Submission to the Senate Environment and Communications Legislation Committee inquiry into the Online Safety Amendment (Digital Duty of Care) Bill 2026

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Introduction

We welcome the opportunity to contribute to the Committee's consideration of the digital duty of care regime. We are academics specialising in innovation policy, technology regulation, and frontier technology.

We have serious concerns about this bill. While we share many of the concerns raised in public commentary about the risks this regime presents to Australians' freedom of expression,[2] we limit this submission to the architectural choices around the design and imposition of regulatory obligations in the Digital Duty of Care regime.

The bill vests far too much discretionary policymaking power in the Minister and the eSafety Commissioner. The Minister can extend the stricter design rules to new services and features, and require any online service to build 'user empowerment tools', without a new Act.

The first proposed instrument – 'My Feed, My Way' – shows how loose the test of harm for significant intervention is. The determination rests on contested claims that ranked feeds polarise users. Governments of other political persuasions might also use these powers in ways that this government does not intend. Parliament is our system of government's protection against the arbitrary use of power.

We also have concerns about the policy stance this bill signals to the technology industry more generally. Australia has a very serious problem of weak productivity that, if not revived, threatens prosperity and living standards. It is a core finding in economics that innovation and technological change cause economic growth. The expansive and unpredictable nature of this bill presents a sovereign risk to the development and deployment of technology in Australia, putting at risk the benefits we might get from that technology.

1. The bill inappropriately delegates policymaking to the executive

Proposed s 25B covers nine categories of online service, from social media and search engines to internet carriage services, AI generation services, and firms that install equipment used for internet

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[2] For our work on freedom of speech see for example Allen, D.W.E., Berg, C. and Davidson, S. (2020) *The New Technologies of Freedom*. American Institute for Economic Research, Berg, C. (2012) *In Defence of Freedom of Speech: From Ancient Greece to Andrew Bolt*. Institute of Public Affairs and Mannkal Economic Education Foundation, Berg, C. (2026) "An Institutional Theory of Free Speech". Available at: https://doi.org/10.2139/ssrn.2910563. Berg, C. and Davidson, S. (2016) "Section 18C, Human Rights, and Media Reform: An Institutional Analysis of the 2011–13 Australian Free Speech Debate," *Agenda - A Journal of Policy Analysis and Reform*, 23(1). Available at: https://doi.org/10.22459/AG.23.01.2016.01.

communications. Every covered provider must take 'appropriate action to ensure a safe online environment'. What the duty demands in practice is then left largely to the executive.

- The Minister gets to decide which online services are social media and which design features have 'negative behavioural impacts' (ss 25C(2) and 25G(2)).
- The Minister can require any online service to provide a specified user empowerment tool, as long as the Minister is satisfied the tool is necessary to protect users from 'harms associated with access or exposure to a design feature' (s 27A). Those harms need not be serious.

These are major policy decisions. Imposing design requirements on privately provided software is an extreme form of regulatory intervention in the digital economy and should be subject to full parliamentary debate. Deciding which features of an online service are harmful, and what firms must build in response, is policy in every real sense.

It is true that these instruments are disallowable, and that the Commissioner's remedial directions are open to merits review. But as we have argued previously, this is not comforting. Disallowance is an emergency backstop, not a substitute for Parliament debating major policy choices.[3] The government's *Legislation Handbook* reserves for primary legislation 'significant questions of policy', and provisions 'imposing obligations on individuals or organisations to undertake certain activities'.[4]

The policy is also bizarrely untethered from what we would usually understand as an analysis of costs and benefits. In deciding what is appropriate, the cost of the action 'must not be taken into account' (s 26A(3)). The Explanatory Memorandum justifies that exclusion by pointing to 'large platforms with millions of users',[5] but the provision applies to *every* covered service.

2. The 'My Feed, My Way' policy shows how loose 'harm' will be

The draft Online Safety (User Empowerment Tools) Determination 2026 is the first proposed use of this power to regulate software functionality. It is a revealing example of an extreme regime of private product design through legislation.

It requires social media services with a recommender feature to let users choose a following-only feed. The Explanatory Memorandum justifies the power with research that engagement-driven recommender systems 'can feed users more polarising content relative to a reverse-chronological timeline', content which 'can incite violence, fuel division in the community and influence users' affect and internal belief systems'. It adds that 'public sentiment has also shifted'.[6]

This is an extremely tendentious causal chain: from a discovery system, to what a user sees, to what the user believes, to division in the community. The idea that algorithms are largely responsible for exposure to problematic content is among the most common misperceptions about online harm.[7]

The proposed remedy does not match even the government's evidence. The memorandum's comparison is with a reverse-chronological timeline. But the draft determination actually requires a different mechanism: a feed limited to accounts the user follows (s 6(5)). Nothing stops a platform ranking those posts for engagement, and the feed may carry advertising from accounts the user does not follow (s 6(6)).

The Minister described the choice as one between 'the algorithm or their following feed'.[8] But a following-only feed *is also an algorithm*. It must decide the order of posts, whether to show reposts,

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[3] Darcy W. E. Allen et al., 'Dynamic Competition and Digital Platforms', submission to the Australian Treasury, February 2025, pp. 12–14.

[4] Department of the Prime Minister and Cabinet, *Legislation Handbook* (2025), para. 1.11.

[5] Explanatory Memorandum, Online Safety Amendment (Digital Duty of Care) Bill 2026, p. 67.

[6] Explanatory Memorandum, p. 74.

[7] Ceren Budak et al., 'Misunderstanding the Harms of Online Misinformation', *Nature* 630 (2024): 45–53.

[8] Anika Wells, press conference, Parliament House, Canberra, 8 September 2026.

how to treat a followed account that posts fifty times a day, and what to do with material the user has already seen. The bill itself defines a recommender feature as one that selects material 'by reference to any information that the service has associated with an end-user's account' (s 25G(3)). A list of followed accounts is such information. On a plain reading, the government's alternative feed is itself a recommender feature – which the bill declares to have negative behavioural impacts (s 25G(1)(a)).

This difficulty arises because selecting and ranking material is an editorial function, whether a person or software does it. A newspaper decides which story leads the front page and which is buried on page twelve. A platform makes the same kind of judgement for millions of readers at once. No one would require a newspaper's website to offer every story in reverse order of publication, stripped of editorial prominence, because its editors' choices might polarise readers. The bill excludes professional news material from its definitions of harm (s 25F(1)(d)). But it is unclear why digital platforms should be treated differently.

3. Open-ended powers have unpredictable consequences

On the standard the government has applied to feeds, a future minister could justify requiring:

- AI assistants to let users choose a competing search provider, because an opaque default shapes the information users receive;
- platforms to accept third-party recommender systems, so users can escape the platform's ranking;
- a setting that lets adults switch off moderation filters or warning labels, because filtering harms users' autonomy; or
- AI companions to let users turn off memory and unprompted check-ins, because they foster dependence.

Many of these ideas are highly politically charged. A government with different values from this one could use this legislative framework to pursue quite different ends. The current government is concerned about misinformation and polarisation. A future government might be concerned about freedom of speech, and use these significant executive powers to impose new requirements on digital platforms that this Parliament would not support.

The risk that a future executive's preferences might diverge from those of the current executive is exactly why these policy choices should rest with Parliament.

We would be happy to provide the committee with any other information.

Regards,

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