



Australian Government

Department of Communications

9 February 2015

Ms Christine McDonald
Secretary
Standing Committee on Environment and Communications
Legislative Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: sen@aph.gov.au

Dear Ms McDonald

**Inquiry into the Enhancing Online Safety for Children Bill 2014 and the
Enhancing Online Safety for Children (Consequential Amendments) Bill 2014**

I am writing to respond to significant issues raised in submissions to the Committee from industry, community groups and education providers. The Department welcomes the engagement by the 29 stakeholders who wrote submissions to the Senate Committee on Environment and Communications concerning the two bills on enhancing online safety for children, and appreciates their valuable contributions.

An overwhelming majority of stakeholders supported the two bills.

There was particularly strong support for the proposed national leadership role for the Children's e-Safety Commissioner on online safety for children, along with the various proposed functions of the Commissioner including promoting educational programs, research, and consulting and cooperating with schools and child welfare experts.

The Department has considered all submissions carefully, and has comments in relation to the issues raised by submissions in the following areas:

- Who is covered by the Bills;
- Who can make a complaint;
- When can a complaint be made;
- Functions of the Children's e-Safety Commissioner (the Commissioner);
- Decision making principles;
- The Commissioner's qualifications;
- Location of the Commissioner's Office;
- Identity of end-users and compensation to parties assisting the Commissioner with investigations; and

- Administrative and Operative issues.

Attachment A sets out the Department's responses to these issues.

The Department is available to respond to any other specific issues the Committee wishes to raise.

Yours sincerely

Rohan Buettel
Assistant Secretary
Consumer Protection Branch

Attachment A – Department’s responses to key issues raised in submissions

1. Who is covered by the Bill

1.1 Definition of ‘Australian child’

Some stakeholders were concerned that the Bill did not ensure all children within Australia would be protected. The Victorian Catholic Schools Parent Body (VCSPB) and the Australian Psychological Society (APS) stated that the Bill should protect children who may not be citizens or residents of Australia such as refugees or visa holders.

‘Australian child’ is defined in clause 4 as a child who is ordinarily resident in Australia. The Act is intended to only apply to minors who have a strong connection with Australia, not those who only have a temporary connection. It is not intended, for example, that the Act apply to children who are only temporarily in Australia, such as those on a tourist visa.

1.2 Students at the age of 18 years or older

‘Child’ is defined as an individual who has not reached 18 years old.

The VCSPB, APS, Child Wise and the Association of Heads of Independent Schools of Australia (AHISA) mentioned concerns that secondary students who are still attending school, but are 18 years or older, will not be protected by the Act. They have also questioned whether the six month time limit after the person reached 18 years to make a complaint under subclause 18(3) is sufficient.

The Department notes the concern, however considers that the age limit and time frame are appropriate. Australian law recognises that individuals aged 18 years or older have full legal capacity. Article 1 of the Convention on the Rights of the Child (CROC) also defines a ‘child’ to be every human being below the age of 18 years. The Bill is intended to apply to cyber-bullying of children.

If a person is 18 years old, a complaint must relate to cyber-bullying which occurred before the person became 18 and be made within a reasonable time after becoming aware of the matter. This enables late complaints to be made to the Children’s e-Safety Commissioner (the Commissioner) but maintains the policy of limiting the scheme to cyber-bullying of children.

2. Who can make a complaint?

Clause 18(2) enables a responsible person to make a complaint on behalf of an Australian child. Child Wise and the Association of Heads of Independent Schools of Australia (AHISA) have suggested expanding the definition of ‘responsible person’ to include anyone with a duty of care for the child, such as teachers and schools. The Victorian Commission for Children and Young People (Victorian CCYP) also suggested including adults with whom the child resides such as grand-parents and foster carers.

Clause 18 distinguishes between situations where a child consents to another person acting on their behalf, and where the child does not provide such consent. Clause 18(2)(b) provides that any person (which would include a teacher or other person with a duty of care towards the child) can make a complaint with the authorisation of the child. When there has been no consent, only a parent or guardian should be able to complain on behalf of the child. This avoids the potential problems that

might arise where a third party complains against the wishes of the child and without contacting a parent or guardian of the child.

3. When can a complaint be made?

3.1 Cyber-bullying material

3.1.1 Definition of cyber-bullying material targeted at an Australian child

Cyber-bullying material targeted at an Australian child is defined in clause 5 of the Bill. Concern has been raised by the Australian Council on Children and the Media (ACCM), the WA Commissioner for Children and Young People (WA Commissioner) and the National Children's and Youth Law Centre and the Social Policy Research Centre (NCYLC) that the threshold test for cyber-bullying material targeted at an Australian child is higher than the threshold test for a criminal conviction. Under clause 5(1)(b) of the Bill an ordinary reasonable person would need to conclude 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' for it to meet the definition. The NCYLC also noted that complaints should be able to be made for material that does not meet the 'serious' threshold but is more than merely 'minor, trivial or frivolous'.

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 cyber-bullying. 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.

3.1.2 Exclusion under subclause 5(4)

The Victorian CCYP also questioned whether subclause 5(4) is necessary, noting that it is difficult to determine a circumstance where it would be reasonable for a person in the position of authority over a child to post on social media cyber-bullying material.

Clause 5(4) has been included so as not to interfere with reasonable action taken in a reasonable manner by authority figures. Reasonable action taken in a reasonable manner by authority figures such as parents, teachers and employers could include matters such as notifying the child by email of exam results or dismissal from employment, which may be considered as seriously humiliating for the child. Such matters should not be treated as cyber-bullying.

3.1.3 Bullying

The ACCM, Institute of Public Affairs and the WA Commissioner stated that cyber-bullying is just another type of bullying and should not be treated separately. The Department acknowledges the strong overlap between bullying and cyber-bullying, however, the Bill is intended to address a major problem identified in the community and relates to an area of policy where the Commonwealth has

clear jurisdiction. 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.

3.2 Social media service

Concerns were raised about the scope of ‘social media service’ under clause 9 of the Bill.

3.2.1 Sole or primary purpose

The Australian Interactive Media Industry Association (AIMIA) questioned how the Commissioner would determine whether the ‘sole or primary purpose’ of the service is to enable online social interaction, in order to identify whether the service is a social media service.

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. Furthermore, subclause 9(1) makes it clear that social media service relies on the concept of ‘online social interaction’ which does not include business interaction.

3.2.2 Electronic service

Clause 9(1)(b) expands the definition of ‘social media service’ to include an electronic service specified in the legislative rules. The Interactive Games & Entertainment Association (IGEA) and AIMIA have recommended removing this subparagraph to limit the scope of ‘social media services’.

Clause 9(1)(b) has been included to deal with emerging services. As noted in VCSPB’s submission, the definition should be broad enough to cover any emerging technologies, sites and applications. The Department notes that should clause 9(1)(b) be used the *Legislative Instruments Act 2003* imposes requirements in respect to consultation and subjects any such instrument to parliamentary scrutiny.

3.2.3 Exclusions

Various stakeholders have recommended amending the definition to exclude particular services from the definition of ‘social media service’:

- Communications Alliance stated that it is unclear if services that facilitate verbal communications are included in the definition of ‘social media service’, including social interaction made through Voice over IP (VoIP) telephone services.
- AIMIA noted that email, phone calls and text messaging are services that do not directly provide the opportunity to publicly post content to many people, and allow for removal or deletion of content by the recipient.
- The Interactive Games & Entertainment Association (IGEA) raised a concern that services that solely provide games may be included.

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.

3.3 Notification and failure to act within 48 hours

The 48 hour timeframe for removal of cyber-bullying material under clause 29 before an individual can make a complaint to the Commissioner has been raised as a concern by several stakeholders including the Institute of Public Affairs, AHISA, and the NCYLC. It has been noted that in 48 hours, cyber-bullying material can be shared and reposted numerous times.

The AHISA and NCYLC have recommended that in “urgent” emergency intervention cases where there is imminent risk of harm to a child, a complaint should be able to be made to the Commissioner prior to the 48 hours and the Commissioner should be able to make an informal request to relevant services and stakeholders to remove material or take other steps.

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.

The AHISA also raised that there is no stipulated timeframe within which the Commissioner must act upon receipt of a complaint.

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.

4. Functions of the Children’s e-Safety Commissioner (the Commissioner)

4.1 Clause 15 of the Bill

Clause 15 of the Bill outlines the functions of the Commissioner. Stakeholders have made various comments:

- Emphasis is required on online safety education, online privacy education, and how to be a good ‘corporate citizen’ online (WA Commissioner)

The Department agrees that education on online safety for children is important. The Commissioner has a specific function relevant to this matter in clause 15(1)(f).

- An explicit requirement for the Commissioner to consider and respond to needs of children and young people who are most vulnerable to cyber-bullying such as children in Out of Home Care, children with a disability and indigenous children should be included (Victorian CCYP)
- Education resources designed to promote respectful and responsible online behaviour and to educate about staying safe online assume children regularly attend school and have parents at home who are able to support and assist them. There is a need to ensure specific

strategies are developed to meet the needs of Indigenous children and young people (Victorian CCYP)

The Department acknowledges the Victorian CCYP's point that there may be groups of children and young people who are particularly vulnerable to cyber-bullying. However, 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. The Department notes that there is a current educational program for indigenous communities called *Be Deadly Online* provided by the Australian Communications and Media Authority (ACMA), created with contributions from a number of Indigenous communities across Australia. This program will come under the Commissioner's authority.

- The Commissioner should work with relevant organisations such as the Australian Human Rights Commission (AHRC), and children and young people (APS, Victorian CCYP, Project Rokit)

Clause 15(1)(l) requires the Commissioner to consult and cooperate with other persons, organisations and governments on online safety for children. The Department expects that the Commissioner will consult and cooperate with the relevant organisations and groups noted by the various stakeholders.

- There should be a formal requirement to consult with schools and the role of principals and schools in relation to resolution of incidents referred to the Commissioner must be transparent (AHISA)

Once appointed, the Commissioner will be expected to establish formal consultation mechanisms with representatives of schools and also formulate and promote best practice guidelines. The Commissioner will consult with relevant stakeholders in developing these guidelines.

- The Bill should include accreditation guidance to ensure all educational online safety programs are assessed by the extent to which they pursue the objects of the Bill, are compliant with the law and in accordance with children's rights principles and clearly establish their effectiveness, value and evidence base (WA Commissioner)

Once appointed, the Commissioner will be expected to develop accreditation guidelines on educational online safety programs and the guidelines will be subject to consultation.

4.2 Deletion of material

The NCYLC recommended amending clause 42 to enable the Commissioner to direct an end-user to delete cyber-bullying material to deal with a threat to post material not yet acted upon.

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.

Additionally, it is noted that clause 42 would allow the Commissioner to direct an end-user to refrain from posting cyber-bullying material for which the child is the target, which may operate to reduce the threat and likelihood of further cyber-bullying material being posted.

4.3 Investigation of complaints

Under clause 19, the Commissioner may investigate a complaint made under clause 18 and conduct such inquiries as he or she thinks fit. The ACCM and the Law Council of Australia have recommended including criteria to guide the way the Commissioner conducts inquiries.

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.

4.4 Factors to consider before issuing clause 39 or 40 statements

AIMIA recommended amending clauses 39 and 40 to include a requirement for the Commissioner to consider various factors such as the accuracy of the report of abuse and the complexity of the case before publishing a statement on the Commissioner's website.

The Commissioner's publication powers relate to failure to comply with a request or notice to remove material. The Commissioner will not issue such requests or notices without properly investigating the matter. Social media services can be expected to rely on the work undertaken by the Commissioner and will not need to carry out their own further investigations of the circumstances of individual cases.

Moreover, in practice, administrative law will require procedural fairness to be provided to a social media service before the exercise of the powers under clauses 39 and 40.

Accordingly, the Department is of the view that there is no need to include a clause listing factors to be considered before publishing a statement under clause 39 or 40.

5. Decision making principles

Various stakeholders including the Law Council of Australia, the WA Commissioner and the NCYLC, have raised concerns that it is not explicit in the Bill that the Commissioner should place a strong emphasis on the principle of the best interests of the child, as per Article 3.1 of the Convention on the Rights of the Child (CROC).

Article 3.1 of the CROC requires that in all actions concerning children undertaken by administrative bodies, the best interests of the child shall be a primary consideration. Clause 12(1) of the Bill states the Commissioner must, as appropriate, have regard to the CROC in performing functions under the Act. The Department considers that clause 12(1) will have the effect of requiring the Commissioner to consider the 'best interests of the child'.

6. The Commissioner's qualifications

The WA Commissioner, the NCYLC, the Law Council of Australia and the ACCM have indicated that clause 50 should include a requirement for the Commissioner to have experience in or knowledge of child welfare or wellbeing.

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 a 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.

Clause 50 includes criteria relating to public engagement on online safety issues.

The Commissioner will be able to draw on child welfare expertise among the Commissioner's staff and through consultation mechanisms where necessary.

7. Location of the Commissioner's Office

The Bill outlines that the Commissioner will be an independent statutory office within the ACMA. The ACCM, the WA Commissioner, Families Australia and the NCYLC have questioned the suitability of the ACMA as the location for the Commissioner. Stakeholders have recommended locating the Commissioner within the Australian Human Rights Commission.

The Department consulted various stakeholders and considered a range of options in the public consultation in 2014 on *Enhancing Online Safety for Children*.

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. As mentioned earlier, 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 functions such as the Online Content Scheme, which has a strong focus on child sexual abuse material.

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

8. Identity of end-users and compensation to parties assisting the Commissioner with investigations.

8.1 Identifying end-users

AHISA stated its concern that it is not clear under clause 15 of the Bill that the Commissioner's powers allow for determining the identity of end-users. AIMIA also expressed concerns about the effectiveness of the end-user notice scheme where there are unidentifiable end-users.

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 or the exercise of his or her powers. This power may assist the Commissioner with identifying end-users, particularly those who are anonymous users due to use of pseudonyms.

8.2 Compensation

Telstra and Communications Alliance have recommended inclusion of a cost recovery mechanism so that parties assisting the Commissioner or government offices and authorities with investigations, such as to identify an end-user, receive compensation.

The 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.

9. Administrative and Operational Issues

Various stakeholders have raised important considerations in relation to the operation of the Bills and these will be considered during the implementation stages of the establishment of the Commissioner. These issues include:

- Complaints forms should be accessible to culturally and linguistically diverse complainants (APS, the Federation of Ethnic Communities' Councils of Australia (FECCA));
- Greater clarity is required around the roles of different stakeholders such as schools (AHISA);
- Broad consultation is required when developing the details of the complaints handling process under Part 3 of the Bill, keeping in mind that the process must be accessible to children and respectful of their needs (WA Commissioner, APS);
- Guidelines need to be introduced stipulating how the end-user notices are provided, and what form they will take (Child Wise);
- Safeguards should be in place to ensure any communication from the Commissioner with an end-user, particularly end-users who are children, is appropriate and undertaken in a sensitive manner (Youth Affairs Council of Western Australia (YACWA)); and
- Clearer guidelines are needed to determine at what point matters are referred to the Federal Court, and these guidelines need to be developed with input from key stakeholders (APS).

The Commissioner has been given a specific function in clauses 15(1)(f) and (g) to formulate and promote best practice guidelines relating to online safety for children and these issues will be addressed in the performance of these functions.