



**SUBMISSION TO the Department of Infrastructure, Transport, Regional Development, Communications and the Arts' Statutory Review of the *Online Safety Act 2021***

Submission by the Information and Privacy Commission NSW

21 June 2024

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**A/Privacy Commissioner**

The Commissioner's signature has not been included in this submission to facilitate public access to the submission, manage security risks and promote availability in accordance with the *Redacting signatures on public facing documents Practice Guide* published on the IPC website.

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1. The Information and Privacy Commission NSW (IPC) welcomes the opportunity to provide a submission to the Department of Infrastructure, Transport, Regional Development, Communications and the Arts' Statutory Review of the *Online Safety Act 2021*.

**About the IPC**

2. The Information and Privacy Commission NSW (IPC) is an independent integrity agency that supports the Information Commissioner and Privacy Commissioner to oversight the operation of privacy and information access laws in New South Wales.
3. The Privacy Commissioner is an independent statutory officeholder with responsibility for overseeing and advising NSW public sector agencies on compliance with the *Privacy and Personal Information Protection Act 1998* (PPIP Act) and the *Health Records and Information Privacy Act 2002* (HRIP Act).
4. The Information Commissioner is an independent statutory officeholder with responsibility for overseeing the information access rights and obligations established by the *Government Information (Public Access) Act 2009* (GIPA Act) and exercises functions under the *Government Information (Information Commissioner) Act 2009* (GIIC Act). The Information Commissioner is also the head of the IPC.

**IPC Comments**

5. The IPC has reviewed the Issues Paper and notes the following:
6. While there is not a direct nexus between the NSW IPC's Privacy remit and the *Online Safety Act 2021* (the Act), there are nevertheless broad privacy considerations, in particular, in relation to the preservation of citizens' privacy rights from a regulatory perspective.

7. The IPC notes in the Issues Paper the operation of the adult cyber bullying complaints and content-based scheme which sets a threshold for regulatory action which is extremely high for adult cyber-abuse. This means the eSafety Commissioner may be unable to require removal of abusive online material targeted at an Australian adult, including adults in vulnerable or high-risk situations, because the material does not meet the criteria of adult cyber-abuse under the Act. The IPC notes that in the 2022-23 financial year of 2,516 complaints that were made relating to adult cyber-abuse, a large number of those complaints did not meet the threshold for cyber-abuse, with the eSafety Commissioner issuing a total of three removal notices to have material removed from service providers. The IPC also notes that there are a number of online harms arising as a result of emerging technologies, such as generative AI, which may not be fully addressed under the Act.
8. Given the high-level threshold for harm and the potential for various technologies and harms to not be captured by the Act, it is important that Basic Online Safety Expectations provide a robust framework for online service providers to take proactive steps to protect the Australian community from abusive conduct and harmful content online. The IPC notes that the core expectations for service providers as set out in section 46 of the Act include provisions to ensure that online services have clear and readily identifiable mechanisms that enable end-users to report, and make complaints about, certain material provided on the service and breaches of the service's terms of use. Further, the IPC notes that there are currently key reform proposals being considered in the Basic Online Safety Expectations Determination which include new additional expectations that generative artificial intelligence capabilities are designed and implemented with user safety in mind, that services using generative artificial intelligence capabilities proactively minimise the extent to which that capability produces unlawful or harmful material, and that the best interests of the child are a primary consideration in the design and operation of services likely to be accessed by children. The IPC supports those reforms proposals.
9. The Issues Paper notes that the Australian Government's response to the Commonwealth Privacy Act Review is likely to include reforms related to doxing, the intentional online exposure of an individual's identity, private information or personal details without their consent. While the Privacy Act reforms may go some way towards addressing the practice of doxxing, it is a significant privacy concern and consideration should be given as to whether there are specific matters that can be better addressed by legislative amendments to the Act.

It is noted that there are no penalties for a service provider failing to comply with the expectations outlined in the Basic Online Safety Expectations Determination. Additionally, it noted that at present the Act does not provide the affected individual with a right of action against the perpetrator of that abuse. The IPC notes that the Review is considering a Statutory duty of care approach to place additional statutory duties on online services to make online services safer and minimise online harms. Considering the significant potential impacts arising from cyber bullying and other forms of online abuse (including loss of employment, damage to reputation, or emotional distress) consideration should be given to including an appropriate redress mechanism for individuals for the serious invasion of privacy arising from cyberbullying and online abuse.

We hope that these comments will be of assistance. If you have any queries, you may contact [REDACTED]

For further information about the IPC visit [www.ipc.nsw.gov.au](http://www.ipc.nsw.gov.au).