

An online ombudsman?

- 13.1 There were divergent views on the merit of establishing an office of online ombudsman to investigate, advocate and act on cyber-safety issues.
- 13.2 Those in favour saw the ombudsman as providing investigative and advocacy functions as well as presenting an opportunity for a more visible and centralised reporting place. Those opposing the proposal raised concerns about duplication of existing facilities, the actual functions of the office, jurisdictional considerations and timeliness of procedures. Some participants remained undecided, perhaps because of uncertainty about the role of the ombudsman.

Role of an ombudsman

- 13.3 The Australian and New Zealand Ombudsman Association describes the term ‘ombudsman’ as being ‘understood by the public as signifying an independent office, which primarily has a complaint handling and investigation function’.¹
- 13.4 The Australian University Cyberbullying Research Alliance defined an ombudsman as:
- a government official responsible for impartially investigating citizens' complaints against a public authority or institution and trying to bring about a fair settlement.²
- 13.5 The Australian and New Zealand Ombudsman Association stressed that:

1 Australian and New Zealand Ombudsman Association, Media Release, 18 May 2010, *Peak body seeks to halt the misuse of the term Ombudsman*, p. 1.

2 The Australian University Cyberbullying Research Alliance, *Submission 62*, p. 47.

It is important that members of the public are not confused about what to expect when they approach an Ombudsman. Public trust in, and respect for, the Ombudsman institution generally – and its independent dispute resolution function specifically – must not be undermined. Neither should the term Ombudsman be used in a way which distorts the appropriate character of an Ombudsman office.³

13.6 It added that:

Where problems arise in an industry or an area of government services, the call for an ombudsman commonly follows. In itself, this is not a problem – indeed it is a testament to the high level of public respect for the independence, integrity and impartiality of Ombudsman offices.⁴

[However] using the term ombudsman to describe an office with regulatory, disciplinary and/or prosecutorial functions confuses the role of Ombudsman with that of a regulatory body.⁵

13.7 The Association outlined six essential criteria expected of ombudsman offices: independence, jurisdiction, powers, accessibility, procedural fairness and accountability.⁶ The Telecommunications Industry Ombudsman summarised these attributes as:

- *independence* - the office of the Ombudsman must be established by legislation or as an incorporated or accredited body so that it is independent of the organisations it investigates;
- *jurisdiction* - the jurisdiction should be clearly defined in legislation or in the document establishing the office and should generally extend to the administrative actions or services of organisations falling within the Ombudsman's jurisdiction;
- *powers* - the Ombudsman must be able to investigate whether an organisation within jurisdiction has acted fairly and reasonably in taking or failing to take administrative action or in providing or failing to provide a service;

3 Australian and New Zealand Ombudsman Association, *Submission 53*, p. 1.

4 Australian and New Zealand Ombudsman Association, Media Release, 18 May 2010, *Peak body seeks to halt the misuse of the term Ombudsman*, p. 1.

5 Australian and New Zealand Ombudsman Association, Media Release, 18 May 2010, *Peak body seeks to halt the misuse of the term Ombudsman*, p. 1.

6 Australian and New Zealand Ombudsman Association, Media Release, 18 May 2010, *Peak body seeks to halt the misuse of the term Ombudsman*, p. 1.

- *accessibility* - there must be no charge to a complainant for the Ombudsman's investigation of a complaint;
- *procedural fairness* - the actions of the Ombudsman and staff must not give rise to a reasonable apprehension of partiality, bias or prejudgment; and
- *accountability* - the Ombudsman must be accountable to the Parliament if it is a Parliamentary Ombudsman and to an independent board of industry and consumer representatives if an Industry-based Ombudsman.⁷

13.8 The Association called for stronger controls on the use of the term 'ombudsman'.⁸ The Telecommunications Industry Ombudsman added that, if the Committee recommends the establishment of an ombudsman's office, this should meet with the criteria set out by the Australian and New Zealand Ombudsman Association.⁹ Alternatively:

if the body proposed is to have other functions - including for example advocacy or regulatory functions - which would generally not be compatible with the functions of an 'Ombudsman', the TIO would strongly encourage that another and more appropriate title be used.¹⁰

13.9 The Australian and New Zealand Ombudsman Association stressed that in situations where the office of an ombudsman is under the direction or control of an industry or a government minister, they are not independent.¹¹

For example, an Ombudsman office must be established as a standalone body by way of its own Act or Constitution. Its primary responsibility must be to resolve consumer/citizen disputes, independently, fairly and reasonably and without direction.¹²

7 Telecommunications Industry Ombudsman, *Submission 46*, p. 6. The Australian and New Zealand Ombudsman Association Policy Statement provided additional explanation - Australian and New Zealand Ombudsman Association, *Submission 53*, p. 5.

8 Australian and New Zealand Ombudsman Association, Media Release, 18 May 2010, *Peak body seeks to halt the misuse of the term Ombudsman*, p. 1.

9 Telecommunications Industry Ombudsman, *Submission 46*, p. 6.

10 Telecommunications Industry Ombudsman, *Submission 46*, p. 6.

11 Australian and New Zealand Ombudsman Association, Media Release, 18 May 2010, *Peak body seeks to halt the misuse of the term Ombudsman*, p. 1.

12 Australian and New Zealand Ombudsman Association, *Submission 53*, p. 1.

The office must be truly independent from the bodies or individuals about whom complaints are made. The Ombudsman must not be — nor be able to be perceived as — an advocate for a special interest group, agency or company.¹³

- 13.10 The Association commended the Benchmarks for Industry-Based Customer Dispute Resolution Schemes as principles to be observed by offices which provide an external dispute resolution service for consumer complaints.¹⁴

- 13.11 The Attorney-General's Department made the point that:

The power of an Ombudsman generally lies in his or her ability to investigate complaints and then notify the relevant government agency or the public of the findings. The Department notes that many of the websites an Online Ombudsman would receive complaints about would have no, or only a minimal, presence in Australia. Consideration will need to be given to how an Australian Ombudsman could perform an effective oversight and investigation role in this context.¹⁵

The Department also notes that there are a range of agencies that deal with complaints about the online environment including ACMA, the AFP, ACCC and the Privacy Commissioner. In assessing the merits of establishing an Online Ombudsman, it will be important to examine how the role of this new body can be clearly delineated from the roles of existing agencies to ensure there is no confusion about where to direct complaints or delays causing by adding another layer to the current system.¹⁶

Support for an online ombudsman

- 13.12 The Queensland Council of Parents and Citizens' Associations supported the establishment of an online ombudsman 'to investigate, advocate and act on cyber-safety issues'.¹⁷ Australian University Cyberbullying Research Alliance also saw merit in this approach:

13 Australian and New Zealand Ombudsman Association, *Submission 53*, p. 2.

14 Australian and New Zealand Ombudsman Association, *Submission 53*, p. 2.

15 Attorney-General's Department, *Submission 58*, p. 9.

16 Attorney-General's Department, *Submission 58*, p. 9.

17 Queensland Council of Parents and Citizens' Associations Inc, *Submission 99*, p. 2.

... to advocate and act on cyber-safety issues, and would suggest that it could be structured in such a way that enables and promotes engagement with education/academia/research, in addition to police and industry. It would be important that it not be a figurehead solely for the police, for example.¹⁸

- 13.13 When appearing before the Senate Legal and Constitutional Affairs Legislation Committee in March 2010, Ms Susan McLean was asked of the benefits of having an online ombudsman who can advocate in respect of the social networking sites to get results and to deal with offensive material. Ms McLean commented that:

I think that would be fabulous provided that he or she had sufficient powers. If it were just someone saying, 'Look, we've got a range of issues here and we need the stuff taken down because it is clearly offensive,' and they say, 'Well, it's within our operating guidelines and we self-report,' you are not going to achieve anything. I think it is imperative that they be equipped with the correct tools ... In the last 10 days I have had four calls from people extremely distressed by the fact that they have repeatedly – in excess of 10 times each – contacted Facebook to get content removed, being threatening content against a principal, content against a schoolteacher ... – and two high-profile AFL identities who have had impostor profiles set up. They were all at their wit's end given the fact that they had reported it and reported it and nothing had been done, the content was still there. They were concerned for the safety and welfare of the people that were attaching themselves to friends on the impostors' profiles. In the case of the principal and the schoolteacher, there were serious welfare considerations as well. I deal with this on a weekly basis. When I was a police officer I could do something ... Whilst the line on Facebook is 'we take your privacy seriously and we will actively look at your complaints and act promptly', they do not. ... I think that a government appointed official with some teeth and some power would be an excellent idea.¹⁹

- 13.14 The Young People Big Voice group comprises 14 to 20 year olds and was formed to provide advice to the Centre for Children and Young People by

18 The Australian University Cyberbullying Research Alliance, *Submission 62*, p. 47.

19 Ms Susan McLean, *Transcript of Evidence*, 9 March 2010, Senate Legal and Constitutional Affairs Legislation Committee, Reference: *Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2010*, p. 9.

advising and collaborating on research activities and advocating to Government on important issues:

YPBV members are generally supportive of the idea of an Online Ombudsman to investigate, advocate and act on cyber-safety issues. YPBV recommend that one of the functions of an Online Ombudsman be to facilitate Australian children to share their views on developing effective responses in relation to issues of cyber-safety.²⁰

13.15 Mr Johann Trevaskis also supported the establishment of an ombudsman position:

If nothing else, it will offer a central collection point for real data about cyber-safety issues, so that future government policy can be based on good information about what cyber-safety issues arise and with what frequency.²¹

Parents and/or children may be more comfortable reporting an incident to an Ombudsman rather than to the police, which may be more intimidating or may be perceived as an overreaction.²²

13.16 He also provided some qualifications in relation to:

- the necessity to implement procedures for the exchange of information between the ombudsman and the police;
- the Ombudsman can advocate with online service providers but any attempt at enforcement is likely to be unhelpful (any breach of actual law should be left to law enforcement and the justice system); and
- statistical information about number and type of issues notified to the Ombudsman (via whatever mechanism) should be reported annually to the public, and to the parliament.²³

13.17 The System Administrators' Guild of Australia supported the establishment of an independent online ombudsman:

As in the telecommunications industry, the ombudsman's primary responsibility should be in advocating for users and other stakeholders and in resolving user concerns. Further, SAGE---AU believes that the ombudsman's responsibility should be to advocate to government and law enforcement, and within Internet

²⁰ Centre for Children and Young People, *Submission 31*, p. 3.

²¹ Mr Johann Trevaskis, *Submission 40*, p. 2.

²² Mr Johann Trevaskis, *Submission 40*, p. 2.

²³ Mr Johann Trevaskis, *Submission 40*, p. 2.

centric industries, on matters pertaining to Internet usage education and policing.²⁴

- 13.18 The Office of Youth South Australia saw the establishment of an ombudsman office as a step towards addressing the lack of a:

clear agency responding to cyber-safety issues and quite a bit of public confusion about who to go to for help. Additionally, there is public concern that police responses are not always adequate and often when people do seek help, there is little that can be done and the individual is left feeling frustrated that there is no one to follow up and resolve their concerns.²⁵

- 13.19 Brilliant Digital Entertainment referred to the absence of an:

independent position that rises above the opposing position and competing vendors that would enable on-line safety to become a fundamental right rather than wishful thinking.²⁶

The proposed role of Online Ombudsman has the potential to have a far reaching effect not only on the safety of on-line activity but also make a positive contribution to Australia's digital economy.²⁷

- 13.20 It called for the role to be sufficiently empowered to influence the online environment and the powers of the ombudsman 'to reach across a wide variety of organisations and take innovative or creative actions'.²⁸ It further commented that:

In order to achieve the full potential of this role the Ombudsman should have the capacity to influence or act jointly with a range of stakeholder organisations such a law enforcement agencies, a variety of other ombudsmen, certain government agencies and have enforceable investigative and dispute resolution powers. The role should have the authority and obligation to submit amicus curiae briefs in Court matters likely to have an impact or otherwise influence the course of internet activity including e-commerce, law enforcement and content distribution.²⁹

24 System Administrators' Guild of Australia, *Submission 71*, p. 8.

25 Office of Youth South Australia, *Submission 98*, p. 5.

26 Brilliant Digital Entertainment, *Submission 102*, p. 9.

27 Brilliant Digital Entertainment, *Submission 102*, p. 9.

28 Brilliant Digital Entertainment, *Submission 102*, p. 10.

29 Brilliant Digital Entertainment, *Submission 102*, p. 10.

- 13.21 It was submitted to the Committee that an ombudsman could provide ‘another legal avenue to bring content providers like Google to heel when it comes to upholding their Terms of Service’ and to deal with persistent spammers through the appropriate channels.³⁰ Further:

the legislation covering this would be very important to get right, and give the Ombudsman certain powers of jurisdiction when it comes to content. I believe that the Gutnick case could well be useful in this regard. Expanding this decision into a workable visible law applying to the Internet in Australia could have the world sitting up and taking notice. If we get it right, we could set the standard for genuine and workable cyber safety.³¹

- 13.22 Ms Catherine Davis from the Australian Education Union saw the online ombudsman as part of potential measures to mitigate some of the anti-social behaviour.³²

Those opposing the establishment of an ombudsman

- 13.23 The ACT Council of P & C Associations called for ‘a firm strategic stance to pressure websites that are popular with children to introduce sufficient privacy and safety protocols’ and stated that:

Council recognises that the government has limited power in patrolling the internet and therefore it should take a moral stance against offending websites rather than fund an online ombudsman.³³

- 13.24 The Council was not convinced that the position would have meaningful power, and added that:

Unless a site is Australian registered, an online ombudsman will have no power to enforce control over online material or proceed with any further action. Illegal content on Australian sites can already be raised with the ACMA. But, in terms of offensive material, it is difficult to see how an ombudsman

³⁰ Name withheld, *Submission 106*, p. 4.

³¹ Name withheld, *Submission 106*, p. 4.

³² Ms Catherine Davis, Federal Women’s Officer, Australian Education Union, *Transcript of Evidence*, 30 June 2010, p. 4.

³³ ACT Council of P&C Associations Inc, *Submission 41*, pp. 3-4.

could have any power to control what is posted on websites, particularly if hosted overseas.³⁴

- 13.25 The ACT Council of P & C's Associations suggested a more productive approach would be :

for the government to urge the owners of websites to introduce additional safety measures to protect children. For example, while only the page creators on facebook can delete a post made by a member of a group, the government should pressure sites like facebook to automatically hide comments by users if there are a number of "dislikes". The government has limited power in relation to patrolling the internet and therefore it should take a moral stance rather than using funds to establish an online ombudsman whose role will be mostly ineffective.³⁵

- 13.26 Yahoo!7 commented that:

We remain committed to making the Internet a safer place for all users, especially those who are more vulnerable such as children, and working with government and community stakeholders to take positive steps forward in this respect. Whilst we would be very happy to consider ways in which government, industry and relevant communities could work in a more coordinated manner towards this goal, we are not convinced that the appointment of an Online Ombudsman would be an effective step in the right direction.

- 13.27 Yahoo!7 also referenced the work of industry in promoting safe online environments for users:

At present, most of industry work both individually and collectively with various government departments who have an interest in cyber-safety and have informal processes in place to deal with issues as they arise. All websites should have mechanisms in place which allow users to report illegal or offensive content directly to them in order that the content can be taken down expeditiously. We appreciate that awareness of these mechanisms may not be top of mind for some people and the Internet Industry Association is currently preparing a reference guide which identifies how to escalate these sorts of issues for each of the more popular social networking websites. We fear that the scope of work which would logically be tasked to an Online

34 ACT Council of P&C Associations Inc, *Submission 41*, p. 12.

35 ACT Council of P&C Associations Inc, *Submission 41*, p. 12.

Ombudsman may be duplicative and ignorant of relationships and processes that are already in place. We are also mindful of the fact that many of the more popular social networking services (where safety concerns are of greater concern) are operated out of the United States and an Online Ombudsman may not have jurisdiction to actually compel these companies to take action where there has not been a breach of the website terms of use. Lastly, whilst we think that coordination between government, industry and community stakeholders could be better coordinated and harnessed, we would rather see the investment that would be required to establish an Online Ombudsman's office used to supplement funding to existing organizations that are doing very important work in this area such as law enforcement agencies and the ACMA.³⁶

13.28 Telstra Corporation also made the point that:

the appointment of a separate Online Ombudsman is not required but such a function could be co-ordinated by the Australian Communications and Media Authority (ACMA) within the existing Australian legislative framework. ... Telstra understands concerns about the need for a cohesive, integrated contact point to investigate, advocate and act on Cyber-Safety issues. In Telstra's view this function could be co-ordinated by the Australian Communications and Media Authority (ACMA) within the existing Australian legislative framework, without the need to appoint a separate Online Ombudsman. Challenges would arise in executing such a function and in ensuring effective remedies given jurisdictional limitations in relation to content hosted offshore. In this respect, the ACMA is well-positioned to coordinate with its counterparts overseas. Cooperative and more informal processes established between industry, the ACMA and Government will ensure that these challenges can be managed quickly as they arise.³⁷

13.29 The Australian Library and Information Association believes that:

the Australian Communications and Media Authority is already fulfilling the functions of an ombudsman such as investigating, advocating and acting on cybersafety issues. Therefore, we do not support the establishment of an Online

36 Yahoo!7, *Submission 2.1*, p. 1.

37 Telstra, *Submission 14*, pp. 2-4.

Ombudsman which may cause confusion for concerned parents and users in the community.³⁸

- 13.30 The Australian Federal Police (AFP) did not see a need for an additional 'reporting point or investigative structure dedicated solely to cyber safety':

Rather the need is to consider an enhanced coordination, longer term evaluation and policy synergies of existing or proposed cyber safety programs.³⁹

- 13.31 In response to a question on the usefulness of an online ombudsman, Commander Taylor of the AFP told the Senate Legal and Constitutional Affairs Legislation Committee that:

My concern would be that there is a possibility that crimes would not be reported as quickly as they should be or could be. If parents are concerned that an offence is occurring, we would want that to be reported as quickly as possible so that any action that has to be taken can be taken. I am not sure if an ombudsman could add anything further than the current regime we have already got in place.⁴⁰

- 13.32 The Communications Council was of the opinion that:

rather than establishing a new body such as the Ombudsman, which may make matters increasingly complex, options in which cyber safety issues are tackled through existing structures should be explored... The Council would support an option which would see relationships between existing enforcement agencies and publishers be strengthened.⁴¹

- 13.33 The Association of Independent Schools of South Australia commented that:

Whilst the safety of students in Independent schools is paramount, member schools expressed concern that establishing an Online Ombudsman may not be the most effective way to ensure students remain safe from cyber-harm... The application of an

38 Australian Library and Information Association, *Submission 16*, p. 13.

39 Australian Federal Police, *Submission 64*, p. 25.

40 Commander Stephanie Taylor, Australian Federal Police, Hansard 9 March 2010, Senate Legal and Constitutional Affairs Legislation Committee, Reference: *Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2010*, p. 13

41 The Communications Council Inc, *Submission 65*, pp. 6-7.

administrative/regulatory approach to cyber-safety is not considered the most appropriate risk management strategy.⁴²

13.34 This Association added that:

Exploration of the formation of a national an advisory group to guide policy development and keeping a watching brief on the 'bigger picture', particularly in regards to international research and policies. This is an alternative to the establishment of an Online Ombudsman that the AISSA may support.⁴³

13.35 The Internet Industry Association made the point that informed users already have the ability to respond to misuse of social networking sites as most popular social websites already have such services within their networks.⁴⁴ The Association also advised that:

At present, understanding and appreciation of such resources is uneven. In conjunction with the Government, schools and the community, the IIA proposes improved education on such facilities... The IIA understands the case for an Online Ombudsman is inspired in part on the effectiveness of our local telecommunications, banking, insurance and other utility ombudsman-like offices.⁴⁵

In principle, they often operate as a 'last resort' grievance service. This means that if a user complains to an ombudsman before taking their complaint to the service that caused the issue in the first place, they may only waste time getting their complaint processed. In other words, an Ombudsman may add another layer of regulation which may slow the response time for legitimate complaints to be dealt with by relevant providers.⁴⁶

We note that law enforcement agencies have generally praised the responsiveness under existing informal protocols with the main social media sites. We would not like to see anything undermine or add complexity to those arrangements. There is no evidence of systemic failure such as to warrant the establishment of such an office... In addition where a jurisdiction crosses borders there is a risk that an Online Ombudsman may offer only symbolic

42 Association of Independent Schools of South Australia, *Submission 19*, p. 3.

43 Association of Independent Schools of South Australia, *Submission 19*, p. 15.

44 Internet Industry Association, *Submission 88*, p. 10.

45 Internet Industry Association, *Submission 88*, p. 10.

46 Internet Industry Association, *Submission 88*, pp. 10-11.

assurance as they may not have any powers beyond that of publicity where a complaint is well-founded.⁴⁷

13.36 This Association did not support the 'establishment of an online ombudsman until it can be established that such a role will add value to online safety and avoid adding delay to current processes'.⁴⁸

13.37 ninemsn stated that:

Our preliminary view is that an ombudsman would duplicate the reporting mechanism already in place by ACMA in relation to inappropriate content. In terms of the more pernicious online offences, ninemsn believes that the Australian Federal Police remains the most appropriate forum for investigation and prosecution.⁴⁹

13.38 Web Management InterActive Technologies commented that:

Until there is a framework which encourages a Protective environment, any such position would run the risk of holding a great deal of responsibility and yet have little in the way of mechanisms in which to achieve any real goals. It would be a little like putting a policeman in the middle of the highway with no uniform, no tools of the trade and no respect from the passing traffic. There is much more to do before we reach the point of establishing that position.⁵⁰

13.39 The jurisdiction of an ombudsman was also questioned because of international online developments.⁵¹ The question was raised as to what an online ombudsman regulates:

In circumstances where globally acceptable benchmarks for bad conduct are breached, such as murder, theft, drug offences or other crime, extradition treaties are entered into for the purposes of mutually dealing with offenders. This spirit of cooperation between independent sovereign jurisdictions who have the same or similar values about human behaviour, is not repeatable when it comes to the Internet because of how different our approach is... In circumstances where law has genuinely been broken, the police are able to cooperate internationally with their counterparts

47 Internet Industry Association, *Submission 88*, p. 10.

48 Internet Industry Association, *Submission 88*, p. 11.

49 ninemsn, *Submission 91*, p. 6.

50 Web Management interactive technologies, *Submission 96*, p. 9.

51 Mr Geordie Guy, *Submission 105*, p. 16.

overseas (our AFP are well regarded internationally on these issues). What would an online ombudsman bring to the situation?... An online ombudsman would be wholly ineffectual, or be nothing more than a figurehead.⁵²

13.40 The Consultative Working Group on Cybersafety commented that:

Many websites operate on a global basis and often only have a minimal presence in Australia. The CWG considers there would be significant limitations as to what an Australian Ombudsman can legally oversight and report on. In addition, without jurisdiction over sites hosted outside Australia, the scheme would rely on voluntary compliance without any guarantees that this would occur which would in turn undermine the effectiveness of an Online Ombudsman.⁵³

13.41 The Working Group added that:

In Australia there are already several mechanisms for dealing with online complaints established by the ACMA, the AFP, ACCC, and the Privacy Commissioner. Establishing yet another mechanism may exacerbate existing confusion in the minds of the public as to where to direct complaints and potentially add time and complexity to complaint resolution without necessarily improving outcomes for consumers. It would be necessary to clarify the existing roles and look at ways of removing duplication if an Online Ombudsman were introduced.⁵⁴

13.42 It concluded that:

there are other ways to safeguard the interests of consumers, as has occurred overseas. For example, the European Union's Safer Social Networking Principles, which most major social networking sites have signed up to, provide an alternative and means of regulating the sector. Approaches such as this need to be explored further as they are more likely to include a larger proportion of the internet community.⁵⁵

13.43 The Association of Independent Schools South Australia outlined a number of existing mechanisms which facilitate the investigation and reporting on cyber-safety issues:

52 Mr Geordie Guy, *Submission 105*, p. 16.

53 Australian Government's Consultative Working Group on Cybersafety, *Submission 113*, p. 38.

54 Australian Government's Consultative Working Group on Cybersafety, *Submission 113*, p. 38.

55 Australian Government's Consultative Working Group on Cybersafety, *Submission 113*, p. 39.

The requirements of school registration set out by the [Non-Government Schools Registration Board] ensure that child protection and anti-bullying and harassment policies are in place in all schools to protect students from harm, including cyber-harm.⁵⁶

The Association does not support duplication of policies and processes. Enhanced red tape will not enhance the effectiveness of strategies to ensure cyber-safety.⁵⁷

When serious incidents that compromise student safety occur, the Police are contacted and take carriage of incidents. There is also legislation in place to support victims of cyber harm, such as harassment and defamation laws.⁵⁸

At a local level, schools have developed policies to follow when managing incidents of cyber-bullying and abuse. In incidents involving students, there is usually a broader context that needs to be considered with schools often being in the best position to consider this. Schools can implement a supportive set of strategies, with the support of Police or others if required, without the heavyhanded approach an Ombudsman may introduce.⁵⁹

- 13.44 Further, the Association of Independent Schools of South Australia did not support the establishment of an 'Online Ombudsman as the overarching advocacy body for this area without further evidence to support that it would have a positive impact on eliminating cyber-safety issues', and added:

In issues between students, it is sometimes the case that the aggrieved student and parents remain dissatisfied with the outcome, regardless of the process taken. If an external body such as an Online Ombudsman is readily available to handle complaints, parties may be less willing to resolve the matter at a local school level. Schools are concerned that parents and students may not use their best endeavours to resolve the issues at a school level and escalate matters unnecessarily.⁶⁰

The AISSA also expresses concern that an Online Ombudsman may not be the most efficient administrative process by which to

56 Association of Independent Schools South Australia, *Submission 19*, pp. 14-15.

57 Association of Independent Schools South Australia, *Submission 19*, p. 15.

58 Association of Independent Schools South Australia, *Submission 19*, p. 15.

59 Association of Independent Schools South Australia, *Submission 19*, p. 15.

60 Association of Independent Schools South Australia, *Submission 19*, p. 15.

report incidents of cyber harm. It may in fact slow down the process of reporting, investigating and acting upon issues, when cyber-safety is an area that moves rapidly and needs to be constantly monitored and managed. In addition, schools may be reluctant to involve an Ombudsman because of the perceived additional administrative duties associated with this process. Teachers may also be confused about their role in the investigation and management of incidents because of a perception that an Ombudsman will solve the problem. Consequently, incidents may go undetected, unreported and unresolved.⁶¹

The Association is also concerned about the negative impact on young people resulting from being involved in a legalistic process and the associated administrative burden that would be generated.⁶²

13.45 The Department of Broadband, Communications and the Digital Economy commented that:

looking at the incidents that have led to the call for an ombudsman. I am not aware of one incident where the material that was of concern was not hosted on an offshore website, such as Facebook, which makes the question of extraterritoriality very difficult. That is the first issue that would have to be dealt with. The second side of it, as you have rightly pointed out, is that there are already a number of Commonwealth agencies that have a role in taking and dealing with complaints in this space, including the ACMA, the AFP and the ACCC. We are not aware of a type of complaint in this space that would not fall within the jurisdiction of one of those three agencies – if it were not an extraterritoriality issue.⁶³

Other options

13.46 The Association of Independent Schools of South Australia would prefer to see an:

61 Association of Independent Schools South Australia, *Submission 19*, p. 15.

62 Association of Independent Schools South Australia, *Submission 19*, p. 15.

63 Mr Abul Rizvi, Deputy Secretary, Digital Economy and Services Group, Department of Broadband, Communications and the Digital Economy, *Transcript of Evidence*, 3 March 2011, p. CS14.

Exploration of the formation of a national an advisory group to guide policy development and keeping a watching brief on the 'bigger picture', particularly in regards to international research and policies... Currently in South Australia, mandatory reporting requirements exist for teachers and others in relation to suspected physical, emotional and sexual abuse and neglect. This could be extended to include online maltreatment or abuse, though this would require extensive consultation and negotiation with states. Any variation to the mandatory reporting laws would need to be supported by adequate funded training of teachers to recognise and report incidents of cyber-harm. This could be an alternative to introducing an Online Ombudsman.⁶⁴

- 13.47 The Alannah and Madeline Foundation advocates a broad community change approach to cyber-safety through the empowerment of young people and adults to keep themselves safe and to deal with online risks. This includes the ability to report and seek support when risks and potential harm are identified.⁶⁵ The Foundation added that:

When in immediate danger, the advice always given is to call 000. Children and young people are always encouraged to seek help from a trusted adult. Help Line and Kids Helpline receive calls regarding cyberbullying and cybersafety issues. Social networking sites also have mechanisms on their sites for reporting cybersafety issues... There are currently a number of other, more specialised, mechanisms for reporting cybersafety issues, including reporting to the Australian Communications and Media Authority (ACMA) issues around cybersafety and inappropriate content, reporting to the Privacy Commission concerns around breaches of privacy, reporting to the Australian Human Rights Commission complaints of discrimination and human rights breaches, and reporting potential criminal activity and illegal content to the Australian Federal Police.⁶⁶

- 13.48 The Foundation advocated that any new mechanism being considered for investigating, advocating and acting on cybersafety issues should consider the significant resources, support and expertise already available and 'should include how these current mechanisms can be better harnessed, coordinated and communicated'.⁶⁷ Rather, the existing avenues of

64 Association of Independent Schools South Australia, *Submission 19*, pp. 15-16.

65 Alannah and Madeline Foundation, *Submission 22*, p. 42.

66 Alannah and Madeline Foundation, *Submission 22*, p. 42.

67 Alannah and Madeline Foundation, *Submission 22*, p. 42.

complaint, reporting and redress could be strengthened by an appropriate legal framework for bullying, cyberbullying and other cyber-risks – a change that ‘is fundamental for an effective response to cybersafety issues’.⁶⁸

Those undecided

- 13.49 Netbox Blue did not have a firm view on establishing an online ombudsman, but saw that a similar office to the Banking, Insurance or Telecommunications Industry Ombudsman may be helpful.⁶⁹ It qualified this by adding that:

the fact that legal jurisdiction is uncertain especially for the most popular networking sites, could lead to merely another layer of mediation without any real power.⁷⁰

- 13.50 Netbox Blue also cautioned that:

It is something that would require legal coordination across several international borders. It would be useful to clarify where the gap exists and how an online ombudsman can fulfil such roles as against other mediation options available.⁷¹

- 13.51 The Australian Communications Consumer Action Network commented that:

There are many different agencies involved in promoting e-security and cyber-crime awareness – the ACCC, BDCDE, the Australian High Tech Crime Centre – and we expect these agencies will have undertaken assessments of the effectiveness of their campaigns and messages.⁷²

- 13.52 The Australian Education Union suggested ‘a feasibility study into the role, powers and objectives of an online ombudsman in preference to a mandatory ISP-level filtering policy’.⁷³

- 13.53 Though undecided about an online ombudsman, Professor Bjorn Landfeldt commented that:

68 Alannah and Madeline Foundation, *Submission 22*, p. 42.

69 Netbox Blue Pty Ltd, *Submission 17*, p. 6.

70 Netbox Blue Pty Ltd, *Submission 17*, p. 6.

71 Netbox Blue Pty Ltd, *Submission 17*, p. 6.

72 Australian Communications Consumer Action Network, *Submission 1*, p. 5

73 Australian Education Union, *Submission 11*, p. 5.

I believe that cyberbullying – and bullying as a wider matter than just cyberbullying – is something that needs attention and more concerted effort than putting out little fires here and there. The Children’s Ombudsman in Sweden is a fantastic institution. It provides many more services. It provides a safety net and a voice for children in society that I have not experienced in Australia ... because children are well aware that the ombudsman is a point of contact; everyone is aware of that. It is not hard to get to the ombudsman as a child and go there with any concern. The ombudsman deals with children.⁷⁴

Conclusion

- 13.54 While there was considerable support throughout the Inquiry for a centralised reporting authority, the evidence supporting the formation of an online ombudsman position was mixed. Those strongly supporting the ombudsman approach appeared to recommend such an office assume reporting, investigative and advocacy roles, rather than those of an ombudsman *per se*.
- 13.55 It was not evident to the Committee that, in attempting to increase cyber-safety for the community, evaluations of the effectiveness of existing campaigns and the resultant proposals for improvement had been adequately brought together for the benefit of stakeholders. Therefore there is a need for better coordination. The question remains as to how a central organisation should be managed and the designation of a formal figurehead. The role of an ombudsman may be too restrictive to achieve this goal.

74 Associate Professor Bjorn Landfeldt, University of Sydney, *Transcript of Evidence*, 24 March 2011, pp. CS25-26.

