

Friday, 1 August 2025

CC25-0070

Ms Melissa McIntosh MP
Shadow Minister for Communications
PO Box 6022
House of Representatives
Parliament House
Canberra ACT 2600

CC: *The Hon Sussan Ley, Leader of the Opposition*

CC: *Mr Ted O'Brien MP, Deputy Leader of the Opposition*

Dear Ms McIntosh:

I refer to 29 and 30 July press releases ('Has the eSafety Commissioner Gone Too Far?' and 'Albanese Government's YouTube U-turn') and wish to address some of your concerns. Before I do, I wish to acknowledge that I fully understand and share Australians' desire to protect privacy and personal freedoms, including those online. I also want to state clearly that the Search Engine Services Code was not drafted by eSafety, as I explain below. It is the responsibility of industry to prepare codes for assessment and registration by me.

I have tried to address the majority of the concerns in your press releases, but want to offer a full briefing for you and your staff, should you wish.

Background to the eSafety Commissioner

Like other statutory positions, including the Chair of the ACMA and the Australian Information Commissioner, the position of eSafety Commissioner (appropriately) is not an elected one. My roles and functions are set out in the *Online Safety Act 2021* (OSA), and I am accountable to the Australian Parliament through various means, including Senate Estimates hearings, committee inquiries, and annual reporting requirements. My decisions are also reviewable by the Administrative Review Tribunal, the Federal Court of Australia, and the Commonwealth Ombudsman.

As you know, the eSafety Commissioner was first created by the Abbott Coalition Government in July 2015 as the Children's eSafety Commissioner. The related Act (the *Enhancing Online Safety for Children Act 2014*) established the Commissioner as an independent statutory office. In 2017, the Commissioner's functions were expanded to broaden the general functions of the Children's eSafety Commissioner to cover online safety for all Australians, not just Australian children. In his 9 February 2017 second reading speech outlining the changes in the *Enhancing Online Safety for Children Amendment Bill 2017*, then-Minister for Communications Mitch Fifield noted that:

"The Children's eSafety Commissioner has been a huge success in enhancing online safety for children. The amendments proposed will assist the good work of the commissioner to continue to have a positive impact on a broader range of vulnerable Australians."

Then in 2021, while Minister for Communications, Paul Fletcher introduced the *Online Safety Bill 2021* to the Parliament stating that:

“In 2015 our government established the Children's eSafety Commissioner to support Australian children exposed to the risk of cyberbullying. In 2017 we expanded the commissioner's remit to include all Australians, renaming the office the eSafety Commissioner, and introduced a strong scheme to support victims of image-based abuse. Over six years of operation the eSafety Commissioner has established a reputation as an effective regulator, providing swift, practical assistance to people who have been exposed to harm online.”

Explaining the role played by mandatory industry codes in the Bill, Mr Fletcher said:

“The Australian government believes the digital industry must step up and do more to keep their users safe. That belief underpins the provisions of the Bill. The Bill will require new and updated industry codes to be developed.”

Accordingly, s 137 of the Act as passed states:

*“The Parliament intends that bodies or associations that the Commissioner is satisfied represent sections of the online industry should develop codes (**industry codes**) that are to apply to participants in the respective sections of the industry in relation to their online activities.”*

Mandatory industry codes of practice

As I acknowledge above, I understand and appreciate that Australians value their privacy and online freedoms. With these values in mind, I have considered and registered a number of the codes required under the OSA. These include six industry codes registered by me in 2023 that deal with the worst-of-the-worst online content, including child sexual abuse material and pro-terror material.

It is important for me to emphasise that **industry codes are not legislation**. Instead, they are drafted by trade associations representing the industry sectors to which they apply and include the individual companies that occupy the sector. Thus, these are industry's own codes. eSafety has a legislative requirement to consult with the trade associations while Codes are developed.

Once submitted, my role is to assess the codes against relevant statutory requirements, including the requirement that they provide appropriate community safeguards in relation to matters of substantial relevance to the community. If I am satisfied that the statutory test is met, I can register a Code. Under the Act, I have no power to draft the content of industry codes, or to amend a code.

The development of these codes occurred in two phases, with phase one focused on class 1 material such as child sexual abuse and exploitation material and phase 2 focused on class 2 material that is legally age-restricted including under the National Classification Scheme and inappropriate for children, such as online pornography.

In the first phase, I found two industry-drafted codes to be deficient (those relating to Relevant Electronic Services such as messaging and dating services; and Designated Internet Services such as some websites and generative artificial intelligence services), especially in their commitments to taking effective action against child sexual abuse material.

In their place, I implemented stringent industry standards. As delegated legislation, these standards were subject to the usual disallowance processes, which involved scrutiny by the Senate Standing Committee

for the Scrutiny of Delegated Legislation. The standards were also reviewed and considered by the Parliamentary Joint Committee on Human Rights.

More recently, my office has been engaging with industry on the second phase of codes development, dealing largely with the issue of children's access to online content that is harmful to them, such as pornography, and harmful materials like those promoting disordered eating, suicide and self-harm. As you know, I have now registered three industry-drafted codes through this process (including the Search Engine Services Code) and am considering a further six. My decision about registering these draft codes will be made soon.

Each code reflects a range of safety issues provided for in Part 9 of the OSA. These are matters that the Parliament saw fit to pass into law under a Coalition Government.

While I do not develop codes under the OSA, I do have the power under the Act to direct industry's compliance with them. This reflects the policy rationale underpinning the development of the *Online Safety Bill 2021* by the former Coalition Government and creates an important distinction between code creation (which is the responsibility of industry) and code enforcement (which is the responsibility of eSafety).

The making and enforcement of industry codes in this way is common. For example, the Australian Communications and Media Authority is responsible for enforcing compliance by the telecommunications industry with industry-developed codes such as the Telecommunications Consumer Protections Code.

Far from being opaque, the process of code creation has been publicly promoted by both my office and the responsible industry groups. For instance, in June 2024 eSafety published detailed guidance on my expectations in relation to the recent round of code-making via a position paper you can access here: [Development of Phase 2 Industry Codes under the Online Safety Act - eSafety Position Paper](#). This has been accompanied by successive media releases by me over the course of the Code development process, including the following:

- [eSafety receives final draft industry codes to protect children from porn and other high-impact content](#) (21 May 2025)
- [Industry submits draft Codes to protect children from high-impact content](#) (3 March 2025)
- [New world-first standards set new rules for how tech giants must tackle worst-of-the-worst online content | eSafety Commissioner](#) (19 December 2024)
- [eSafety statement on Social Media Minimum Age Bill | eSafety Commissioner](#) (21 November 2024)
- [eSafety statement: South Australia social media announcement | eSafety Commissioner](#) (9 September 2024)
- [Clock ticking for online industry to come up with plan to protect Aussie kids from porn | eSafety Commissioner](#) (2 July 2024) which received widespread media coverage including a front-page story in The Australian newspaper.
- In 2025 alone, we have put out four separate press releases about the status of the draft codes, for optimal transparency.

DIGI and Comms Alliance are the industry associations responsible for the drafting of the SES Code. Further, the OSA requires industry to both conduct public consultation on draft codes (for at least 30 days) and give consideration to public submissions received during that period. Industry conducted this consultation in October 2024. A website hosting the SES Code and the other registered and proposed Codes has been active since October 2024: [Codes-24 | Online Safety](#). Several versions of the draft

Codes have been published there, including the Codes which were subject to public consultation in October and November 2024 and submissions received during that consultation.

Misunderstandings about the Search Engine Services Code

Several misunderstandings have accompanied the public discussion about the SES Code, including in the Senate during a Motion of Urgency on 29 July 2025.

The first is that the code will ‘require every individual to have an account before they can freely use a search engine’. On the contrary, under the SES code search engines will continue to offer functionality to all users, even in a logged-out state. The Code notes that “Providers of internet search engine services are not required to implement age assurance measures for end-users who are not account holders”.

For logged-out users, harmful content such as suicide instructional material will be downranked, while authoritative sources and support services (such as crisis intervention lines) will be promoted when a user enters a search relating to suicide (see Compliance Measure 10 of the SES Code). In this state, users will also notice that sexually explicit or highly violent imagery is blurred by default, reducing the possibility that children and others will be confronted by explicit images unintentionally. Adults can opt in or out to these settings. These steps merely codify a range of existing practices that have long been practised by major providers of search engines like Google. We hope you would agree these are more than reasonable steps that industry can take to reduce unnecessary and inadvertent exposure of harmful material to Australians, and in particular young people and children.

As you note, search engines will be required to implement appropriate age assurance mechanisms. However, these apply only to individuals who have created accounts with a search engine provider and choose to use the service while logged in. Age assurance in this context is intended to ensure that the highest safety settings are applied where a service’s age assurance systems detect an account holder is likely to be an Australian child. However, as you will observe in the Code, it is also open to search engine services to also rely on other signals other than account-based age assurance to determine if a user is a child.

To be clear, the age assurance requirements under this code, as outlined in the Head Terms also drafted and published by industry, expand on existing practices already routinely applied where if a search engine recognises based on signals that an account holder is a child, safety settings are applied. For example, Google’s SafeSearch will already be applied and “*set to **Filter** automatically when Google’s systems indicate that you may be under 18*”: see [Secure Searches & Safe Results - Google Safety Center](#).

I should emphasise that the obligations of search engine services under the SES Code also need to be read against the Head Terms. These terms are intended as a set of uniform guiding principles applicable to all codes registered under the current codes process.

Importantly, the Head Terms specify a number of compliance measures, including at clause 5.1(b)(iii), which requires service providers to take account of:

“the importance of protecting and promoting human rights online, including the right to freedom of expression, the right not to be subjected to arbitrary or unlawful interference with privacy, the right to protection from exploitation, violence and abuse, and the rights and best interests of children, including associated statutory obligations”.

Further questions about the SES Code – including on any concerns about the sufficiency of public consultation or how the codes will be implemented by industry – should be directed to DIGI, via Managing Director Sunita Bose (sunita@digi.org).

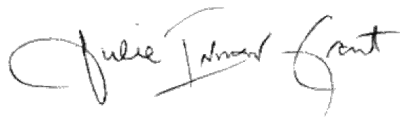
For ease of reference, I note that in the Request for Registration which was submitted to me and publicly published alongside the draft SES Code (available at [Request for Registration : Phase 2 Online safety codes](#)) industry representatives stated that:

“The approach taken in [the SES Code] strikes the right balance ... by:

- *Requiring default ‘blur’ settings to be applied where users are logged out ...;*
- *Requiring those default settings to be set to the strictest setting to filter out material for users identified as a child, either via age assurance mechanisms ... or otherwise via the provider’s systems ...; and*
- *preserving users’ ability to privately access pornography and other legal content, including where a user has specifically chosen to log out of their account. The Code puts protections in place to reduce the risk of these users being exposed to this material in search results, by requiring that material be blurred by default for all end-users ... and imposing measures to reduce unintentional exposure to material.”* (pp 99, 100)

As I note above, I would be very happy to organise to meet with you and your team to further discuss the matters raised in this letter. Amy Oram (amy.oram@esafety.gov.au) is the best contact should you wish to meet to discuss further.

Yours sincerely,



Julie Inman Grant
eSafety Commissioner