



ASSOCIATION OF HEADS OF INDEPENDENT SCHOOLS OF AUSTRALIA

12 January 2015

Senator Anne Ruston
Chair
Senate Environment and Communications Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Emailed to: ec.sen@aph.gov.au

Dear Senator Ruston,

Inquiry into the Enhancing Online Safety for Children Bill 2014

The Association of Heads of Independent Schools of Australia (AHISA) is grateful for the invitation to make comment on the Inquiry into the Enhancing Online Safety for Children Bill 2014 (the Bill).

As mentioned in our submission to the Australian Government's consultation on cyber safety measures in March 2014¹, AHISA members are deeply concerned by the capacity of digital technologies to become agents of harm among young people at a critical time in their development. Young people are at risk of becoming not just victims but aggressors, in ways that may have long-term negative effects on themselves and others.

In brief, AHISA broadly supports the Bill:

- AHISA commends the Government for taking action to help ensure the cyber safety of young people. In particular, the establishment of the Office of the Children's e-Safety Commissioner, the power of the Commissioner to investigate and act on complaints, to send an end-user notice and to initiate litigation, and the Government's support for cyber safety programs will help schools communicate to young people the seriousness of inappropriate behaviours enacted through digital technologies.
- Schools are the most important point of delivery of online safety and anti-bullying education programs to young people. Schools are also the most important point of mediation between students engaging in bullying behaviours, including cyber bullying. It is therefore vital that a formal consultation process be established between the Office of the e-Safety Commissioner and schools as soon as possible on the appointment of a Commissioner. To this end, **AHISA recommends** that a schools advisory panel be established and/or that a nominee of the four national principals' associations be included in the Government's Online Safety Consultative Working Group or other such group formed to advise the Commissioner.

A more detailed response follows.

COLLEGIAL SUPPORT FOR EXCELLENCE IN SCHOOL LEADERSHIP



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About AHISA

The primary object of AHISA is to optimise the opportunity for the education and welfare of Australia's young people through the maintenance of collegiality and high standards of professional practice and conduct amongst its members.

The membership of AHISA comprises principals of 420 independent schools with a collective enrolment of some 421,000 students, representing 11.8 per cent of total Australian school enrolments. At senior secondary level, the proportion of total school enrolments rises to 20 per cent; that is, one in every five Australian Year 12 students has gained part of his or her education in an AHISA member's school.

AHISA has a history of leadership in student pastoral care. It was the first organisation in Australia to establish a dedicated conference on pastoral care in schools. Since its formation in 1985, members of AHISA's Social Issues Committee have given evidence to national and state parliamentary inquiries into student wellbeing issues such as the effects of violent and sexually explicit video material on children, internet access to pornographic material and alcohol and drug abuse.

1. Establishment of the Office of the Children's e-Safety Commissioner

AHISA supports the Bill's provision to establish the Office of a Children's e-Safety Commissioner.

AHISA recognises that the Australian Human Rights Commissioner, National Children's Commissioner, state and territory Children's Commissioners or Commissioners of Children and Young People and the Australian Communications and Media Authority all play important roles in protecting the rights of Australian children and promoting their safety. We believe, however, that establishment of the Office of a Children's e-Safety Commissioner is warranted to coordinate governments' efforts to respond to the escalation of risks to children through the rapid evolution of digital technologies and applications. These technologies and applications have the potential to dramatically accelerate and intensify the damage to victims of online bullying. It is estimated that up to one in five young Australians aged 8 to 17 may be victims of cyber bullying and that this rate is increasing.²

Establishment of the Office of a Children's e-Safety Commissioner creates a single focal point for official action to protect children in the digital world. It affirms to young people the importance placed by the community on their safety. At the same time, the office conveys to the community, and particularly to young people, the seriousness of inappropriate behaviours enacted through digital technologies.

2. Functions of the Children's e-Safety Commissioner and consultation with schools

In general, AHISA supports the functions of the Commissioner as set out in section 15(1)(a) to (s) of the Bill. However, AHISA is concerned that while the Commissioner's role is likely to have a significant impact on schools, there is no formal requirement to consult with schools.



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We note that subsection 15(1)(f) enables the Commissioner to 'support, encourage, conduct, accredit and evaluate educational, promotional and community awareness programs that are relevant to online safety for children'. Subsection 15(1)(p) enables the Commissioner to formulate guidelines or statements that 'recommend best practices for persons and bodies involved in online safety for children'.

In his speech to the House of Representatives on the second reading of the Bill³, the Hon. Paul Fletcher noted that 'the government anticipates that the Commissioner will enter into arrangements with the police and educational bodies setting out the circumstances in which matters would be dealt with by those parties'.

It is to be expected that the work of the Office of the e-Safety Commissioner will intersect with that of schools: schools are the most important point of delivery of digital citizenship and anti-bullying education programs to young people, and the most important point of mediation between students engaging in bullying behaviours or inappropriate uses of technology. We welcome the provision in subsection 15(1)(l), which empowers the Commissioner 'to consult and cooperate with other persons, organisations and governments on online safety for children', but believe it is vital that that a formal consultation process be established between the Office of the e-Safety Commissioner and schools as soon as possible on the appointment of a Commissioner.

While it is critical for schools to be consulted on any actions of the Commissioner that will affect them, schools also have much to contribute in an advisory capacity.

Schools are in the front line in dealing with bullying – including cyber bullying. They deliver education programs and work with parents and students to resolve bullying incidents should they occur. They have comprehensive anti-bullying policies and protocols in place that are known to students, staff and parents. Similarly, all good schools have in place 'appropriate use of technology' policies and systems to filter or monitor students' access to inappropriate or sexually explicit material on the internet while at school. There is a wealth of experience in schools covering both program development and implementation that the Commissioner can and should be expected to draw on.

School leaders have a deep knowledge of program delivery in schools and the management of relationships between schools, students and parents. They are best placed to advise on implementation issues around any proposed programs or protocols for schools, and AHISA therefore recommends:

1. The Commissioner to appoint an advisory panel of practising principals, school leaders (such as deputies or other senior staff such as directors of student wellbeing) and/or teachers whose role would be to advise the Commissioner on existing and emerging online safety issues for children and the best methods of resolving problems that arise from inappropriate use of technology; and/or
2. The Commissioner to institute a formal consultation process between the Office of the Commissioner and schools through the inclusion of a representative nominated by the four national principals' associations on the Government's Online Safety Consultative Working Group or other such group formed to advise the Commissioner.



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3. The complaints and resolution processes

AHISA supports the provision in the Bill for children to make a complaint direct to the Commissioner. As set out in our March 2014 submission, AHISA believes it is important for children or a parent, guardian or another adult in a position of authority in relation to a child to be able to initiate a complaint if legislation is to be effective in promoting children's safety.

In regard to the power of the Commissioner to disclose information to a teacher or school principal and impose conditions to that disclosure, as set out in Section 81 of the Bill, AHISA again urges that a formal consultation mechanism between the Commissioner and schools be established. The role of principals and schools in relation to resolution of incidents referred to the Commissioner must be transparent to all within and beyond the school community, especially in regard to schools' duty of care and their relationship and responsibilities to both students and parents. For example, the freedom or otherwise of schools to contact parents when both the complainant and abuser are students within the same school needs clarification. Similarly, the authority of schools, principals, teachers, school counsellors, boarding house staff and chaplains to initiate a complaint to the Commissioner at the request of the student but without the consent of the child's parents (or, in the case of school staff, without the knowledge of the principal) must be made explicit.

Clarity around such issues is particularly important given that any Commonwealth legislation arising from the Bill will sit alongside state legislation that may, for example, contain age related exceptions to instances of consensual peer-to-peer sexting. As it is likely that the Commissioner will issue end-user notices to people under the age of 18, it is also important for the sake of young people that Commonwealth and state/territory legislation are as far as possible in alignment. Recent research shows that lack of alignment in Commonwealth and state laws regarding child pornography are confusing for young people.⁴ At the very least, it must be a priority of the Commissioner to compile and published a document setting out the points of intersection of the new legislation with existing Commonwealth and state/territory legislation.

The relationship structure within schools is complex and interacts with existing legislation and regulation at many levels. We stress the urgent need for schools to be reassured that consultation will occur around the development of guidelines for action in the complaints process and any mediation process initiated by the Commissioner to resolve complaints.

4. The power of the Children's e-Safety Commissioner

While the Bill sets out that a function of the Commissioner is to monitor compliance with legislation, it is not clear in the Bill what powers the Commissioner would have to determine the identity of end-users, particularly in the case where a social media site or provider failed to comply with a removal order.

While the Bill sets out a time frame of 48 hours within which social media services must remove material deemed harmful to an Australian child, there is no time frame stipulated within which the Commissioner or the Commissioner's delegate must act upon receipt of a complaint and/or pursue action on a complaint where the case to do so is established. AHISA understands that such a stipulation is difficult and impractical to enshrine in legislation. However, time is an important contributor to the escalation of damage caused via digital technologies and applications. We believe the strength of the legislation to protect children's cyber safety will depend on targets the



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Government sets for action by the Commissioner to follow through on complaints and the resources it makes available to achieve those targets.

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.

Section 18(3) of the Bill provides for an adult up to the age of 18 years and 6 months to make a complaint to the Commissioner about content posted to a social media site when they were a child if the complaint 'is made within a reasonable time after the person became aware of the matter'. Given the rapid evolution of digital technologies and the impact of their 'digital footprint' on people's work prospects, reputation and wellbeing, consideration could be given to removing or increasing the age limit applying to complainants in such cases. There may also need to be consideration of a 'right to erasure' of cached material in addition to the removal provisions already in the Bill.

5. Competing rights

AHISA recognises there is concern around the capacity of the Bill if enacted to undermine the right of individuals' freedom of expression and to seek, receive and impart information and ideas. The intersection of the Bill with this and other rights is set out in the Explanatory Memorandum to the Bill and the Enhancing Online Safety for Children (Consequential Amendments) Bill.

As noted by the Australian Human Rights Commission (AHRC)⁵, article 19(3) of the *International Covenant on Civil and Political Rights* (ICCPR) provides that the exercise of the right to freedom of expression may be subject to certain restrictions, including 'respect of the rights or reputations of others'. The AHRC further notes that 'a range of rights may present possible justifications for limitations on freedom of expression through the internet'. Citing articles in the ICCPR and the *Convention on the Rights of the Child* (CRC), the AHRC lists these rights as including:

- Freedom from discrimination
- Freedom from cruel, inhuman or degrading treatment
- The right of children to special protection
- Freedom from arbitrary interference with home, family, correspondence or reputation privacy.

The AHRC rightly cautions that any proposed restrictions on freedom of expression designed to protect these rights must be shown to be justifiable. As it stands, the Bill primarily provides for the establishment of the Office of a Children's e-Safety Commissioner with a key function to administer a complaints system for 'cyber bullying material' targeted at an Australian child. Take down, removal and other provisions relate to material deemed 'seriously' harmful to children (Section 5(1)(b)(ii)). AHISA therefore supports the contention of the Explanatory Memorandum that the restrictions on the right to freedom of expression are not over-broad. By providing recourse for children who are subject to harmful material, AHISA regards any consequent restriction of freedom of expression to be justifiable.



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6. The need to move forward

AHISA recognises that legislation and regulation of the cyber world are extremely difficult, especially given the rapidly changing nature of that world.

Schools are alert to all forms of bullying, and generally have comprehensive anti-bullying policies and protocols in place to deal with them, including cyber bullying. Online bullying may not take place on school computers or in school time, but its effects are often felt in the classroom or playground. While the use of digital channels to enact bullying behaviours certainly multiplies the impact of those behaviours enormously, school-based measures remain relatively effective in containing and resolving the fallout from a large proportion of these behaviours.

Since it has become the norm for children to own a smart phone, the greatest challenge for schools – and parents and the wider community – is the increasing prevalence of sexting among minors and the inappropriate sharing or posting of sexting images. AHISA acknowledges the removal powers of the e-Safety Commissioner will not reach most of the sites where such images are posted – often within only days of first being shared or posted – or the email or SMS accounts of all those who receive or transmit such images. However, it is still vitally important to attempt to enforce removal of offending material from popular social media sites where the impact on children's wellbeing and reputation can be the greatest.

As discussed, AHISA believes there needs to be greater clarity around the roles of schools and those who work within them – and especially around the role of principals – in relation to the proposed legislation and the actions of the Commissioner under that legislation. We believe our concerns can be addressed through consultation by the Commissioner with principals and/or school leaders, especially in the development of guidelines for schools, and we will press the Australian Government to ensure an adequate consultative mechanism is put in place.

In spite of the difficulties of law making in this area and in spite of our own concerns, AHISA broadly supports the Bill. It is important that the community takes prompt action to protect its young people. We therefore recommend to the Senate Committee that when considering the Bill and its implications that it puts the best interests of Australian children first.

Yours sincerely,

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Further inquiries may be addressed to AHISA's Chief Executive, Geoff Ryan, telephone (02) 6247 7300; email ceo@ahisa.edu.au.

NOTES

- ¹ AHISA submission 7 March 2014 available at http://www.communications.gov.au/_data/assets/pdf_file/0013/220207/Association_of_Heads_of_Independent_Schools_of_Australia.pdf.
- ² In Katz, I., Keeley, M., Spears, B., Taddeo, C., Swirski, T. & Bates, S. (2014) *Research on youth exposure to, and management of, cyberbullying incidents in Australia: Synthesis report*. Accessed at <http://www.communications.gov.au/publications/publications/cyber-bullying>.
- ³ Enhancing Online Safety for Children Bill. Second reading speech, House of Representatives, 3 December 2014.
- ⁴ National Children's and Youth Law Centre and Children's Legal Services of Legal Aid NSW (2012) *New voices/New laws: School-age young people in New South Wales speak out about the criminal laws that apply to their online behaviour*. Accessed at http://www.lawstuff.org.au/_data/assets/pdf_file/0009/15030/New-Voices-Law-Reform-Report.pdf
- ⁵ Australian Human Rights Commission (2013) *Background paper: Human rights in cyberspace*. Accessed at <https://www.humanrights.gov.au/publications/background-paper-human-rights-cyberspace>.