

**Deakin Centre for Law as Protection Submission on the Department's
Exposure draft: Online Safety Amendment (Digital Duty of Care) Bill 2026**

The Centre for Law as Protection at Deakin University welcomes the opportunity to make a submission on the exposure draft of the Online Safety Amendment (Digital Duty of Care) Bill 2026. The Centre is a scholarly community dedicated to strengthening legal protection from diverse harms. This submission is authored by Professor Kate Seear and Professor Shiri Krebs, Co-Directors of the Centre, and focuses on their respective areas of expertise, including drug law, harm reduction, human rights, privacy and surveillance.

Overall statement

The proposed reforms create significant opportunities to improve online safety in Australia. At the same time, they also create a corresponding risk: measures adopted in the name of safety may themselves produce new forms of surveillance, profiling, identification, behavioural monitoring and harm, also undermining important existing policies and laws. As it is currently drafted, the bill poses a series of risks, including risks to the production and dissemination of legitimate health and harm reduction information, as well as risks to personal identity, autonomy, and privacy. The issues we raise in this submission may extend to other areas, including the provision of legitimate medical advice and information in the context of voluntary assisted dying, sexual health and related phenomena.

Harm reduction and health information considerations

1. The bill may prohibit the dissemination of vital public health and harm reduction advice

Since the late 1980s, harm reduction has been a key part of Australian drug policy. It is one of the three pillars of Australia's drug policy, as articulated in the *National Drug Strategy 2017-2026*, as well as state and territory strategies. Harm reduction also features in other major strategies such as the new *Sixth National Hepatitis C Strategy*.¹ Harm reduction takes many forms but includes the provision of services, information and advice on overdose prevention; opioid substitution therapies; needle and syringe programs; drug checking services; drug education; safer injecting techniques and strategies; and the dissemination of information on new and emerging drug trends and risks – such as fentanyl and nitazenes in the drug supply. Public health and harm reduction advice is provided by individuals and organisations, including government-funded drug user organisations, peer workers, nurses and doctors, authorised drug checking workers, allied health professionals, non-government organisations, government departments, religious and charitable organisations, and academics. Such information is disseminated via formal, informal and interpersonal (including peer-to-peer) networks, websites, newsletters, public drug warning alerts, in blogs, websites and social media. Providing information through multiple fora is essential as a matter of health equity but also vital to ensure reach. This is because people who use drugs are a heavily stigmatised and criminalised population and may be less willing to engage with mainstream health services about their drug use.² Crucially, people who use drugs are leading experts and play a key role in preventing harms. Australia is often considered a global leader in this space. Harm reduction is to aiding in the prevention of overdoses, the prevention of blood-borne virus transmissions including hepatitis C in accordance with Australia's hepatitis C elimination agenda, and other harms associated with drugs.

Section 25C(1)(k) of the bill defines 'seriously harmful material and conduct' to include 'material or conduct that encourages, promotes, urges or instructs illicit drug use'. Other matters include 'material or conduct that encourages, promotes, incites or instructs' sexual violence, suicide and self-harm. Section 25C(1)(k) is broadly defined and could effectively capture public health and harm reduction guidance, including instructions about

¹ Department of Health. (2017). *National Drug Strategy 2017-2026*. Commonwealth of Australia: Canberra; Department of Health (2026). *Sixth National hepatitis C Strategy*. Commonwealth of Australia: Canberra.

² Lloyd, C. (2010). *Sinning and sinned against: The stigmatisation of problem drug users*. London: UK Drug Policy Commission.

drug use, and peer-to-peer engagement. Alcohol and other drug (AOD) organisations including government departments commonly produce and publish evidence-based drug related public health and harm reduction information that is consistent with government policy, but may nevertheless be characterised as ‘instructing’ drug use. These risks are likely to be magnified for small and peer-based organisations. Similarly, advice on how to use drugs safely might be conceptualised as ‘encouraging’ or ‘promoting’ drug use.

In relation to drug-related digital content, the bill as currently drafted is likely to result in online services taking a precautionary approach that does not discriminate between evidence-based public health and harm reduction information, pro-social community participation, and harmful content. The bill thus puts public health and harm reduction organisations (including their workers) at risk for the work they do, and is likely to have serious adverse implications. It may also have a chilling effect on the production and dissemination of legitimate health information and will result in barriers to access to information by communities, many of whom rely on online content. The objects of the bill in s3 do not properly guard against these likely consequences.

2. The operative provisions do not adequately recognise content promoting health & safety

Section 26 establishes the digital duty of care and Section 26A sets out the process for undertaking risk assessments in furtherance of the duty. The former does not provide clear guidance on what constitutes a ‘safe online environment’. Although harm reduction is a form of safety itself, this is often misunderstood and thought to be in tension with/undermine public safety (e.g. as a set of practices that some believe *encourage* or *promote* drug use – incidentally, terms which also appear in s25C(1)(k)). This is part of a broader phenomenon/ problem in law, in which policy and legislation often invoke ‘safety’ considerations to authorise blanket measures that restrict the interests, needs and rights of people who use drugs, therein generating further harms.³ Illicit drug use is frequently characterised in law as *inherently* unsafe; the bill repeats this logic without distinction or nuance. Such logics are especially common when the safety of young people is being explored.⁴ Drug user, public health and harm reduction organisations routinely work with a different set of health and safety norms and assumptions than the mainstream public health frame assumes. They often produce carefully curated content that makes their audiences ‘safe’, but which may not be perceived as such from those who lack this context or subject-matter expertise. A duty of care aimed at achieving a ‘safe environment’ for the wider public risks generating harms for those with distinct needs, different knowledges and norms and harm reduction expertise. Risk assessments (see s 26A) will require online providers to identify groups at particular risk of harm. For complex areas such as this, risk assessments conducted by online services may be insufficiently informed or nuanced. The bill will also impose significant, costly, unworkable and unjustified operational obligations on the many organisations that deliver essential health services.

3. The bill may prohibit (or have a chilling effect) on necessary and legitimate public policy debate regarding Australia’s drug law and policy

Arguably, efforts to ‘promote’ drug use – to take the language of Section 25C(1)(k) – could extend to legitimate public policy debate, research, advocacy and scholarship on drug law reform. This includes work critical of existing prohibitionist approaches and which recognises the value of drug use for some individuals and groups, or the value of reform. It is well-established, for instance, that prohibition generates harms and that regulated systems of ‘safe supply’ can reduce/prevent harms such as drug overdose deaths. Debate on these issues is vital in a democratic society such as ours.

Ambiguity around what constitutes non-harmful – or, ‘safe’ – drug-related content and discussion carries serious implications for anyone engaged in public debate about drug law reform online. This may affect discussions where forms of lived and living experience are invoked – where such narratives and illustrative exemplars that do not align with abstinence-based or recovery-oriented stories may be misconstrued as ‘promotion’ or ‘encouragement’. Moreover, in recent years, important reforms to Australian drug laws have been shaped by public debates led by those with lived and living experience, including the parents of seriously ill children, or veterans and victim-survivors of gendered violence, sexual abuse and assault for whom access to (historically

³ Seear, Kate and Mulcahy, Sean (2022). Enacting safety and omitting gender: Australian human rights scrutiny processes concerning alcohol and other drug laws. *Contemporary Drug Problems*, 49(3): 258-277.

⁴ Volpe, Isabelle; Lancaster, Kari and Ritter, Alison (2026; early online). Making ‘safety’ for children and young people in drug policy: A critical analysis of governing logics. *Journal of Applied Youth Studies*.

illicit) drugs like medicinal cannabis, psilocybin and MDMA has been important.⁵ These public campaigns arguably involved the ‘promotion’ of illicit drug use, especially as calls for reform often emerged out of illicit forms of experimentation/use. In this sense, rights to political participation – including that of people who use drugs, which are already routinely constrained – risk being further limited by the bill.⁶

4. Complaint processes may expose ‘controversial’ areas to added and unwarranted scrutiny

Section 26F empowers the Minister to prescribe online services for the purpose of requiring them to establish procedures from complaints and disputes. This has potentially very significant resourcing implications for relevant public health and harm reduction organisations if they are ‘online service providers’. Due to the prevalence of drug-related stigma, as well as misunderstanding and misinformation about the aims of harm reduction, complaints processes are at risk of being misused or heavily utilised by opponents of essential harm reduction information. Relevant organisations may receive an influx of ‘complaints’ about legitimate but otherwise misunderstood work. Small and under-resourced organisations may be obliged to respond to and/or manage these complaints. ‘Controversial’ or ‘sensitive’ public policy areas like sex work, voluntary assisted dying and drug use are routinely exposed to both genuine and bad faith actors who do not agree with public health policy that supports access to information. Careful consideration should be given to the potential for complaints mechanisms to be misused to prevent access to or hinder the delivery of such information, or to censor discussion of sensitive topics which are critical features of our democracy. The bill should be amended to minimise these risks and/or additional resourcing should be considered for relevant organisations.

We therefore recommend:

1. S 25C(1)(k) be removed.
2. The existing objects of in s3 be amended to clarify that information provided with a purpose of supporting health and harm reduction are not intended to be protected, not excluded and/or deemed ‘unsafe’. This might alternatively take the form of an additional, standalone object which unequivocally states that health and harm reduction information is not intended to be undermined by the operation of the Act.
3. S 26A is overly vague in its current form and should be amended to ensure that there is protection for content (material and practices) where the purpose of material that might otherwise be captured by the bill is to mitigate harm. It should also be amended to ensure that material furthering policy debate is protected.
4. That if public health and harm reduction organisations are to be impacted by the bill, resourcing be increased to enable them to undertake risk assessments, manage compliance, establish complaints and dispute mechanisms, manage and respond to complaints where such things are required, recognising that for this (and allied) sectors, such needs could be substantial.

Privacy and surveillance considerations

1. Make privacy protection an express component of the digital duty of care

Proposed ss 25A-25H define the scope of the digital duty of care (25A), the requirements of a safe online environment (25B), the materials that are considered seriously harmful (25C) and the scope of harm (25E). These definitions focus on protection from seriously harmful materials and conduct, harms to children, and specified harmful design features, but fail to identify privacy and data protection as a vital component of a safe online environment. This omission is significant because failure to protect individuals’ privacy can constitute serious online harms.⁷ For example: a platform may expose a person’s sensitive personal information without their knowledge or consent; a service may use persistent tracking, behavioural profiling, or location monitoring in ways that expose users to surveillance, manipulation or other harms; an online service may require intrusive

⁵ Seear, Kate (2024). Shifting solutions: Tracking transformations of drugs, health and the ‘human’ through human rights processes in Australia. *Health Sociology Review*, 33(3):257-272.

⁶ Seear, Kate and Mulcahy, Sean (Early online). Troubling Drug Law, Political Participation and Human Rights: A Dope Sick Ontology. *Contemporary Drug Problems*.

⁷ Hildenbrand, Serena Syme. "Public sector data sharing: Applying state-based human rights laws to minimise privacy harms." *Melbourne University Law Review* 47.2 (2024): 386-428; Krebs, Shiri, and Lyria Bennett Moses. "Data sharing agreements: Contracting personal information in the digital age." *Melbourne University Law Review* 48.1 (2024): 95-151.

age or identity verification, creating new risks through the collection and retention of identity or biometric information; and a platform's design may facilitate profiling and discrimination through aggregation and inference of information about an individual.

These risks may arise without any harmful material or conduct of the kind presently identified in proposed s 25B. An online environment could satisfy the proposed definition of a "safe online environment" while subjecting users to significant and unnecessary privacy intrusion. Privacy is instead introduced in proposed s 25H(e)(ii), which provides that, in determining what is "reasonably practicable" in complying with the duty, regard must be had to the impact of the relevant measure on the level of privacy an ordinary reasonable person would expect. This is insufficient for two reasons. *First*, it treats privacy as a constraint on the implementation of safety measures, rather than as an independent dimension of safety that the duty itself requires platforms to protect. *Second*, proposed s 25H(e)(ii) does not establish a substantive obligation to prevent or minimise privacy harms. It requires consideration of privacy impacts but permits those impacts unless they are "grossly disproportionate" to the relevant safety risk. This safeguard provides insufficient protections from measures involving persistent identification, behavioural monitoring, profiling, age assurance, biometric processing or sensitive inference.

The legislation should instead recognise that privacy and safety are not conceptually separate or even contradictory interests in online environments. In some circumstances, protecting privacy is itself a means of protecting users from harm. Conversely, measures adopted to improve online safety may create new privacy and surveillance risks that should fall within the scope of the duty. **Privacy should therefore not appear for the first time in proposed s 25H as a factor relevant to whether a safety measure is "reasonably practicable". It should form part of the statutory conception of safety that the digital duty of care exists to protect.**

We therefore recommend:

1. Proposed s 25B be amended so that a "safe online environment" expressly includes an environment in which users are protected from privacy harms.
2. Proposed s 25H(e)(ii) be amended to replace the "grossly disproportionate" threshold with an express requirement to consider the necessity and proportionality of the measure, as well as a duty to adopt the least privacy-intrusive means reasonably available.
3. Proposed s 26 should correspondingly make clear that the digital duty of care includes an obligation to identify, prevent and mitigate reasonably foreseeable privacy harms arising from the design, operation and governance of an online service.

2. Embed privacy and surveillance safeguards in research access schemes

The Bill should incorporate explicit privacy and surveillance safeguards into the research access schemes established under proposed ss 205B–205L, rather than leaving these protections primarily to legislative rules. Proposed s 205C would allow legislative rules to establish schemes requiring online services to provide approved researchers with access to data. Although the provision expressly identifies "the privacy, security and confidentiality of data accessed" as a matter that may be addressed by the data access rules, it does not establish substantive privacy safeguards in the Act itself. The same concern arises more acutely with the proposed sock-puppet provisions. Sections 205H–K would authorise approved researchers and the Commissioner to use false or fictitious identities to access online services, observe, download and record material, engage with services and users, and test service features and responses. The Commissioner would additionally be authorised to generate material, including using artificial intelligence.

These powers can create privacy and surveillance harms even where the underlying research serves legitimate online-safety objectives. Data-access schemes may expose researchers to personal, sensitive or otherwise identifiable information, while sock-puppet research may involve covert observation, collection of information about users, behavioural monitoring and interaction with individuals who are unaware they are being observed or engaged with for research or regulatory purposes. The risks may be particularly significant where research concerns children or other vulnerable users, or where multiple datasets can be combined to identify individuals.

We therefore recommend:

1. The Bill should therefore require the data access rules and sock-puppet authorisations to incorporate safeguards including **data minimisation, purpose limitation, restrictions on re-identification and dataset linkage, limits on retention and onward disclosure, secure storage, deletion requirements, and appropriate oversight and audit mechanisms.**⁸
2. For sock-puppet activities, the legislation should additionally require that covert observation or interaction be **necessary and proportionate to the research or regulatory purpose**, minimise collection of information about individuals who are not the subject of the research, and include heightened safeguards where children or other vulnerable users may be encountered.
3. More broadly, the legislation should recognise that **research undertaken to improve online safety can itself produce surveillance and privacy harms.**

Conclusion

We urge the Department to consider expanding the definitions related to the digital duty of care to provide a holistic approach to online safety; one that recognises the vitality of harm reduction and the provision of medical advice, and that conceptualises protections from privacy harms and discrimination as an integral part of a safe online environment.

We thank the Committee for the opportunity to make this submission and for their time and consideration and can be contacted if any further details are required on our submission.

Yours sincerely,

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⁸ Krebs, Shiri, and Lyria Bennett Moses. "Data sharing agreements: Contracting personal information in the digital age." *Melbourne University Law Review* 48.1 (2024): 95-151.