

Chapter 2

Key issues

Introduction

2.1 Evidence to the inquiry revealed significant support for the bills from submitters working in the field of children's rights, and qualified support from the social media industry. This chapter discusses the following main issues raised in submissions:

- the harm caused by cyber-bullying and need for legislation;
- the Children's e-Safety Commissioner, particularly the qualifications of the Commissioner, the location of the Commissioner's Office and the decision-making principles that guide the Commissioner;
- the definition of cyber-bullying;
- the definition of social media service, particularly the meaning of 'sole or primary purpose'; which social media services are covered by the bills; and issues around delegated legislation;
- enforcement powers of the Commissioner, particularly concerns around the timeframe for complaints and the removal of cyber-bullying material, the investigation of complaints and the use of end-user notices; and
- compensation for services complying with requests from the Commissioner.

Harm caused by cyber-bullying and need for legislation

2.2 In the second reading speech to the Online Safety bill, the Parliamentary Secretary to the Minister for Communications explained the prevalence and impact of cyber-bullying:

The research found that the best estimate of the prevalence of cyberbullying over a 12-month period is 20 per cent of Australians aged eight to 17, with some studies putting that figure as low as six per cent and others as high as 40 per cent.

This is within the range of estimates of other international studies, and is consistent with previous work done by the Australian Communications and Media Authority, which found that 21 per cent of 14- to 15-year-olds and 16 per cent of 16- to 17-year-olds had reported being cyberbullied.

The research found that most incidents of cyberbullying occurred on social media—and that the prevalence of cyberbullying has 'rapidly increased' since it first emerged as a behaviour.¹

1 The Hon Paul Fletcher MP, Parliamentary Secretary to the Minister for Communications, *House of Representatives Hansard*, 3 December 2014, p. 14037.

2.3 The Department of Communications (the department) also explained that while there is a strong overlap between bullying and cyber-bullying, the community has identified cyber-bullying as a major problem:

While bullying itself is not a new problem, with children spending ever more of their time online, social media services and other forms of electronic communication have become a new forum for bullying and this has resulted in increased opportunities and methods for bullying to occur and increased harm to children. Research supports the need for cyber-bullying of children to be addressed. As many victims pointed out, when they are physically bullied in the playground, they at least know that they are safe for a while when they get home. But if looking at a smartphone or a computer immediately exposes a victim to a stream of derision, ridicule or hatred, then they are less able to escape the bullying.²

2.4 A number of submissions received by the committee described the prevalence and harm of cyber-bullying.³ The Australian Medical Association (AMA) stated:

The AMA recognises that cyber-bullying among children and young people is a significant health and welfare issue. Research about the impacts of cyber-bullying is still in its infancy, but there is a strong suggestion that the long-term impacts of cyber-bullying are serious, including a potentially increased risk of suicidal thoughts and suicide. Detrimental health impacts have been observed in children who participate in bullying, as well as those who experience bullying.⁴

2.5 The majority of submissions were supportive of the general intent of the bill and noted the importance of the bill in enhancing online safety for children and young people.⁵ Various submitters, while supporting the bill, also highlighted that much is already being done to protect children online. A number of industry participants, including Optus and Telstra, set out the work they are doing to support online safety,⁶

2 Mr Rohan Buettel, Assistant Secretary, Department of Communications, letter dated 9 February 2015, *Additional Document 1*, p. 3.

3 See Youth Off the Streets, *Submission 9*, pp 2–3.

4 Australian Medical Association, *Submission 23*, p. 1.

5 See Victorian Catholic Schools Parent Body, *Submission 2*, p. 1; Telstra, *Submission 6* p. 1; Federation of Ethnic Communities Councils of Australia, *Submission 7*, p.1; Families Australia, *Submission 8*, pp 1–2; Youth Off the Streets; *Submission 9*, p. 5; Association of Heads of Independent Schools of Australia, *Submission 11*, p. 1; Netsafe, New Zealand, *Submission 13*, p. 1; Project Rockit, *Submission 15*, p. 1; Youth Affairs Council of Western Australia, *Submission 16*, p. 1; Child Wise, *Submission 19*, p. 1; NAPCAN, *Submission 20*, p. 1; Commissioner for Children and Young People Western Australia, *Submission 22*, p. 1; Australian Medical Association, *Submission 23*, p. 1; The National Children's and Youth Law Centre and the Social Policy Research Centre, *Submission 24*, p. 1; Law Council of Australia, *Submission 25*, p. 1; Commissioner for Children and Young People Victoria, *Submission 27*, p. 1.

6 Optus, *Submission 1*, pp 4–5; Interactive Games and Entertainment Association, *Submission 5*, p 1; Telstra, *Submission 6*, p. 1; Australian Interactive Media Industry Association's Digital Policy Group, *Submission 17*, pp 10–14.

and a number of submitters highlighted the efforts of schools and not-for-profit organisations in tackling cyber-bullying.⁷

2.6 The importance of legislation in this area was highlighted by the National Children's and Youth Law Centre and the Social Policy Research Centre's (NCYLC) submission.⁸ The NCYLC stated that it is contacted daily by children who are unable to resolve serious cyber-bullying incidents without the help of a legal advocate:

Each day, we send legal advice outlining the applicable terms of use and the relevant civil, administrative, quasi-criminal and criminal legal options. Unfortunately, what we currently see is mostly an inability to enforce these terms and laws. Reports to schools are often ineffective, reports to social media sites are often rebuffed and reports to the police often go unaddressed. Whereas an enterprising (and affluent) adult might send a cease and desist letter drafted by a lawyer, apply for an urgent injunction, initiate defamation proceedings, or take out a restraining order if circumstances permit, a vulnerable child is left to watch the number of followers on a hate page increase by the minute and wonder why children are encouraged to report bullying if nothing is going to be done about it. We strongly believe that this Bill and the Children's e-safety Commissioner have the potential to do something about it.⁹

2.7 However, a few submitters opposed the bill on the basis that regulatory intervention is not required as current voluntary measures are working, laws are already sufficient, and regulation would, in any event, be unlikely to have any material impact on cyber-bullying.¹⁰ The Interactive Games and Entertainment Association (IGEA), for example, urged caution to ensure children are not pushed away from responsible platforms which already cooperate to remove harmful material, towards social media services outside the regulatory reach of Australian law.¹¹ In addition, the Australian Council on Children and the Media (ACCM) submitted that it was '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'.¹²

7 Association of Heads of Independent Schools of Australia, *Submission 11*, p. 3 & 6; Project Rokit, *Submission 15*, p. 1; Australian Psychological Society, *Submission 21*, pp 3–4; Australian Library and Information Association, *Submission 28*, pp 3–4.

8 National Children's and Youth Law Centre and the Social Policy Research Centre, *Submission 24*.

9 National Children's and Youth Law Centre and the Social Policy Research Centre, *Submission 24*, p. 4.

10 See Australian Information Industry Association, *Submission 10*, p. 2; Institute of Public Affairs, *Submission 18*, pp 5–6.

11 Interactive Games and Entertainment Association, *Submission 5*, pp 1–2.

12 Australian Council on Children and the Media, *Submission 14*, p. 2.

Children's e-Safety Commissioner

2.8 The majority of submitters supported the establishment of the Children's e-Safety Commissioner (the Commissioner),¹³ particularly the function of the Commissioner in taking a national leadership role in online safety for children. However, the committee received comments on a range of specific matters which some submitters considered should form part of the functions of the Commissioner.

2.9 Clause 15 of the Online Safety Bill lists 16 specific functions of the Commissioner, in addition to the Commissioner's general functions under the bill (and any functions that may subsequently be specified in the legislative rules). The Commissioner for Children and Young People Victoria supported the list of functions in the bill but suggested further provisions should be included to ensure the Commissioner 'is specifically required to consider and respond to the needs of those children in the community who are most vulnerable, particularly those in Out of Home Care.'¹⁴

2.10 Other submitters noted the importance of the Commissioner consulting with, and developing strategies in relation to, specific groups, including children and young people, Aboriginal and Torres Strait Islander children and young people, schools and the Australian Human Rights Commission.¹⁵

2.11 The department acknowledged that there may be groups of children and young people who are particularly vulnerable to cyber-bullying. However, the department explained:

The Bill is intended to encompass all Australian children, including those in the groups identified. In practice, the Commissioner can be expected to develop strategies for those who are most vulnerable to cyber-bullying.¹⁶

13 See Victorian Catholic Schools Parent Body, *Submission 2*, p. 1; Federation of Ethnic Communities Councils of Australia, *Submission 7*, p.1; Families Australia, *Submission 8*, pp 1–2; Youth Off the Streets; *Submission 9*, p. 8; Association of Heads of Independent Schools of Australia, *Submission 11*, pp 1–2; Netsafe, New Zealand, *Submission 13*, p. 1–2; Youth Affairs Council of Western Australia, *Submission 16*, p. 1; NAPCAN, *Submission 20*, p. 1; Australian Psychological Society, *Submission 21*, p. 1; Commissioner for Children and Young People Western Australia, *Submission 22*, p. 1; Australian Medical Association, *Submission 23*, p. 2; The National Children's and Youth Law Centre and the Social Policy Research Centre, *Submission 24*, p. 4; Law Council of Australia, *Submission 25*, p. 1; Commissioner for Children and Young People Victoria, *Submission 27*, p. 1.

14 Commissioner for Children and Young People Victoria, *Submission 27*, p. 2.

15 See The Association of Heads of Independent Schools of Australia, *Submission 11*, pp 2–3; Project Rockit, *Submission 15*, p. 3; Australian Psychological Society, *Submission 21*, p. 3; Commissioner for Children and Young People Western Australia, *Submission 22*, p.4; Commissioner for Children and Young People Victoria, *Submission 27*, p. 2.

16 Mr Rohan Buettel, Assistant Secretary, Department of Communications, letter dated 9 February 2015, *Additional Document 1*, p. 5.

2.12 The department also noted that paragraph 15(1)(l) of the Online Safety bill requires the Commissioner to consult and cooperate on the issue of online safety for children with other persons, organisations and governments, and concluded:

The Department expects that the Commissioner will consult and cooperate with the relevant organisations and groups noted by the various stakeholders...Once appointed, the Commissioner will be expected to establish formal consultation mechanisms with representatives of schools and also formulate and promote best practice guidelines.¹⁷

Qualifications of the Commissioner

2.13 A number of submissions argued that the eligibility criteria for the appointment of the Commissioner should include experience in, or knowledge of, child welfare or wellbeing. Subclause 50(2) of the bill requires that a person will be eligible for appointment as Commissioner if the Minister is satisfied that he or she has substantial experience or knowledge and significant standing in four listed fields, which do not include child welfare or safety. The Law Council of Australia submitted:

Given the position is focused on ensuring the wellbeing of children and that the Commissioner will have the ability to disclose material to, for example, teachers, parents, principals, police and guardians in order to resolve a complaint, it would seem essential that the Commissioner is required to possess appropriate skills and expertise with respect to young people.¹⁸

2.14 The ACCM submitted:

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.¹⁹

2.15 The NCYLC also argued that the Commissioner should have experience and standing in child rights protection and in working closely with children at risk of, or experiencing, harm.²⁰ The Commissioner for Children and Young People Western

17 Mr Rohan Buettel, Assistant Secretary, Department of Communications, letter dated 9 February 2015, *Additional Document 1*, p. 5.

18 Law Council of Australia, *Submission 25*, pp 1–2.

19 Australian Council on Children and the Media, *Submission 14*, p.4.

20 National Children's and Youth Law Centre and the Social Policy Research Centre, *Submission 24*, p. 9.

Australia also noted that, as the role of the Commissioner would include functions about online safety for children, the qualifications for the position should also include a requirement for experience in or knowledge of child welfare or wellbeing, with a focus on research or advocacy.²¹

2.16 The department explained why reference to child welfare or wellbeing was not included as an eligibility criteria in the bill:

The Department understands the emphasis that stakeholders place on experience or knowledge of child welfare or wellbeing. However, the Commissioner needs to be a person with a deep understanding of the internet and how it is used. The Commissioner will also need to be someone that has strong credibility with social media services. It is these critical success factors for the role that the Government considers must be specified as requirements in the legislation; but of course there are a range of other factors which would also be positives for a person in this role. There is danger in providing an exhaustive list because it may well be very difficult to find somebody who meets every criterion on such a list – hence the decision to limit the list of criteria to the ones considered to be critical success factors for the role.²²

Location of the Commissioner's Office

2.17 The bill outlines that the Commissioner will be an independent statutory office within the ACMA. A number of submitters suggested either that the Commissioner should be co-located with the Australian Human Rights Commission (AHRC), and/or the Commissioner's functions should be added to those of the National Children's Rights Commissioner.²³ The NCYLC explained that it considered it important to co-locate the Commissioner with the AHRC because:

...the ACMA's predominant culture as an industry regulator is not the ideal environment for what should be seen to be a predominantly child rights and protection function. For this reason, we recommend that consideration should be given to co-locating staff and sharing resources with the Australian Human Rights Commission, should that Commission be so willing. The Australian Human Rights Commission already has significant experience in traditional (offline) bullying and harassment and is developing its expertise in online bullying and harassment. It is also far more expert than the ACMA in the relational underpinnings of person-to-person bullying and harassment and discrimination which is at the core of much bullying.

21 Commissioner for Children and Young People Western Australia, *Submission 22*, p. 4.

22 Mr Rohan Buettel, Assistant Secretary, Department of Communications, letter dated 9 February 2015, *Additional Document 1*, p. 7.

23 For expressions of this general position see Families Australia, *Submission 8*, p. 2; Australian Council on Children and the Media, *Submission 14*, pp 4–5; Youth Affairs Council of Western Australia, *Submission 16*, p. 1; Commissioner for Children and Young People Western Australia, *Submission 22*, p. 3; National Children's and Youth Law Centre and the Social Policy Research Centre, *Submission 24*, pp 10–11.

Such a co-location would also leverage the experience of the National Children's Commissioner and the Australian Human Rights Commission's considerable expertise in community education, promotion and research. Importantly, the Australian Human Rights Commission already has at its disposal experienced complaints officers and complaints resources, including the necessary complaints software, infrastructure and data and complaints management expertise. We consider that these resources could be "leased" by the Children's e-Safety Commissioner from within its own budget rather than being purchased and developed entirely anew.²⁴

2.18 Others submitted that, even if the Commissioner was not co-located with the AHRC, the Commissioner should work closely with that body. For example, the Australian Psychological Society submitted:

While not in a position to comment on the appropriateness of ACMA as this body, the APS recommends that the Commissioner also work closely with the Australian Human Rights Commission, in particular the National Children's Commissioner, to ensure that e-safety is framed as a broader child development/rights issue.²⁵

2.19 In addition, though it did not reference the AHRC, the Australian Library and Information Association considered that addressing online safety for children should take into account existing programs, and that activities and funding for the new Commissioner could be better directed through expanding or refocusing existing channels.²⁶

2.20 The department provided the following response to these concerns and explained why the decision was made to locate the Commissioner within ACMA rather than the AHRC:

The core rights-based advocacy function of the National Children's Commissioner and the Human Rights Commission more broadly is considered inconsistent with the complaints handling role proposed for the Commissioner. The role of the National Children's Commissioner is effectively a 'rights-based' advocacy function rather than a technical or regulatory function...the Commissioner needs to be a person with a deep understanding of the internet and its usage, along with credibility with the social media industry.

The ACMA is well suited to support the Commissioner with significant synergies in respect of existing function such as the Online Content Scheme, which has a strong focus on child sexual abuse material.

24 National Children's and Youth Law Centre and the Social Policy Research Centre, *Submission 24*, pp 10–11.

25 Australian Psychological Society Limited, *Submission 21*, p. 3.

26 Australian Library and Information Association, *Submission 28*, p. 3.

The Commissioner will co-ordinate with the National Children's Commissioner and draw upon advice from child-development experts as necessary.²⁷

Decision making principles

2.21 Some submitters raised concerns that the Online Safety bill does not require the Commissioner to have regard to the best interests of the child when taking any action. In particular, the Law Council of Australia argued:

...the Commissioner should explicitly have regard to the principle of the best interests of the child. Although the Explanatory Memorandum states that '[i]n performing his or her functions under clause 15, the Commissioner will be expected to balance the rights and responsibilities of all stakeholders with the need to take proportionate and appropriate action in the best interests of children', this is not explicit in the Bill.²⁸

2.22 The NCYLC also stated it was 'troubled by the conspicuous absence of children's rights to have their best interests be the paramount consideration in all actions concerning them' and went on to state that 'this should be the fundamental guiding principle of the Act'.²⁹ The ACCM also submitted it would have more confidence in the bill if it set out clearly 'the interests of both children (alleged victim and alleged perpetrator) are to be treated as a primary consideration'.³⁰

2.23 The department noted that the principle of the best interests of the child is set out in the Convention on the Rights of the Child. It noted that clause 12 of the Online Safety bill states that the Commissioner must, as appropriate, have regard to this Convention in performing his or her functions under this bill. The department therefore considered that clause 12(1) 'will have the effect of requiring the Commissioner to consider 'the best interests of the child'.³¹

Definition of cyber-bullying

2.24 Clause 5 of the bill sets out the criteria for determining whether material is 'cyber-bullying material targeted at an Australian child'. If it is, then the Commissioner can investigate a complaint made about such material, request that it be removed or give a notice for its removal. The test includes:

- that the material is provided on a social media service or relevant electronic service; and

27 Mr Rohan Buettel, Assistant Secretary, Department of Communications, letter dated 9 February 2015, *Additional Document 1*, p. 7.

28 Law Council of Australia, *Submission 25*, p. 2.

29 National Children's and Youth Law Centre and the Social Policy Research Centre, *Submission 24*, p. 4. See also Commissioner for Children and Young People Western Australia, *Submission 22*, p. 2.

30 Australian Council on Children and the Media, *Submission 14*, p. 4.

31 Mr Rohan Buettel, Assistant Secretary, Department of Communications, letter dated 9 February 2015, *Additional Document 1*, p. 6.

- that the material would be likely to have the effect on the Australian child of 'seriously threatening, seriously intimidating, seriously harassing or seriously humiliating the Australian child'.

2.25 The Parliamentary Secretary to the Minister for Communications explained, in his second reading speech on the Online Safety bill, that this definition was developed after careful consideration of a number of sources, noting:

There is an important balance to be struck here. On the one hand we seek to capture the full breadth of cyber-bullying material. On the other hand we do not want a regulatory scheme which is excessive or heavy handed and which regulates material that does not need to be regulated.

Striking this balance is particularly important given the power conferred on the commissioner by the bill—to have material removed at very short notice if the commissioner concludes that it is cyber-bullying material targeted at an Australian child.

In other words, it is important that we do not set the bar too low—but equally it is important that we do not set the bar too high.³²

2.26 Some submitters considered that, with the inclusion of the word 'seriously', this definition did in fact set the bar too high. For example, the NCYLC submitted:

We believe that including the word "seriously" sets an unduly high threshold which does not align with the current normative definitions of cyber-bullying and which undermines the intent of the Bill to position the cyber-bullying complaints mechanism as an alternative to criminal investigation processes...

We note that there are a variety of existing civil, administrative, quasi-criminal and criminal laws intended to address threatening, harassing, intimidating or humiliating behaviour which do not require a court to find that the effects on the victim are likely to be "serious"...

The threshold test for a criminal conviction is, therefore, lower than the threshold test for cyber-bullying material targeted at an Australian child. As a result, the Bill will not achieve its goals of facilitating low level resolution of online disputes and in particular of directing appropriate matters away from the criminal justice system.³³

2.27 The ACCM also submitted that there is some confusion in the bill about where the Commissioner sits in the complaints process, as the inclusion of the word 'seriously' sets a higher bar than that required by the criminal law:

...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,

32 The Hon Paul Fletcher MP, Parliamentary Secretary to the Minister for Communications, *House of Representatives Hansard*, 3 December 2014, p. 14039.

33 National Children's and Youth Law Centre and the Social Policy Research Centre, *Submission 24*, pp 5–7.

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.³⁴

2.28 The Commissioner for Children and Young People Western Australia also expressed concerns about the definition, noting that there is no mention of the frequency or intensity of incidents that would reach the threshold for 'serious' behaviour, and highlighting that cyber-bullying is just one way among many that bullying can take.³⁵

2.29 In contrast, the Australian Interactive Media Industry Association's Digital Policy Group (AIMIA DPG) supported the definition in the bill:

In our experience, from working closely with child safety experts, this definition is consistent with experts' understanding of what constitutes cyber-bullying. The inclusion of this definition, in our view, will ensure that the legislation is narrowly targeted to focus the harm that it is designed to address and should not have broad, unintended consequences of regulating content, often posted by young Australians, that others find distasteful but is not harmful.³⁶

2.30 The department disagreed with the view that the definition of cyber-bullying sets too high a threshold:

The Department has noted these concerns but respectfully disagrees that the definition is too narrow. The criminal provisions such as section 474.17 of the *Criminal Code Act 1995* (Cth) apply to a broader range of behaviour than cyberbullying. Consequently, the definition is in broader terms. The Department notes that, in practice, prosecutions under the criminal provisions occur in serious cases and are subject to the safeguards of court proceedings.

Removal requests should only be made in serious cases to limit the interference with freedom of speech involved in requesting removal of material in the public domain such as on social media services.³⁷

Definition of social media services

2.31 A number of digital industry groups raised concerns over the definition in the Online Safety bill of 'social media services'. Clause 9 of the bill sets out this definition, as outlined in chapter 1 of this report.³⁸

34 Australian Council on Children and the Media, *Submission 14*, p. 5.

35 Commissioner for Children and Young People Western Australia, *Submission 22*, p. 4.

36 Australian Interactive Media Industry Association's Digital Policy Group, *Submission 17*, p. 4.

37 Mr Rohan Buettel, Assistant Secretary, Department of Communications, letter dated 9 February 2015, *Additional Document 1*, p. 2.

38 See paragraphs 1.22–1.23.

'Sole or primary purpose'

2.32 The AIMIA DPG raised concerns that clause 9 requires the Commissioner to assess whether the 'sole or primary purpose' of a social media service is to enable online social interaction. It stated:

We would like to better understand how will the Commissioner make this determination. For example, will the Commissioner try to make very difficult assessments comparing the number of businesses using a social media platform for business purposes to the number of people using a social media platform for informational or transactional purposes to the number of people using a social media platform for social purposes? Will the Commissioner rely on what others believe to be the primary purpose of the service or what the relevant company believes to be its primary purpose?³⁹

2.33 In response to this concern, the department stated the Commissioner will be 'responsible for making the initial judgment; however, procedural fairness would require the Commissioner to take into consideration the views of the service provider concerned, as appropriate, in applying the scheme'. The department also noted that 'subclause 9(1) makes it clear that social media service relies on the concept of 'online social interaction' which does not include business interaction'.⁴⁰

What social media services are captured by the bill

2.34 The AIMIA DPG submitted that the definition of social media service goes beyond what it considered was the intention of the bill. It stated that its understanding was that the Online Safety bill would regulate social media services which enable a user to post content which is viewable by many and does not allow the child affected by it to personally delete the content. However, the AIMIA DPG submitted that the current definition:

...captures a number of online services that do not provide for public posting of content and do provide opportunities for the child to delete the content. For example, as written, the definition captures communications services such as email, phone calls and text messaging. None of which directly afford the opportunity to publicly post content to many people and all of which allow for removal or deletion of content. We note that any email or text message that is received can be deleted by the recipient.⁴¹

2.35 The AIMIA DPG also submitted that the Online Safety bill should be amended to expressly exclude 'enterprise services, gaming platforms, and news sites'. It also stated that it should be made clear that 'companies with platforms that allow developers to build, host and distribute social media service should not be held liable for interaction facilitated by those developers'.⁴²

39 Australian Interactive Media Industry Association's Digital Policy Group, *Submission 17*, p. 5.

40 Mr Rohan Buettel, Assistant Secretary, Department of Communications, letter dated 9 February 2015, *Additional Document 1*, p. 3.

41 Australian Interactive Media Industry Association's Digital Policy Group, *Submission 17*, p. 4.

42 Australian Interactive Media Industry Association's Digital Policy Group, *Submission 17*, p. 5.

2.36 Communications Alliance also expressed concerns about the scope of the definition of 'social media service':

It is not clear if services that facilitate verbal communications are intended to be included in the definition of Social Media Service; including social interaction made via Voice over IP (VoIP) telephone services. Monitoring verbal communications is arguably beyond the policy intent, which is to remove cyber bullying material targeted at an Australian Child. We recommend the exclusion of verbal communications and communications made via VoIP telephone services, to avoid uncertainty.⁴³

2.37 The IGEA recommended that the definition be amended to refer to online social 'communication' (instead of 'interaction'), as the current definition 'could potentially include users playing games together for the social experience'.⁴⁴

2.38 The department noted these concerns and stated:

The Department is not persuaded that there is a problem with the current provision. However, clause 9(4)(b) provides the flexibility to specifically exempt such services in the future should issues arise in practice with the operation of the definition.⁴⁵

Delegated legislation to specify electronic services as social media services

2.39 The definition of 'social media service' in paragraph 9(1)(b) of the Online Safety bill includes 'an electronic service specified in the legislative rules'. The IGEA recommended that this paragraph be removed:

Sub-section 9(1)(b) would allow any electronic service to be identified as a social media service and therefore subject to the rapid removal scheme as set out in Part 4 of the Bill. The definition of 'electronic service' is broad and would capture a wide variety of services that do not necessarily have social media functionality. Sub-section 9(1)(a) should be sufficient to capture the intended services for Part 4 of the Bill and there should be no ability to unilaterally expand the definition of 'social media service' and therefore the operation of the rapid removal scheme without appropriate review and consultation with a broad range of electronic service providers.⁴⁶

2.40 The AIMIA DPG also expressed concern that 'it is possible, as presently drafted, for the Minister to employ an update in regulations such that *any* electronic service could be deemed to be covered'. It recommended that paragraph 9(1)(b) be deleted, or that the rules made be subject to disallowance by the Parliament.⁴⁷

43 Communications Alliance, *Submission 12*, p. 1.

44 Interactive Games and Entertainment Association, *Submission 5*, p. 2.

45 Mr Rohan Buettel, Assistant Secretary, Department of Communications, letter dated 9 February 2015, *Additional Document 1*, p. 4.

46 Interactive Games and Entertainment Association, *Submission 5*, p. 2.

47 Australian Interactive Media Industry Association's Digital Policy Group, *Submission 17*, p. 6.

2.41 The department noted that this provision has been included to deal with emerging services. It noted that should legislative rules be made under this provision, the *Legislative Instruments Act 2003* imposes requirements in relation to consultation and subjects any such instrument to parliamentary scrutiny.⁴⁸

Enforcement powers

Timeframe for complaints and removal of cyber-bullying material

2.42 A number of submitters raised concerns over the timeframe in the Online Safety bill for dealing with cyber-bullying material. Clause 19 of the bill gives the Commissioner the power to investigate a complaint about cyber-bullying material. Subclause 19(2) provides that an investigation under this clause is to be conducted as the Commissioner thinks fit. No timeframe for the investigation of complaints is specified. Under clauses 29 and 35, the Commissioner can give written notice requiring a social media service to remove cyber-bullying material within 48 hours. This can only occur if a complaint has already been made to the service and the material was not removed within 48 hours.

2.43 Some submitters noted that, as material on the internet can be shared and reposted many times very quickly, this timeframe may mean the enforcement measures in the bill are ineffective. Youth Off the Streets set out some of the disadvantages it perceived with the bill, including:

The inability for removal notices and their discretionary reasonable time windows for compliance to mitigate the quick, viral and instantaneous proliferation of harmful cyberbullying content.

...

As the damage is also done immediately, although the Act would work to reduce the prolonged existence of harmful material, it would still fail to protect against the first instance of harm experienced by the young person.⁴⁹

2.44 Similarly, the Institute of Public Affairs submitted that the timeframe in the bill meant the effectiveness of the policy was in question:

The 48 hour window which the government has granted is far too long to prevent any of the harm that would come from a single instance of bullying.

But it also must be said that it is unlikely that any bureaucratic mechanism consistent with the rule of law would be able to operate at a faster pace. Given these basic and undeniable limitations of legislative action, the efficacy of anti-cyberbullying policy is very doubtful.⁵⁰

48 Mr Rohan Buettel, Assistant Secretary, Department of Communications, letter dated 9 February 2015, *Additional Document 1*, p. 3.

49 Youth Off the Streets, *Submission 9*, pp 6–7.

50 Institute of Public Affairs, *Submission 18*, p. 5.

2.45 The NCYLC recommended that the Online Safety bill be amended to make it clear that the Commissioner could make an informal request for removal of material before the 48 hour period has passed if a child is at imminent risk of harm:

...there will be circumstances in which an already vulnerable child is placed at further risk through the rapid spread of exceptionally harmful material. In these cases, we would expect that the Commissioner would have the authority to intervene urgently (and well before the 48 hour time period had elapsed) to take necessary steps to minimise harm to the child. In addition, we would expect that if the social media service responds to a complaint in under 48 hours (as we would hope) and indicates that the material will not be removed, then the Commissioner would have the authority to issue a removal notice at that time.⁵¹

2.46 The Association of Heads of Independent Schools of Australia (AHISA) submitted that the bill's effectiveness will depend on 'targets the Government sets for action by the Commissioner to follow through on complaints and the resources it makes available to achieve those targets'. AHISA recommended:

In cases of an extreme nature, such as inciting to suicide or sharing of images and video content of violent and/or illegal sexual acts, AHISA believes there is a case for a complaint to be made to the Commissioner at the same time as a complaint is made to a social media service, not just when the social media site has failed to act. While it is practical for a complaints filter to be in place, the legislation should not prohibit the Commissioner engaging with and assisting in a complaint before a social media service has failed to respond to an initial complaint.⁵²

2.47 In contrast, the AIMIA DPG submitted that the timeframes set out in the Online Safety bill, together with flexibility that allows the Commissioner to extend timeframes, are appropriate.⁵³ It recommended that a complaint should not be able to be made to the Commissioner until '*after* a person has sought to have the content removed using the service's own complaint handling scheme or immediately should a site not have reporting systems'.⁵⁴

2.48 The department responded to these concerns, noting:

The scheme minimises regulatory burden by building on existing complaints mechanisms. Any material of a serious illegal or life threatening nature will be referred to the police. The Department notes that the Bill does not prevent informal contact being made with social media services for urgent matters.

...

51 National Children's and Youth Law Centre and the Social Policy Research Centre, *Submission 24*, p. 10.

52 Association of Heads of Independent Schools of Australia, *Submission 11*, p. 5.

53 Australian Interactive Media Industry Association's Digital Policy Group, *Submission 17*, p. 4 (emphasis in original).

54 Australian Interactive Media Industry Association's Digital Policy Group, *Submission 17*, p. 7.

A timeframe has not been stipulated in the Bill so as to encompass the range of circumstances that may arise. Complex cases will take longer to consider and investigate. However, the Commissioner can be expected to act as rapidly as the circumstances surrounding each individual complaint allow, while providing procedural fairness to parties who are subject to a complaint.⁵⁵

Investigation of complaints

2.49 Concerns were raised by some submitters that there is limited guidance in the Online Safety bill on how the Commissioner is to investigate complaints. Clause 19 provides that the Commissioner can conduct an investigation 'as the Commissioner thinks fit' and 'obtain information from such persons, and make such inquiries, as he or she thinks fit'. The Law Council of Australia submitted:

...criteria should be included to guide the way the Commissioner conducts inquiries, such as ensuring that any limitations on an individual's rights are necessary, proportionate and reasonable in the circumstances. The Bill as currently drafted provides the Commissioner with open discretion to conduct inquiries as he or she sees fit.⁵⁶

2.50 The ACCM submitted that the Online Safety bill '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'. It stated that it would have more confidence in the bill 'if it set out very clearly the requirements of due process'.⁵⁷

2.51 In response, the department stated to include guidance in the bill would reduce flexibility:

The Department is of the view that specifying administrative procedures in legislation would create inflexibility. The Commissioner, once appointed, is expected to develop detailed procedures taking into account best practice for complaints handling. These procedures can be expected to evolve in the light of experience with the operation of the scheme. The Commissioner will be subject to standard administrative law requirements in conducting investigations, including requirements to provide procedural fairness.⁵⁸

End-user notices

2.52 Part 5 of the Online Safety bill gives the Commissioner the power to give an end-user notice to a person who posts cyber-bullying material, requiring that they remove the material, refrain from posting any further material and apologise. The NCYLC submitted that the end-user notice should also include a requirement that the

55 Mr Rohan Buettel, Assistant Secretary, Department of Communications, letter dated 9 February 2015, *Additional Document 1*, p. 4.

56 Law Council of Australia, *Submission 25*, p. 3.

57 Australian Council on Children and the Media, *Submission 14*, p. 4.

58 Mr Rohan Buettel, Assistant Secretary, Department of Communications, letter dated 9 February 2015, *Additional Document 1*, p. 6.

person delete all cyber-bullying material in his or her possession (if possession of such material would otherwise constitute a criminal offence).⁵⁹ It explained this as follows:

While removing cyber-bullying material from a social media site as quickly as possible is essential to reducing harm to victims, we note that this may provide little certainty and assurance to victims that they will enjoy ongoing protection from cyber-bullying and need not live in fear—especially where someone has threatened to post something online but has not yet acted on that threat. The principal example is the case of disseminating or threatening to disseminate sexually explicit images of a victim. In our experience, the mere knowledge that somebody possesses these images and may share them in the future often causes severe psychological harm...⁶⁰

2.53 The department stated in response:

The Department acknowledges that such a direction could assist in removing the threat of posting the cyber-bullying material. However, a direction to delete material on a person's device would increase the scope of the scheme and impact on people's privacy, allowing intrusion into material on people's devices that has not been posted online. This proposed measure could represent a step too far and may also raise issues about the scope of Commonwealth power.

2.54 There were also concerns raised that it would be difficult to identify end-users for the purpose of giving end-user notices. AHISA, for example, stated that the Commissioner may not have the necessary power to identify end-users,⁶¹ and AIMIA DPG queried whether, in practice, an end-user could be identified if the person sending the communication uses a pseudonym.⁶²

2.55 In respect of this issue, the Communications Alliance stated that it is opposed to the Commissioner using powers of investigation to compel ISPs to identify the subject of complaints.⁶³

2.56 The department responded to the concern about identifying end-users, noting:

The amendments in items 22 and 23 of Schedule 2 to the Consequential Amendments Bill would enable the Commissioner to direct carriers and service providers in connection with the Commissioner's performance of his or her functions of the exercise of his or her powers. This power may assist

59 National Children's and Youth Law Centre and the Social Policy Research Centre, *Submission 24*, pp 8–9.

60 National Children's and Youth Law Centre and the Social Policy Research Centre, *Submission 24*, p. 7.

61 Association of Heads of Independent Schools of Australia, *Submission 11*, p. 4.

62 Australian Interactive Media Industry Association's Digital Policy Group, *Submission 17*, p. 8.

63 Communications Alliance, *Submission 12*, pp 1–2.

the Commissioner with identifying end-users, particularly those who are anonymous users due to use of pseudonyms.⁶⁴

Compensation

2.57 Telstra and the Communications Alliance recommended that the Online Safety bill include a cost recovery mechanism.⁶⁵ Telstra noted that the Enhancing Online Safety for Children (Consequential Amendments) Bill 2014 includes a provision requiring carriage and content service providers to comply with directions of the Commissioner. Telstra submitted:

We accept that assistance from relevant telecommunication service providers may be necessary for effective investigation and enforcement of aspects of the proposed regime, and as a general principle we stand ready to provide assistance for this purpose. We expect this will also be true of other industry participants.

Carriers and carriage/content service providers already provide assistance to government officers and authorities as is reasonably necessary for the purposes of assisting the enforcement of criminal laws, protecting public revenue and safeguarding national security under s 313 of the Telecommunications Act. However, s 314(2) of the Telecommunications Act also effectively provides for the assisting parties to be compensated in relevant cases by providing that compliance with the assistance obligation is on the basis that “the person neither profits from, nor bears the costs of, giving that help”.

We believe it is appropriate for consideration to be given to including a similar mechanism for the provision of investigation assistance in relation to the Bill. This may assist all parties in resourcing relevant investigations and help ensure the regulatory burden on such parties remains proportionate.⁶⁶

2.58 The department responded to these comments and noted that industry is 'expected to assist the Commissioner with his or her investigations when it can reasonably do so without complex procedures being required or the need to spend substantial monetary amounts to obtain the required information or data'.⁶⁷

Committee comment

2.59 The committee considers that the bills are an important step forward in the protection of children and young people online. As a number of submissions highlighted, cyber-bullying has been shown to cause serious harm to children and young people and is a growing concern. The committee, therefore, considers it

64 Mr Rohan Buettel, Assistant Secretary, Department of Communications, letter dated 9 February 2015, *Additional Document 1*, p. 8.

65 Telstra, *Submission 6*, pp 1–2 and Communications Alliance, *Submission 12*, p. 2.

66 Telstra, *Submission 6*, pp 1–2.

67 Mr Rohan Buettel, Assistant Secretary, Department of Communications, letter dated 9 February 2015, *Additional Document 1*, p. 8.

essential that measures are taken in response to this serious issue, and regards the bills as addressing cyber-bullying and building on the substantial work already being done by responsible social media services.

2.60 The committee considers that the Online Safety bill sets out in significant detail the Commissioner's functions, giving the Commissioner broad scope to engage with relevant stakeholders and take a national leadership role on online safety for children and young people. The committee expects the Commissioner will engage with schools and relevant organisations when developing guidance material and strategies to deal with cyber-bullying.

2.61 The committee acknowledges that it would be highly desirable if the Commissioner had relevant skills and experience in child welfare and wellbeing given the nature of the role, but accepts that the requirement for the Commissioner to have a deep understanding of the internet, and strong credibility with social media services, is regarded as the essential qualification to support the Commissioner's functions. While the committee acknowledges that providing an exhaustive list of criteria for appointment of the Commissioner may overly restrict the pool of suitable applicants for the role, it considers that experience in, or knowledge of, child welfare or wellbeing should be a desirable but not essential requirement for the position.

2.62 The committee considers it important that the Commissioner engage and consult with the AHRC and the National Children's Rights Commissioner when developing strategies to deal with cyber-bullying. However, the committee does not consider that the Commissioner should be co-located with the AHRC or the functions given to the National Children's Rights Commissioner. The committee is of the view that the roles of these commissioners are separate and that the ACMA is best placed to support the Commissioner in this role.

2.63 The committee considers that the current provisions in the Online Safety bill, in particular clause 12 which requires the Commissioner to have regard to the Convention on the Rights of the Child, adequately ensures that the Commissioner is required to consider the best interests of the child when exercising any of his or her functions.

2.64 The committee acknowledges that there is an important and difficult balance to strike in determining what material should be classified as cyber-bullying material. Including a requirement that cyber-bullying has the effect of 'seriously' threatening, intimidating, harassing or humiliating a child is likely to exclude less serious cases of cyber-bullying, which may still cause some distress to a child or young person. However, the committee considers this is an appropriate compromise to ensure that regulation of this area is not overly burdensome and does not unreasonably restrict freedom of speech. The committee is of the view that the definition of cyber-bullying in the Online Safety bill strikes the right balance between capturing serious cases of cyber-bullying and not imposing excessive and unnecessary regulation.

2.65 A number of social media industry groups raised concerns around the definition of 'social media services'. However, the committee considers that the drafting of the legislation gives sufficient clarity as well as flexibility. While it is important that the bills set out the type of services to be covered, flexibility is needed

to deal with constant innovation in social media. The committee expects the Commissioner will engage with existing and new and emerging social media services to ensure that the right social media services are captured by the bills. The power for the subsequent making of legislative rules to both include, and exempt, specified social media services provide for this flexibility.

2.66 The committee notes AIMIA DPG's recommendation that the legislative rules should be made subject to disallowance by the Parliament. The committee notes that the Senate Standing Committee for the Scrutiny of Bills recently raised concerns that legislative rules are not automatically covered by the *Legislative Instruments Act 2003* (LIA) and, therefore, may not be disallowable.⁶⁸ The committee notes that *Office of Parliamentary Counsel Drafting Direction 3.8* has recently been amended to provide that individual bills should include a provision declaring that a rule is to be a legislative instrument (and therefore disallowable) for the purposes of the LIA. The committee notes that clause 108 has been drafted in accordance with this direction and that the legislative rules made under the Online Safety bill are subject to parliamentary scrutiny and disallowance.

2.67 The committee notes the concerns raised by some submitters that the timeframe for complaints and the removal of cyber-bullying material is too long to effectively deal with material on the internet. While the committee acknowledges the fast moving nature of the internet, it considers that the Commissioner needs flexibility to decide when to investigate complaints, basing the speed of the response on the details of the case before him or her. The committee is of the view that it would be unreasonable to impose a requirement on a social media service to remove material any sooner than within 48 hours after notification. As the Department of Communications has pointed out, any material of a serious illegal or life threatening nature should still be referred to the police for action. The committee also considers that the end-user notice scheme established by the bills provides the necessary balance between respecting people's personal freedoms and protecting children from cyber-bullying abuse.

2.68 The committee acknowledges that the bills may require industry to provide assistance to the Commissioner to help deal with cyber-bullying but does not consider that the case for compensation has been established.

2.69 Finally, the committee notes that there are a number of other proposed measures in the bill that were not the focus of submissions but nevertheless received support through submissions and evidence.

68 Senate Standing Committee for the Scrutiny of Bills, *First Report of 2015*, pp 7–10.

Recommendation 1

2.70 The committee recommends that clause 50 of the Enhancing Online Safety for Children Bill 2014 be amended to provide that experience or knowledge in the field of child welfare or wellbeing is a desirable quality that the Minister may consider when appointing a person as the Commissioner.

Recommendation 2

2.71 The committee recommends that, subject to the proposed amendment, the Enhancing Online Safety for Children Bill 2014 and the Enhancing Online Safety for Children (Consequential Amendments) Bill 2014 be passed.

Senator Anne Ruston
Chair