

10 November 2021



Director, Online Safety Reform and Research Section
Department of Infrastructure, Transport, Regional Development and Communications
GPO Box 2154
Canberra ACT 2601

OnlineSafety@infrastructure.gov.au

ACCAN thanks the Department of Infrastructure, Transport, Regional Development and Communications for the opportunity to participate in consultation on the *Online Safety (Basic Online Safety Expectations) Determination 2021* exposure draft (the Expectations).

ACCAN welcomes the release of the draft Expectations, as determined by the Minister under Part 4 of the *Online Safety Act 2021* (the Act). We agree that it is essential to hold social media services, relevant electronic services and designated internet services to account and “place greater responsibility on service providers to ensure they provide safer services to Australian end-users.”

Section 46 of the Act requires the Expectations to address:

- Minimise cyber-bullying or abuse material targeted at a child or adult, non-consensual intimate images, Class 1 material, and abhorrent violent material.
- Take reasonable steps to prevent children from accessing class 2 material.
- Provide ways for people to make complaints about online content.

We note that, in addition to those core Expectations set out in the Act, the draft determination released for public consultation adds eleven additional Expectations, including:

- The provider of the service will take reasonable steps to proactively minimise the extent to which material or activity on the service is or may be unlawful or harmful.
- The provider of the service will ensure that there is an employee or agent who is designated as the service’s contact person for the purposes of the Act.
- The provider of the service will keep records of reports and complaints about the material provided on the service for five years after the making of the report or complaint to which the record relates.
- Pursuant to the Act, the e-Safety Commissioner may issue a notice or a declaration requiring the service, or class of service, to prepare reports detailing the extent of their compliance with the Expectations. Such reports may be required periodically or in regard to a specified period.

Australian Communications Consumer Action Network (ACCAN)
Australia’s peak body representing communications consumers

PO Box 639, Broadway NSW 2007

Tel: (02) 9288 4000 | Fax: (02) 9288 4019 | Contact us through the [National Relay Service](#)

www.accan.org.au | info@accan.org.au | [twitter: @ACCAN_AU](https://twitter.com/ACCAN_AU) | www.facebook.com/accanau

Penalties and enforcement

The measures imposed by the Expectations are a positive step towards increasing online consumer protection. However, we submit that the penalties for breach of these Expectations seem inadequate to incentivise service providers to actively prevent unlawful or harmful online activity.

Reputational Consequences

ACCAN notes that a service in breach of the Expectations may potentially face “reputational consequences” arising from the e-Safety Commissioner’s power to issue a statement (and publish the statement on their website) that the service did not comply with the Expectations, the reporting requirements, or a notice or determination issued by the e-Safety Commissioner regarding the Expectations.

However, it is ACCAN’s assertion that reputational damage is a weak form of penalty with minimal potential for enforcement. Ordinary consumers may not be aware of statements issued by the e-Safety Commissioner, so they will have minimal impact on consumers’ opinions and the service’s reputation.

Furthermore, there is little evidence to prove that reputational damage impacts the profitability of social media platforms like Facebook. Facebook has faced multiple inquiries critical of its operations which have received global media attention and damaged its reputation, yet it continues to thrive as a digital platform without needing to make substantial changes to the way it operates.

Civil Penalties

A provider who fails to comply with a notice from the Commissioner to report on compliance with the Expectations may also be subject to civil penalties of up to \$111,000. However, this is a relatively small financial penalty for highly profitable social media services, relevant electronic services and designated internet services and is unlikely to act as a disincentive.

Terminology

ACCAN notes that the Expectations require a service provider to “take reasonable steps” to, among other things:

- Ensure that end-users can use the service in a safe manner.
- Proactively minimise the extent to which material or activity on the service is or may be unlawful or harmful.
- Minimise provision of certain material.
- Prevent access by children to class 2 material.

We understand that the intention of using the terminology “take reasonable steps” is to provide flexibility for service providers to meet these Expectations, given the fact that traditional regulation may not suit the way content is created and delivered to users today.

We also note that the Expectations provide guidance to services on how to determine “reasonable steps” by requiring them to consult with the e-Safety Commissioner (section 7(1)), as well as by



including examples of “reasonable steps” for safe use, anonymous accounts, preventing children’s access to class 2 material in sections 6(3), 9(2), 10(2) and 12(2).

Despite this guidance, however, we are concerned that “take reasonable steps” is a compliance measure open to relaxed – and potentially ineffective - interpretation and implementation by service providers. The “reasonable steps” recommended in these sections are suggestions only, and not requirements.

Accessibility

ACCAN also welcomes the Expectation in section 16 that service providers make complaints information, terms of use and policies readily accessible to end users. ACCAN asserts that this ‘accessibility’ must also ensure that end-users with disability are able to have equal access to this information and related services.

In conclusion, ACCAN is pleased to see the Department strengthening the regulation to minimise the online harm consumers experience through misuse of social media and other electronic and online services. In particular, the development of Expectations for online services to systematically address consumer complaints is a positive step.

However, while ACCAN is pleased to see the Department taking action to protect children and adults from cyber-bullying and online abuse, pornographic and violent material and the sharing of non-consensual intimate images, we feel that stronger penalties and enforcement actions are needed in order to effectively enforce compliance by online services with the Expectations.

Sincerely

Wayne Hawkins

Director of Inclusion