed, concerns for children should be heightened if the content is being viewed online, as this is more likely to be outside parental supervision, and therefore not subject to the kind of guidance and contextualisation that can mitigate the risk of harm.

We recognise that the same is true of all the content that would come under cl 25F: if it needs to be excluded, then it is presumptively harmful within the meaning of cl 25E. This is reason enough to oppose cl 25F as a whole. Still we find cl 25F(1)(c) particularly egregious

[4] We note as an aside that the NCS has been referred to also in justifying the exclusion of gaming platforms from the Social Media Minimum Age legislation. We have similar criticisms of this argument.

considering the government's own decision-making processes will have determined the content to be harmful, at least in some cases.[5]

We note further that the NCS does not even attempt to cover many of the matters with which the DDOC concerns itself, for example bullying, or pro-disordered eating content. Nor should any faith be placed in the NCS to protect children's interests, even on the matters it does attempt to cover (eg violent content, depictions of sexual activity), due to the scheme's well-known flaws.[6] Because of those flaws, CMA would be dismayed to see online safety concerns outsourced to the NCS. If the DDOC is serious about protecting children from harm, and ensuring that providers act in children's best interests, it should protect them from this content as well.

Clause 25F would be less troubling if the matters listed were expressed only as considerations for providers to take into account when determining what action to take in mitigating a risk of harm. Having them as **blanket exclusions** goes too far in undermining the scheme's capacity to protect children's rights and interests. Overall, we take the position that the whole concept of a list of excluded content has too great a tendency to undermine children's rights, and therefore **sub-cl (2)** should simply be removed from cl 25E.

Finally, we note as a matter of **procedure** that it appears such matters – including whether 'material … is in the public interest' – will fall to be decided by those entities that are bound by this legislation, namely the providers themselves. We have expressed our concerns above about this kind of arrangement. If the exclusions are to remain, CMA would strongly urge the Parliament to add to the Bill an objective and independent procedure for determining whether certain material falls within one of the categories on the list. Such a procedure should include parties other than the providers who are subject to the DDOC, and participants should be specifically briefed, and have the skills, to place great weight on children's rights and interests in striking any balance.

Ministerial and administrative powers

We are glad to see that the powers the Exposure Draft would have granted to the Minister have been significantly rolled back in this Bill. However we still question some of the remaining powers, namely:

- The power under **cl 25B(3)**:[7] we view this as unnecessary, because if a service poses little risk to users in Australia, then the DDOC will not be very onerous for it, and there is no justification for an exemption. Moreover, even if a service poses little

[5] As an aside, if cl 25F(1)(c) is to be kept, it will be necessary to determine whether material classified RC (Refused Content) falls within its terms. It seems likely it would, so that material determined under the NCS to be unsuitable for viewing by any Australian will get a free pass under the DDOC.
[6] See https://childrenandmedia.org.au/assets/files/taking-action/cma-submission-on-classification-standards-may2026.pdf and sources linked there.
[7] We note further that there is a typographical error in cl 25B(3), where 'pose' should read 'poses'. This is because both of the alternative subjects for the verb ('service' and 'class of services') are singular.

risk to users in one year, that does not mean the risk will be equally small in future years. Yet it will be very difficult to revoke an exemption, once granted.

- The power granted in **s 25C(2)**, to determine the content of the class of 'social media service': this is too broad, in that it is not stated to be subject to any criteria or relevant considerations.

User empowerment tools

CMA has no objection to the introduction of user empowerment tools, but we note that these are unlikely to be very much use for less sophisticated users, such as children. We would also suggest that it would be more consistent with the concept of a DDOC to require providers to come up with their own tools, rather than having these prescribed by the Minister under cl 26(4).

More generally, CMA questions whether user empowerment fits well within the logic of a DDOC. The two approaches to online safety seem to proceed on different assumptions, and might even be in tension in some ways. That is, the DDOC aims to shift responsibility onto providers, but 'empowerment tools' flip it back onto users. If the content or algorithms are harmful (or risky), and this is a sufficiently serious matter to warrant legislation, it seems illogical to give users the ability to put themselves in harm's way and call it 'empowerment'.

Enforcement

The Bill provides for a good range of enforcement mechanisms, but CMA suggests it would be consistent with the design of this scheme, and greatly beneficial to its effectiveness, if it provided also a **private right of action**, and/or a power for the Commissioner to initiate litigation for harm caused, similar to that which the ACCC has under the *Australian Consumer Law*. This would empower users and increase the likelihood that resources will be allocated where harm is greatest; and perhaps most importantly, it should increase the motivation of providers to take the DDOC seriously. Thinking of the parallel to civil liability for personal injury, insurance companies and actuaries there play a significant part in quantifying risk and bringing it to the attention of those who are potentially liable. They could beneficially play a similar role here.

Other matters

CMA suggests:

- Limiting the **response time under cl 27(3)(c)** to 14 days, rather than 30, to remove any incentive for providers to take a 'wait and see' attitude as to whether they will be requested to provide an assessment

- Specifying what the various **statements of penalty units** extend to – for example is the penalty per day, per instance of harmful content disseminated?

**********END OF SUBMISSION**********