

WOMEN SPEAK AUSTRALIA

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

20 SEPTEMBER 2026

ABOUT WOMEN SPEAK AUSTRALIA

Women Speak Australia (WSA) is an independent national advocacy organisation dedicated to advancing and protecting the sex-based rights and protections of women and girls. We advocate for public policy grounded in biological reality, safeguarding children and recognition of motherhood.

WSA welcomes the opportunity to comment on the exposure draft. We support measures protecting women and children from genuine online harms. Our concern is not the objective of improving online safety, but the proposed framework for determining what constitutes “harm”, how that harm is established, and who decides which lawful material or conduct falls within the regulatory framework.

SUMMARY OF POSITION

The Bill would introduce a preventative digital duty of care requiring online services to identify and mitigate reasonably foreseeable risks of harm arising from content, design features and systems. The Government's May 2026 issues paper described the proposed duty in similar terms, including requirements for risk assessment and mitigation.

A duty of this breadth requires precise statutory definitions, an evidentiary threshold and safeguards for lawful expression. WSA's principal concern is proposed section 25D(1)(c), which treats as “harmful to children” material or conduct that “encourages or promotes hostile attitudes towards women or gender equality”.

That phrase is undefined. Questions of sex, gender and women's rights are subject to significant public, scientific, legal and political debate. Unless Parliament defines the provision tightly, there is a risk that lawful and contested speech could be treated as harmful material by online services seeking to manage regulatory risk.

1. “HARM” SHOULD BE CLEARLY DEFINED

Proposed section 25E provides that harm can be caused by material or conduct, including where it is not directly engaged with or experienced by a user. It describes circumstances in which harm may arise, but does not establish what “harm” means.

The existing Act provides an important comparison. Section 5 defines “serious harm” as serious

physical harm or serious harm to a person's mental health, whether temporary or permanent. It includes serious psychological harm and serious distress, while excluding mere ordinary emotional reactions such as distress, grief, fear or anger.

The adult cyber-abuse scheme contains additional thresholds. Under section 7, material must be likely to have been intended to cause serious harm to a particular Australian adult and an ordinary reasonable person in that adult's position must regard it as menacing, harassing or offensive. Section 8 specifies matters relevant to determining whether material is offensive, including its literary, artistic or educational merit.

The proposed Digital Duty of Care should not operate without comparable clarity. WSA recommends clear statutory thresholds for intervention.

2. "MAY CAUSE HARM" IS AN INSUFFICIENT THRESHOLD FOR DELEGATED POWER

Proposed sections 25C(2) and 25D(2) permit the Minister, by legislative instrument, to determine additional categories of material or conduct where the Minister is satisfied that it "may cause serious harm" or "may cause harm to children".

These are precautionary and open-ended formulations. The exposure draft does not specify whether such a determination requires evidence of actual harm, a demonstrated causal relationship, consistent empirical evidence, expert consensus, a reasonably foreseeable risk assessed against a stated standard, or another defined threshold.

Because the duty is preventative, the broader the power to expand regulated harm, the greater the need for a transparent evidentiary test.

WSA considers that new categories carrying consequences for lawful expression should ordinarily be determined by Parliament. Where delegated legislation is retained, the process should require publication of the proposed instrument and supporting evidence, public consultation, publication of the eSafety Commissioner's advice, and consideration of proportionality and freedom of expression.

3. "HOSTILE ATTITUDES TOWARDS WOMEN OR GENDER EQUALITY" MUST BE DEFINED

WSA supports action against material that promotes hatred of women, sexual violence, dehumanisation or abuse of women and girls. However, proposed section 25D(1)(c) does not define "hostile attitudes", "gender equality", or the distinction between hostility and disagreement, criticism, scientific discussion or political advocacy.

Questions of sex, gender and women's rights are the subject of active public, scientific, legal and political debate. Controversy does not, of itself, establish harm.

For example, the following propositions are matters of public policy, science or law and should not, merely because they are contested, be treated as "hostile attitudes towards women or gender equality":

- biological sex is binary and relevant to areas such as sport, medicine, crime statistics and safeguarding;
- women have sex-based rights, including rights relating to female-only services, spaces, sport and prisons;
- sex and gender identity are distinct concepts;
- public policy may distinguish sex from gender identity; and
- children should be protected from social or medical pathways where the evidence for particular interventions is contested or uncertain.

A woman discussing female-only services, women's sport or sex-based rights could potentially be characterised as opposing a particular conception of "gender equality". The legislation should ensure that lawful disagreement is not, without additional conduct demonstrating genuine harm, brought within the category of harmful material.

If section 25D(1)(c) is retained, WSA recommends that Parliament define the provision so that it is directed to identifiable harmful conduct rather than disagreement about sex, gender or equality. It should expressly provide that lawful disagreement, criticism, scientific discussion and political advocacy concerning sex, gender or women's sex-based rights are not, of themselves, material that is harmful to children.

4. FREEDOM OF EXPRESSION SHOULD BE AN EXPRESS STATUTORY CONSIDERATION

The Government's May 2026 Digital Duty of Care issues paper identified the proposed duty as requiring online services to take reasonable steps to prevent foreseeable online harms. The exposure draft should make the relationship between this preventative duty and freedom of expression explicit.

Proposed section 25H identifies matters relevant to determining what is "reasonably practicable", including likelihood and degree of harm, knowledge of risk, available mitigation measures, cost and privacy. Freedom of expression, political communication, scientific discussion and journalistic or academic debate are not expressly identified.

Proposed section 26(7) provides a limited exception for lawful communications occurring in private solely between consenting adults. This is not a general protection for lawful public expression.

WSA recommends that section 25H expressly require consideration of freedom of expression and that the Act's objects make clear that measures taken under the digital duty of care must be proportionate to the identified harm and no more restrictive of lawful expression than reasonably necessary.

5. PENALTIES AND UNCERTAINTY MAY INCENTIVISE OVER-REMOVAL

The proposed digital duty of care carries a civil penalty of up to 60,000 penalty units. Providers will also be required to conduct risk assessments, implement mitigation measures, operate complaints systems and comply with regulatory directions.

Where the boundary between harmful and lawful material is uncertain, substantial penalties may create an incentive for providers to adopt conservative moderation practices. This is particularly important where the subject matter involves contested questions of sex, gender, medicine, science, politics or women's rights.

The legislation should require proportionate responses and make clear that uncertainty about the status of material is not, by itself, sufficient reason to treat lawful expression as a risk requiring removal or restriction.

6. DELEGATED POWERS NEED PUBLICATION, EVIDENCE AND CONSULTATION

Proposed sections 25C(2), 25D(2) and 25G(2) would allow additional categories of harmful material, conduct or design features to be created by legislative instrument. Proposed section 27B requires the Minister to seek and have regard to advice from the eSafety Commissioner before making certain instruments. WSA considers this necessary but insufficient.

The draft does not require the Minister to publish the Commissioner's advice, publish the evidence relied upon, undertake public consultation, apply a defined evidentiary threshold, or demonstrate that a restriction is proportionate.

WSA recommends that categories of material carrying significant consequences for lawful expression ordinarily be determined by Parliament. Where delegated legislation is retained, the process should include:

- publication of the proposed instrument and supporting evidence;
- publication of the eSafety Commissioner's advice;
- a defined period for public consultation;
- consideration of freedom of expression; and
- an express requirement to consider proportionality.

7. RISK ASSESSMENTS SHOULD DISTINGUISH EVIDENCE FROM ASSUMPTION

Proposed section 26A requires providers to identify reasonably foreseeable risks of harm, assess likelihood and potential severity, and document mitigation measures.

WSA supports evidence-based risk assessment. However, assessments should distinguish between demonstrated harms, credible evidence of causation, correlation, theoretical or emerging risks, and contested claims.

Without such distinctions, "foreseeable harm" could encompass claims of harm that have not been adequately demonstrated. Risk assessment should therefore be evidence-based, transparent and capable of independent scrutiny.

RECOMMENDATIONS

1. Define "harm" and "serious harm" for the purposes of the new Digital Duty of Care provisions, with clear thresholds distinguishing serious harm from ordinary offence, disagreement, distress and political controversy.

2. Amend proposed sections 25C(2) and 25D(2) so that any additional category of regulated harm must satisfy a defined evidentiary threshold based on reliable evidence of harm and a demonstrated or reasonably foreseeable relationship between the material or conduct and the identified harm.
3. Define “hostile attitudes towards women or gender equality” in proposed section 25D(1)(c), including a clear distinction between harmful abuse or incitement and lawful disagreement, criticism, scientific discussion and political advocacy.
4. Provide expressly that lawful discussion and advocacy concerning sex, gender, women's sex-based rights and public policy are not, of themselves, harmful material.
5. Amend section 25H to make protection of freedom of expression an express consideration when determining what measures are reasonably practicable, including political, scientific, academic and journalistic expression.
6. Require measures taken under the Digital Duty of Care to be proportionate to the identified harm and no more restrictive of lawful expression than reasonably necessary.
7. Strengthen safeguards surrounding delegated legislative powers by requiring publication of proposed instruments, supporting evidence and eSafety Commissioner advice, together with public consultation before new categories of harm or regulated design features are established.
8. Require risk assessments under section 26A to distinguish demonstrated harms and credible evidence from correlation, theoretical risks and contested claims, with sufficient transparency to permit meaningful scrutiny.

CONCLUSION

WSA supports making Australians safer online. A preventative duty of care has significantly greater reach than a complaints-based scheme confined to defined categories of serious harm. The greater the reach, the greater the need for precision.

That need is particularly important in proposed section 25D(1)(c). Without clear definitions and safeguards, the provision leaves unresolved the boundary between genuinely harmful material and lawful disagreement about sex, gender and the rights of women and girls.

The Digital Duty of Care should protect Australians from genuine online harms while preserving the ability to discuss, debate and challenge contested questions of public importance. The boundary between harmful material and lawful expression should be clearly established by Parliament before the Digital Duty of Care is enacted.

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