

Cyberbullying Scheme Regulatory Guidance

eSC RG 1

Updated November 2021



Contents

Overview of this guidance	2
Overview of the Cyberbullying Scheme	2
Key terms	3
Who is ‘an Australian child’?	3
What is ‘cyberbullying material’?	3
What is ‘seriously threatening, seriously intimidating, seriously harassing, or seriously humiliating’ material?	3
Is any material exempt from cyberbullying complaints?	3
Making a complaint to eSafety	4
Who can complain?	4
Complaint made by an Australian child	4
Complaint made on behalf of an Australian child	4
Making a complaint to online service providers first	4
Investigation of cyberbullying material	5
Approaches to compliance and enforcement	5
Informal requests	5
Formal actions	5
Compliance and enforcement options	6
Service provider notifications	7
What are service provider notifications?	7
When can eSafety issue them under the Cyberbullying Scheme?	7
What are the consequences of a service provider notification?	8
Removal notices	8
What is a removal notice?	8
When can eSafety issue a removal notice under the Cyberbullying Scheme?	8
What are the consequences of a removal notice?	9
End-user notices	9
What is an end-user notice?	9
When can eSafety issue an end-user notice?	9
What are the consequences of failing to comply with an end-user notice?	9
Taking enforcement action	10
Review rights	11
Find more information and support	11

Overview of this guidance

eSafety is committed to empowering all Australians to have safer, more positive experiences online.

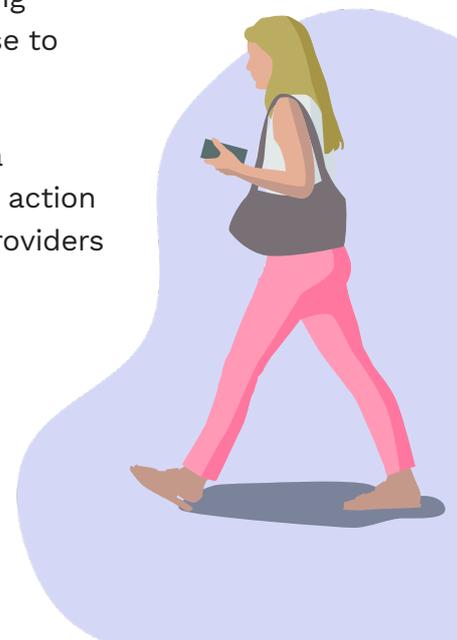
This information is for members of the general public (including children, parents, carers and educators), industry and other professionals who require further information about the Cyberbullying Scheme. It provides an overview of the actions available to eSafety under the Online Safety Act 2021 (the Act) to address cyberbullying of Australian children. It also explains how eSafety will generally interpret and apply the law when responding to reports of cyberbullying.

All decisions made by eSafety will be made on a case-by-case basis, considering the particular circumstances of each complaint received.

Overview of the Cyberbullying Scheme

The Online Safety Act 2021 includes a Cyberbullying Scheme which has the following regulatory features:

- 1. A system under which a person may make a complaint** about cyberbullying material that targets an Australian child. Generally, this system operates as a safety net, as the complainant must have first reported the material to the relevant online service provider before asking eSafety to issue a notice to the provider requiring removal of the cyberbullying material.
- 2. Investigative and information gathering powers** which allow eSafety to assess complaints about cyberbullying material targeting an Australian child and decide what action we can take.
- 3. Removal powers** which allow eSafety to issue notices to online service providers, and to people (end-users) who have posted cyberbullying material, requiring them to remove the material. Notices to end-users can also require that the person stop posting cyberbullying material directed to the targeted child and apologise to them.
- 4. Enforcement actions** available to eSafety where there has been a failure to comply with our notices. This includes taking injunctive action against end-users and seeking civil penalties for online service providers who fail to remove material in response to our notices.



Key terms

Who is ‘an Australian child’?

When the Act refers to ‘an Australian child’¹ it generally means any young person under 18 who ordinarily lives in Australia. This can include an Australian child who is travelling overseas temporarily.

eSafety cannot use its powers under the Cyberbullying Scheme to help a child who does not ordinarily live in Australia.

What is ‘cyberbullying material’?

Under the Act, cyberbullying material² means online communication to or about an Australian child that is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating. It can include posts, comments, emails, messages, memes, images and videos.

For eSafety to investigate, the material must target a specific child, not broad groups of unidentified children.

What is ‘seriously threatening, seriously intimidating, seriously harassing, or seriously humiliating’ material?

These terms are not defined in the Act and are intended to have their ordinary meaning. Cyberbullying material will not generally include material that is simply offensive or insulting.

Examples include:

- 1. Seriously threatening, seriously intimidating:** when someone posts or comments that they are going to harm a child, or encourages others to do it, such as saying ‘We’re going to wait outside your house and bash you when you come out’ or ‘If you stop talking to me I will post your address and phone number all over the internet.’
- 2. Seriously harassing:** when someone keeps sending messages to a child or persistently reposting material. Each message or post on its own may not be enough to be called cyberbullying material, but the repetition increases the impact.
- 3. Seriously humiliating:** when someone posts comments or images that seriously embarrass a child – this could be a video that shows them slipping over in mud at school then crying about having to wear dirty clothes all day, with captions and comments making fun of the child being clumsy and ‘acting like a baby’ about it.

Is any material exempt from cyberbullying complaints?

The Act recognises that a person in a position of authority over a child (such as their parent, carer, teacher or employer) may need to send, post or share material that could upset the child. If this action is considered reasonable in the circumstances, it will not be treated by eSafety as cyberbullying.³ For example, if a teacher posts class exam results online or an employer emails a young person to notify them of their dismissal, neither of those materials would meet the definition of cyberbullying.

¹Section 5 of the Act. ²Section 6 of the Act. ³Section 6(4) of the Act.

Making a complaint to eSafety

Who can complain?

A cyberbullying complaint may be lodged by the targeted child, a parent or guardian of the child or someone who is authorised by the child to complain on their behalf. The complaint can be made to eSafety through the online form on our website.

Complaint made by an Australian child

A cyberbullying complaint may be made by an Australian child if they have reason to believe they are, or have been, the target of cyberbullying material.⁴

The material must be, or have been, provided on:

- a social media service
- a relevant electronic service such as an email service, chat service, instant messaging service or an online game where end-users play against each other, or
- a designated internet service such as a website.

A person who has recently turned 18 can complain about cyberbullying material targeting them if both of the following additional conditions are met:

- the complaint is made within a reasonable time after the person became aware of the material; and
- the complaint is made within 6 months after the person reached 18 years of age.⁵

Complaint made on behalf of an Australian child

A responsible person may make a complaint on behalf of an Australian child if the person has reason to believe that the child is, or has been, the target of cyberbullying material on one of the online services listed in the previous section. This person can be a parent or guardian of the child, or a person the child has asked to make a complaint about the matter – for example, this could be a carer, teacher or police officer.⁶

Making a complaint to online service providers first

If the person making the complaint wants eSafety to issue a removal notice to an online service provider, they must show that they have made a complaint about the material to the relevant online service provider listed in the previous section.⁷ We will ask for this evidence through our online reporting form. eSafety cannot issue a removal notice until at least 48 hours have passed since the complaint was made to the relevant online service provider.

⁴Section 30(1) of the Act. ⁵Section 30(3) of the Act. ⁶Section 30(2) of the Act. ⁷Section 30(4) of the Act.

Many online services provide links or other methods for members of the public to report cyberbullying and they will have the material removed without help from eSafety. This is often the fastest way to get material removed. The [eSafety Guide](#) has more information about how to report cyberbullying to commonly used online services.

If the relevant online service provider supplies a receipt, reference or report number as part of its business processes, we will usually need to know that number. In cases where receipts are not provided, we will need a screenshot of the report or some other proof that it was made. Otherwise, a statutory declaration can be supplied – this is a legal document that contains a written statement saying something is true, which has been witnessed by an authorised person.

Investigation of cyberbullying material

eSafety is empowered to investigate complaints about cyberbullying material under the Act.⁸

Under the Act, eSafety may obtain information from such persons, and make such inquiries, as we think will help with our investigation of a cyberbullying complaint.⁹ eSafety may also end an investigation at any point.¹⁰

eSafety's investigative powers are set out in Part 14 of the Act. These powers include the ability to compel a person to answer questions and/or produce documents or other information.¹¹ eSafety has additional information-gathering powers under Part 13 of the Act to obtain end-user identity and contact information from the provider of a social media service, relevant electronic service or designated internet service.¹²

Approaches to compliance and enforcement

When seeking to have cyberbullying material removed, eSafety may take informal or formal action.

Informal requests

eSafety often approaches online service providers informally to ask them to remove cyberbullying material in the first instance. We find that this generally results in faster removal of material compared to formal action, which is a better outcome for the targeted child. This is also preferable for online service providers, particularly where they are committed to resolving the complaints we raise with them swiftly and amicably.

Formal actions

While we prefer to seek informal removal of material by online service providers, we will not hesitate to use our formal powers when we consider it appropriate.

⁸Section 31(1) of the Act. ⁹Section 31(2) of the Act. ¹⁰Section 31(5) of the Act. ¹¹Sections 197 to 205 of the Act. ¹²Sections 193 to 196 of the Act.

For example, if an online service provider has a history of not responding to our informal removal requests or there are other factors that suggest the online service provider is unlikely to respond to an informal removal request, we may decide to issue a removal notice without first approaching them informally for removal.

Compliance and enforcement options

Under the Act, eSafety can consider a range of formal compliance and enforcement options when investigating cyberbullying material.

Outcome	Formal action - end-user	Formal action - online service provider
<p>Put an online service provider on notice</p>		<p>Issue one of the following service provider notifications:</p> <ul style="list-style-type: none"> • a written notice informing an online service provider that material that meets the definition of cyberbullying is on its service • a statement informing an online service provider that material that meets the definition of cyberbullying and that breaches the service’s own terms of use is, or was, on its service on two or more occasions over the past 12 months. In addition, eSafety may publish this statement on our website.
<p>Require removal of content</p>	<p>Issue an end-user notice requiring the person who posted the cyberbullying material to do any or all of the following:</p> <ul style="list-style-type: none"> • take all reasonable steps to remove the material within a timeframe specified by eSafety • stop posting cyberbullying material targeting the child • apologise to the child in a way and timeframe specified by eSafety. 	<p>Issue a removal notice requiring the online service provider to remove the material within 24 hours (or a longer timeframe specified by eSafety).</p>
<p>Take enforcement action</p>	<p>Options for failing to comply with a requirement under an end-user notice:</p> <ul style="list-style-type: none"> • issuing a formal warning • seeking a court injunction. 	<p>Options for failing to comply with a requirement under a removal notice:</p> <ul style="list-style-type: none"> • issuing a formal warning • accepting an enforceable undertaking • seeking a court injunction • issuing an infringement notice • seeking a civil penalty order.

Service provider notifications

What are service provider notifications?

Generally, a service provider notification informs the online service provider that eSafety is aware that material which meets the definition of cyberbullying is on its service.

A service provider notification may be issued to the provider of a social media service, relevant electronic service or designated internet service.¹³

eSafety can issue two different types of service provider notifications, as set out in the next section.

When can eSafety issue them under the Cyberbullying Scheme?

Service provider notifications can be issued in two circumstances:

- A written notice may be used by eSafety to make an online service provider aware of cyberbullying material on its service following a complaint. We can issue this notice to an online service provider even if a complainant has not yet made a complaint about the matter to the online service provider. This is a quick way of putting the service provider “on notice” about cyberbullying material, and eSafety expects the notice would prompt the service provider to remove the material. eSafety may use this option where, for example, a less formal approach is likely to result in faster content removal. This type of service provider notification can only be issued with the consent of the complainant and does not give rise to enforcement options if the online service provider does nothing in response.¹⁴
- eSafety may provide a statement to an online service provider where cyberbullying material is, or was, available on the service on 2 or more occasions over the past 12 months. To issue this statement, the material must also have breached the service’s own terms of use. eSafety may also publish this statement on our website. The purpose of publishing this statement is to call out services that are not doing enough to combat cyberbullying.¹⁵



¹³Section 73 of the Act. ¹⁴Section 73(1) of the Act. ¹⁵Section 73(2) of the Act.

What are the consequences of a service provider notification?

A service provider notification is a less formal approach than issuing a removal notice and there is no enforcement action which arises from a failure to act after receiving such a notification. However, eSafety expects that an online service provider would take action to remove the content without the need for eSafety to issue a removal notice.

In addition, eSafety will consider an online service provider's response to any notifications when considering other regulatory options.

Removal notices

What is a removal notice?

A removal notice is a written notice requiring the recipient to remove cyberbullying material from a service within 24 hours or a longer timeframe specified by eSafety.

A removal notice may be issued to the provider of a social media service, relevant electronic service, designated internet service,¹⁶ or hosting service.¹⁷

Failure to comply with the notice enables eSafety to take a range of enforcement actions, from issuing a formal warning to seeking civil penalty orders.

When can eSafety issue a removal notice under the Cyberbullying Scheme?

Under the Cyberbullying Scheme, eSafety may issue a removal notice where:

- the material is, or has been, provided on a social media service, a relevant electronic service or a designated internet service
- the material was the subject of a complaint made to the provider of the service
- the material was not removed from the service within 48 hours after the complaint was made or such longer period as eSafety allows
- a complaint has been made to eSafety about the material, and
- eSafety is satisfied that the material is, or was, cyberbullying material targeted at an Australian child.¹⁸

A removal notice can also be issued to a hosting service provider where the material provided on a social media service, relevant electronic or designated internet service is hosted by a hosting service provider and the criteria listed in this section are met.¹⁹

The Act does not impose any time limits within which a removal notice must be issued.

The issue of a removal notice is ultimately at eSafety's discretion. This means eSafety makes the final decision about whether we will take action.

¹⁶Section 65 of the Act. ¹⁷Section 66 of the Act. ¹⁸Sections 65 and 66 of the Act. ¹⁹Section 66 of the Act.

What are the consequences of a removal notice?

A person must comply with a requirement under a removal notice to the extent that the person is capable of doing so.²⁰

Failure to comply with a removal notice may result in a civil penalty of up to 500 penalty units.²¹ eSafety may also consider several other enforcement options.

End-user notices

What is an end-user notice?

An end-user notice is a written notice to an end-user requiring them to do any or all of the following:

- take all reasonable steps to ensure the removal of the cyberbullying material from a specified service, and do so within the period specified in the notice
- refrain from posting cyberbullying material directed at the targeted child, and
- apologise to the child for posting the material and to do so within the period specified in the notice.²²

When can eSafety issue an end-user notice?

eSafety can issue an end-user notice when:

- the material is, or has been, provided on a social media service, a relevant electronic service or a designated internet service
- a complaint has been made to eSafety about the material
- eSafety is satisfied that the material is, or was, cyberbullying material targeted at an Australian child, and
- the material was posted on the service by a particular end-user of the service.²³

The Act does not impose any time limits within which an end-user notice must be issued.

The issue of an end-user notice is ultimately at eSafety's discretion. This means eSafety makes the final decision about whether we will take action.

What are the consequences of failing to comply with an end-user notice?

A person must comply with a requirement under an end-user notice to the extent that the person is capable of doing so.²⁴

Where a person fails to comply with an end-user notice, eSafety can take injunctive action or issue a formal warning.

²⁰Section 67 of the Act. ²¹The monetary value of 1 penalty unit is \$222 (until 30 June 2023) for individuals. In addition, the maximum penalty ordered against a corporation (which can include online service providers) can be 5 times more than the maximum penalty ordered against an individual. ²²Section 70 of the Act. ²³Section 70 of the Act. ²⁴Section 71 of the Act.

Taking enforcement action

Sometimes eSafety needs to go a step further, taking enforcement action against an end-user who has failed to comply with an end-user notice, or an online service provider who has failed to comply with a removal notice.

eSafety is empowered under the Act to address cyberbullying material through a range of actions. Where appropriate, eSafety takes a graduated approach to enforcement action.

Enforcement options available include the following:

- **Formal warnings.** A formal warning can be issued to either:
 - advise an online service provider that they have failed to comply with the requirements of a removal notice, and they could face further consequences if they continue to fail to comply, or
 - advise an end-user that they have failed to comply with the requirements of an end-user notice and they could face further consequences if they continue to fail to comply.
- **Enforceable undertakings.** An enforceable undertaking requires an online service provider to enter into an agreement with eSafety to ensure compliance with the Cyberbullying Scheme requirements. Once accepted by eSafety, the undertaking can be enforced by a Court.
- **Injunctions.** An injunction is an order granted by a Court to compel an end-user or online service provider to take certain actions, or to refrain from taking certain actions, to comply with the Cyberbullying Scheme requirements.
- **Infringement notices and civil penalty orders.** These require payment of a financial penalty and can be directed towards online service providers who do not comply with a removal notice.



Review rights

Certain actions taken by eSafety under the Cyberbullying Scheme can be reviewed internally and by the Administrative Appeals Tribunal. The purpose of these review rights is to ensure that we have made the correct and preferable decisions on a case-by-case basis.

Under the Cyberbullying Scheme, a review can be requested when a removal notice or end-user notice has been issued, or when eSafety has decided not to issue a removal notice for material that meets the definition of cyberbullying.

Action which can be reviewed	Who can seek review?
Issuing a removal notice	<ul style="list-style-type: none">• The online service provider that received the notice• The end-user who posted the relevant material
Issuing an end-user notice	<ul style="list-style-type: none">• Generally, a person whose interests are affected by the notice
Refusing to issue a removal notice	<ul style="list-style-type: none">• The targeted child, or with the targeted child's consent• The person who made the complaint about the material to eSafety

Find more information and support

For more information regarding cyberbullying, or to make a cyberbullying complaint to eSafety, please visit our website at esafety.gov.au.

If you are in Australia and you are in immediate danger, call police on Triple Zero (000). If you are 25 or under and need support, you can call Kids Helpline anytime on 1800 55 1800. If you are 25 or over, please call Lifeline on 13 11 14.

