



Terms of Reference

February 2024

Terms of Reference – Statutory Review of the *Online Safety Act 2021*

Context

Online interactions are a part of the everyday life of nearly all Australians. Spending time online provides opportunities to connect with each other and with community. While the online environment has enabled significant benefits across society and the economy, these technologies also provide avenues for malicious activities that can harm individuals and erode social cohesion.

Australia's [Online Safety Act 2021](#) (the Act), which commenced in January 2022, supports Australians online by providing the eSafety Commissioner (the Commissioner) with powers to address cyber-bullying of children, cyber-abuse of adults, illegal and restricted content, and the non-consensual sharing of intimate images. The Act makes online service providers more accountable for the online safety of Australians who use their services through the Basic Online Safety Expectations (BOSE) and the development of industry codes or industry standards.

The Act currently defines 'Class 1' and 'Class 2' material which underpin the industry codes and standards regime through reference to the Australian National Classification Scheme and the classification or likely classification of the material. The Government will conduct a separate public consultation process in the first half of 2024 to inform the development of options for the second stage of reforms to ensure the National Classification Scheme is fit-for-purpose in the modern media environment.

History of online safety legislation

On 1 July 2015, the *Enhancing Online Safety for Children Act 2015* commenced, establishing the Children's eSafety Commissioner as an independent statutory office holder, supported by the Australian Communications and Media Authority (ACMA), to take a national leadership role in online safety for children.

The Act was renamed to the *Enhancing Online Safety Act* in 2017 and the Children’s eSafety Commissioner became the eSafety Commissioner following changes to the Act to broaden the Commissioner’s role to online safety for all Australians, not just children.

In 2018, an independent review of the *Enhancing Online Safety Act 2015* and Schedules 5 and 7 of the *Broadcasting Services Act 1992* was conducted by Ms Lynelle Briggs AO (the 2018 Review). The 2018 Review recommended that there be a single up-to-date Online Safety Act that would allow key elements of the framework to be modernised and improved. In 2021, the Act passed Parliament, creating a modernised and fit for purpose regulatory framework that built on existing legislative regimes for online safety. The Act commenced on 23 January 2022.

The Act established the BOSE framework, which is a key part of the Act and underpin efforts to improve transparency and accountability of platforms and keep Australians safe from online harm. Industry is also expected to do more to keep its users safe, including by developing mandatory, enforceable industry codes designed to protect Australians from illegal and restricted online content (Online Content Scheme). If a code does not meet statutory requirements under the Act, the Commissioner can develop an industry standard for that section of the online industry instead.

On 24 January 2022, the [Online Safety \(Basic Online Safety Expectations\) Determination 2022](#) (BOSE Determination) came into effect. The Commissioner has powers to seek information from service providers about how they are meeting the expectations outlined in the BOSE Determination. Further information about the reporting notices issued by the Commissioner can be found at [Basic Online Safety Expectations | eSafety Commissioner](#).

Industry bodies are developing codes in a two-phased approach. The first phase is focused on the most seriously harmful online content by reference to Class 1 of the National Classification Scheme, including Class 1A (child sexual exploitation material, pro-terror material and extreme crime and violence material) and Class 1B (crime and violence material and drug-related material).

The Commissioner registered six industry codes in 2023, covering social media services, internet carriage services, equipment providers, app distribution services, hosting services and internet search engine services. Five codes came into effect on 16 December 2023, and one will come into effect on 12 March 2024. The Commissioner declined to register two draft industry codes and is now developing industry standards for relevant electronic services and designated internet services.

eSafety will soon commence work with industry on the development of a second phase of codes which will focus on Class 1C material and Class 2 material (which include online pornography and other high-impact material). Further information about the development of industry codes including regulatory guidance outlining Class 1 and Class 2 materials can be found at [Industry codes | eSafety Commissioner](#).

Legislative basis for the Review

Section 239A of the Act states:

239A Review of operation of this Act

(1) Within 3 years after the commencement of this section, the Minister must cause to be conducted an independent review of the operation of this Act.

(2) The Minister must cause to be prepared a written report of the review.

(3) The Minister must cause copies of the report to be tabled in each House of the Parliament within 15 sitting days of that House after the day on which the report is given to the Minister.

As part of the [Government's response to the House of Representatives Select Committee on Social Media and Online Safety Report](#), the Government committed to undertaking and completing the Statutory Review earlier than required under the Act, and within this term of Government, so that the Act can keep pace with the evolving online environment.

Matters to be considered by the Review

The Act does not prescribe particular provisions to be examined by the Review. Accordingly, the Review will be broad ranging and include consideration of:

1. The overarching objects in section 3 of the Act, including the extent to which the objects and provisions of the Act remain appropriate to achieve the Government's current online safety policy intent.
2. The operation and effectiveness of the following statutory schemes and whether the regulatory arrangements should be amended:
 - a. cyber-bullying material targeted at an Australian child¹
 - b. non-consensual sharing of intimate images²
 - c. cyber-abuse material targeted at an Australian adult³
 - d. the Online Content Scheme,⁴ including the restricted access system and the legislative framework governing industry codes and standards, and
 - e. material that depicts abhorrent violent conduct.⁵
3. The operation and effectiveness of the Basic Online Safety Expectations (BOSE) regime in the Act.
4. Whether additional arrangements are warranted to address online harms not explicitly captured under the existing statutory schemes, including:
 - a. online hate
 - b. volumetric (pile-on) attacks
 - c. technology-facilitated abuse and technology-facilitated gender-based violence

¹ The statutory scheme for cyber-bullying material targeted at an Australian Child is described in Part 5 of the Act. 'Cyber-bullying material targeted at an Australian child' has the meaning given in section 6 of the Act.

² The statutory scheme for non-consensual sharing of intimate images is described in Part 6 of the Act. 'Non-consensual intimate image of a person' is defined in section 16 of the Act.

³ The statutory scheme for cyber-abuse material targeted at and Australian adult is described in Part 7 of the Act. 'Cyber-abuse material targeted at an Australian adult' has the meaning given by section 7 of the Act.

⁴ The Online Content Scheme is described in Part 9 of the Act.

⁵ The statutory scheme for material that depicts abhorrent violent conduct is described in Part 8 of the Act. 'Material that depicts abhorrent violent conduct' is defined in section 9 of the Act. 'Abhorrent violent conduct' is defined in section 5 of the Act as having the same meaning as in Subdivision H of Division 474 of the *Criminal Code*.

- d. online abuse of public figures and those requiring an online presence as part of their employment
- e. other potential online safety harms raised by a range of emerging technologies, including but not limited to:
 - generative artificial intelligence
 - immersive technologies
 - recommender systems
 - end-to-end encryption,
 - changes to technology models such as decentralised platforms
5. Whether the regulatory arrangements, tools and powers available to the Commissioner should be amended and/or simplified, including through consideration of:
 - a. the introduction of a duty of care requirement towards users (similar to the United Kingdom’s *Online Safety Act 2023* or the primary duty of care under Australia’s work health and safety legislation) and how this may interact with existing elements of the Act
 - b. ensuring industry acts in the best interests of the child
6. Whether penalties should apply to a broader range of circumstances.
7. Whether the current information gathering powers, investigative powers, enforcement powers, civil penalties or disclosure of information provisions should be amended.
8. The Commissioner’s functions and governance arrangements, including:
 - a. the Commissioner’s roles and responsibilities under the Act
 - b. whether the current functions and powers in the Act are sufficient to allow the Commissioner to carry out their mandate.
9. Whether the current governance structure and support arrangements for the Commissioner provided by the ACMA are fit for purpose for both the Commissioner and the ACMA.
10. Whether it would be appropriate to cost recover from industry for eSafety’s regulatory activities.

Process and timing

The Minister for Communications has appointed Ms Delia Rickard PSM to undertake the Review. Ms Rickard will be supported by staff from the Department of Infrastructure, Transport, Regional Development, Communications and the Arts.

The Review will involve a period of public consultation, commencing with the release of an Issues Paper in the first half of 2024. This will be accompanied by a call for public submissions, with the intention to conduct follow up stakeholder meetings as required. Subject to the discretion of the Reviewer, consultation may be conducted with relevant stakeholders, including but not limited to: industry, non-government organisations, community support groups, Members of Parliament, the Commissioner, ACMA, the Australian Federal Police and other law enforcement agencies, international regulatory bodies, Commonwealth, state and territory government agencies, and other interested groups and individuals.

The Final Report of the Review will be provided to the Minister for Communications by 31 October 2024, for tabling in Parliament within 15 sitting days as required by section 239A of the Act. Any recommendations made by the Review will be carefully considered by Government and responded to at the appropriate time.