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SUBMISSION

TO

SENATE ENVIRONMENT AND COMMUNICATIONS LEGISLATION COMMITTEE

ON

Enhancing Online Safety for Children Bill 2014 and Enhancing Online Safety for Children (Consequential Amendments) Bill 2014

JAN 2015

Australian Council on Children and the Media: Submission to the Senate Environment and Communications Legislation Committee Jan 2015:

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Introduction

The Australian Council on Children and the Media (ACCM) is a peak national community organisation with major children's organisations as members.

Its core business is the collection and review of research on the impacts of media on children's development; the dissemination of reliable information and strategies for healthy use of media to parents and children's professionals via its website, seminars, publications; the production of child-development-based reviews of media to support parents' choices; and advocacy on behalf of children to industry and regulators for a healthy media environment.

This submission has been prepared on behalf of the Board of ACCM by Prof Elizabeth Handsley, President ACCM and Barbara Biggins OAM, Hon CEO. ACCM is happy to expand on issues raised in this submission should the Committee require it.

ACCM thanks you for the opportunity to contribute to the review of this legislation. While we support all efforts to keep children and young people safer online, we have reservations about certain elements of the package.

Limitation to cyberbullying

ACCM is disappointed to see the Government's election promise honoured only in part, and moreover in our view there are other online safety issues that require attention more urgently than cyberbullying. The Explanatory Memorandum (EM) itself recognises that cyberbullying may not be as significant an issue as it seems to the community:

> Police understandably avoid investigating low level matters where the offender is a juvenile and prefer youth cyber-bullying matters to be dealt with by schools or other agencies outside the criminal justice system. … <u>This situation is likely to be contributing to a perception that cyber-bullying is not currently adequately addressed nor does it carry any consequences for the perpetrator.</u> (Appendix E, p 48; emphasis added)

The Coalition's policy statement in 2013 itself recognised the risks of 'being groomed by a paedophile [and] becoming exposed to violent, pornographic or other age-inappropriate content' (*The Coalition's Policy to Enhance Online Safety for Children*, p 4). Examples of the latter category that we can identify would include content that encourages suicide or pro-anorexia sites. To the Coalition's list we would add children's online privacy (especially in relation to corporate marketing); and sexting, which may or may not meet the description of cyberbullying. It is disappointing to see all these issues left aside by this legislation. The coverage is so partial as to make the title 'Enhancing Online Safety for Children' almost a misnomer.

There is evidence that encounters with many of these areas also causes children distress (see Green, Lelia 2013a, b). We believe that children's online privacy, in particular, requires more urgent attention than cyberbullying because, as the EM demonstrates, there are already at

least some measures in place to address cyberbullying. There is no legal or regulatory protection for children's online privacy.

We note that the role of administering the *Online Content Scheme* (OCS) is to be transferred to the Commissioner. This Scheme also does not deal effectively with the above areas of concern.

Insufficient attention to role of parents

There is very little in the legislation or the EM about either the interests or the responsibilities of parents. The EM makes repeated reference to the Commissioner working with police and schools but we believe that parents are an important part of this picture too, even in enforcement (see below on Procedure), but certainly in educating and supporting children and young people to avoid becoming cyberbullies. As the respondents in the Synthesis Report referred to in the EM considered: 'Educating the general public, particularly parents, [is] as important as educating young people.' (p12 – emphasis added)

ACCM notes with interest the statement that research shows parents expect teachers to educate children to be safe online (EM p 21). We believe that the most effective program will be one that moves away from this expectation, but rather builds a strong partnership between schools and parents. This is especially so in light of the risk that parents' own online practices can unintentionally undermine the messages from any school-based programme. The Committee should take into account the fact that we are now moving into a period where parents have themselves grown up in the internet age, but before effective cybersafety and anti-bullying programs were in place. We cannot assume that their attitudes and information needs will be the same as those of previous generations.

Moreover, more and more children are starting to access the internet before they start school. This underlines once again the importance of parents and the home environment in shaping the experience children have online, and keeping them safe. (It also, of course, suggests a need for programs in early childhood settings.)

ACCM also detects something of an 'elephant in the room' in this discussion, namely the number of young children who have unsupervised access to internet-enabled devices (EM pp 14-15). The legilation as currently drawn appears to see this as unproblematic from a policy point of view, or at least something that need not be addressed. We disagree. There is a role for government in setting up at least a conversation about how old a child should be before he or she is provided with a smart phone or similar device.

Closer attention to the role of parents would be consistent with the UN Convention on the Rights of the Child (UNCROC - see esp articles 3(2), 5, 18(2) and 29(1)(c)) and with the Coalition's election promises (*The Coalition's Policy to Enhance Online Safety for Children*, pp 6-7).

Procedure

ACCM supports the decision of the legislators not to create a new criminal offence and we are pleased to note the statements in the EM that 'the Government is wary of imposing fines on children' (p 49) and that criminal proceedings increase the trauma for everybody (p 54).[1] However we take it slightly further, to conclude that where both the alleged victim and the alleged perpetrator are children, the emphasis should be on restorative justice. In this we

[1] As an aside, though, we wonder if there is an error in the EM, where it refers to the prospect of a lower penalty where the victim is a child – we presume this meant to say where the alleged *perpetrator* is a child? We see no justification for lowering a penalty because of the age of the victim; if anything it should be higher, other things being equal.

support the existing approach as reported at p 18 of the EM. We believe that the difference between a Government-issued take-down notice and a criminal or other punishment, in terms of appropriateness for a child, is likely to be one only of degree, and even then not necessarily a great degree. Therefore great care needs to be taken to protect the needs and interests of all parties, including and especially the alleged perpetrator.

In any case the legislation, having eschewed a criminal procedure, should be very clear what procedure is to be used in reaching a conclusion that a child has committed cyber-bullying, and in deciding what response is appropriate. At the moment the Bill leaves the broadest possible discretion as to procedure, stating that an investigation of a complaint 'is to be conducted as the Commissioner thinks fit' (cl 19(2)). We note that cl 12 requires the Commissioner to 'have regard to' the UNCROC 'as appropriate' but we would have more confidence in the package if it set out very clearly the requirements of due process, a preference for a restorative justice approach and that the interests of both children (alleged victim and alleged perpetrator) are to be treated as a primary consideration.

To the extent that restorative justice is to be incorporated into the system, this is another reason to pay greater attention to the needs and interests of parents, because naturally they would have a significant role to play in any such process.

Role of child development expertise

ACCM has long experience in examining and commenting on regulatory systems for the protection of children as media consumers, and a persistent theme is the haphazard nature of reference to research and expertise on child development. We believe that such reference is essential to ensure that a regulatory system is effective in protecting children from harm, as distinct from simply applying subjective and value-laden moral precepts to decisions about what media experiences children should, and should not, have. Other risks are that harms inherent in new kinds of media and content will not be recognised because decision-makers have no experience of them, or misconceptions will abound regarding things like how to recognise whether a child has been harmed by a certain media experience. Only credible research and professional expertise can tell us what is harmful to children.
These matters are too important to leave to chance, therefore all enabling legislation, including this, should mandate mechanisms for including up-to-date child development research at all stages of the decision-making process. Ideally we think that the Commissioner should be required to have formal qualifications in a child development-related field, but at the very least there should be a formal role in decision-making for people who have such expertise. It is also necessary to build in mechanisms for ensuring that the research base for decision-making is reviewed regularly, so that it is up to date.

Situating the Commissioner within the ACMA

We have already noted our disappointment that the package focusses almost solely on cyberbullying, at the expense of other online experiences that can be harmful to children. No doubt the Government had its reasons for singling it out but to us it appears an odd choice of a children's online safety issue for two reasons: first it is not uniquely a child's experience, and second bullying is not uniquely an online experience.

Adults can be cyber-bullied too (though it's more often called 'trolling') and it can be just as devastating, even if the EM is correct in its assertion that generally speaking the impact of cyberbullying on children is greater than that on adults. We are not convinced that there is any warrant for framing this as 'the' children's online safety issue, when the other issues we mentioned above (for example privacy) have a special resonance for children that is much stronger.
Perhaps more tellingly, cyberbullying is more of an interpersonal issue than an internet use issue. It is true that the internet enables bullying content to spread faster and further and it is

harder for the victim to feel safe from it – but these are differences of degree, not kind. Similarly with the point frequently suggested that people feel more confident to bully online because they may (think they) have anonymity: it does not change the fundamental nature of the interpersonal exchange, where one is exerting power over another in a harmful way. As the Synthesis Report summarises the views of some respondents to that survey, 'bullying is … a relationship problem and cyberbullying is an online social relationship problem – both require relationship solutions.' (p 10) This would explain why, as that Report indicates, changes that agencies have needed to make to address cyberbullying have been of a practical nature, for example 'recruiting staff who are themselves users of social media in order to be able to better understand and intervene in the online environment.' (p 6) There is no suggestion of a need to change staff's fundamental expertise.

This observation also opens up a question as to whether the ACMA is the most appropriate home for a Commissioner whose sole (or primary) job is to address cyber-bullying. Another relevant factor would arise if the Parliament were to take our suggestion and build restorative justice principles into the package.

If we accept that cyberbullying among children is deserving of separate treatment from that among adults, then we submit that it should be dealt with in the context of other matters relating to children's well-being, for example within the portfolios of education or even health, considering how many of the sequelae of bullying resonate in mental health. While we welcome the transfer of the functions of the OCS to a body whose main or sole aim is to protect children from harm and hope that that can lead to a more focussed and effective approach within that Scheme, we underline that the capacity to protect children from harm is only as good as the input provided from child development research and experts. Therefore these concerns could be addressed, in part, with the measures suggested above under the heading 'role of child development expertise'.

On the other hand, those measures would not be able to equip an ACMA-based Commissioner with the experience and expertise to deal with cyberbullying as a relationship issue, for example by implementing a restorative justice approach, or to ensure compliance with the letter and spirit of the UNCROC. For this reason the functions of the Commissioner would be better entrusted to an agency such as the Australian Human Rights Commission or the Family Court.

Addressing degrees of seriousness

At pp 48-49 the EM indicates the Commissioner will come in between school-based enforcement (low-level activity) and police enforcement (serious activity); see also the statement on p 28 under 8.2, about focussing on complaints that cannot be more appropriately handled by schools or the police. All of this seems to indicate that the intent is for the Commissioner to address mid-level activity. This seems sensible to us.

However, the Bill's definition of cyberbullying is stronger than that used in the existing criminal provision (*Criminal Code Act*, s 474.17): the former uses 'likely to have the effect on the Australian child of seriously threatening, seriously intimidating, seriously harassing or seriously humiliating the Australian child' (emphasis added) whereas the latter only refers to using a carriage service 'in a way ... that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.' This suggests that to get a take-down notice, one needs to do something worse than what is needed to get 3 years in prison.

We believe this demonstrates a degree of confusion in the current Bill about exactly where the Commissioner and the complaints process are to sit within the current mechanisms, and/or the best way of defining cyberbullying to ensure that result. If true, this clearly needs further attention.

References

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FOR FURTHER INFORMATION
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