



5 July 2024

Director – Strategy and Research

Online Safety, Media and Platforms Division

Department of Infrastructure, Transport, Regional Development, Communications and the Arts

By email: OSAReview@COMMUNICATIONS.gov.au

Dear Director Strategy and Research,

Statutory Review of the Online Safety Act 2021

1. Youth Law Australia thanks the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (the Department) for the opportunity to provide a submission in response to the *Statutory Review of the Online Safety Act 2021 Issues Paper* (the Issues Paper). We also thank the Department for providing a short extension of time for this submission.
2. We welcome the review of the *Online Safety Act 2021* (the Act) and the potential this brings to enhance and tailor protections for children and young people who experience some of the highest levels of harm when using online services and are often the group most impacted by new and emerging misuse of online spaces and technology. It is also vital to get the balance between protection and inclusion right, as children and young people lead vibrant, extensive, and fast paced digital lives and have rights to equal access to the digital environment and to develop and express their identities online.

Acknowledgements

3. Youth Law Australia acknowledges the Traditional Owners and Custodians of Country and pays respect to the Elders, past and present. We acknowledge the strength, resilience and capacity of Aboriginal and Torres Strait Islander peoples from the many locations across Australia where we support children and young people in their journey for safety, dignity, equality and justice.
4. We also acknowledge all children and young people who are courageous and hopeful in sharing their experiences with us.



Youth Law Australia

Bedegal Land, Level 1, Law Centres Precinct

Law Building, UNSW Sydney 2052

T: (02) 9067 6510

W: yla.org.au

About Youth Law Australia

5. Youth Law Australia (YLA) (formerly the National Children’s and Youth Law Centre) is an accredited community legal centre dedicated to helping children and young people under the age of 25 years and their supporters to understand their legal rights and find solutions to their legal problems. YLA is Australia’s only national, technology-based community legal service, providing specialist child-safe and trauma-informed legal services and referrals primarily through web content, email, phone and live webchat.
6. We receive funding under the *National Strategy to Prevent and Respond to Child Sexual Abuse 2021-2030* via the *Enhance and Expand Legal Assistance Services for Victims and Survivors of Child Sexual Abuse* program to provide a national legal service, including an online legal webchat service, for children and young people experiencing, or at risk of experiencing child maltreatment including in online spaces. This is known as the Harm Practice.
7. During 2023 the Commonwealth Attorney General’s Department commissioned an independent evaluation of the Harm Practice by Urbis. The *Evaluation of the Enhancement and Expansion of Legal Assistance Services for Victims and Survivors of Child Sexual Abuse Final Report* was published on 20 December 2023.¹ The evaluation concluded that YLA provides a unique legal service via an online legal platform that is a mostly appropriate response to the needs of the children and young people experiencing, or at risk of experiencing harm.
8. Wherever possible we support Gillick competent young people² to make independent decisions and informed choices and prioritise the direct participation of all children and young people in all matters that impact them where safe to do so.³

Our work with children and young people using online spaces and technology

9. YLA has significant experience and expertise in advising and supporting children and young people and their advocates on matters relating to online spaces and technology including, child cyberbullying and adult cyber abuse; online child sexual exploitation and abuse material; sexting; non-consensual sharing of intimate images; sextortion; grooming; sexual harassment; technology facilitated abuse; accessing pornography and illegal and restricted content; deep fakes; doxing; swatting; online hate and harassment; fraud, hacking, impersonation accounts and ID theft; pranks and scams; the impact of algorithmic harmful content; privacy and defamation.⁴

¹ The *Evaluation of the Enhancement and Expansion of Legal Assistance Services for Victims and Survivors of Child Sexual Abuse - Final Report* prepared for the Commonwealth Attorney General’s Department by Urbis, 20 December 2023, is not publicly available but a copy can be provided on request.

² *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 (“Gillick”).

³ Direct participation to give effect to United Nations, *Convention on the Rights of the Child*, 20 November 1989, articles 12 and 19.

⁴ In the 2023-2024 financial year YLA provided 1,532 legal services relating to online spaces and use of technology. We also note that the demand for services across all our practices surpasses our capacity and due to measures undertaken to reduce intake we estimate that about 50 children and young people are unable to access a YLA service each week.

10. We provide legal information and referrals, legal advice, advocacy and representation services which may include outlining the scope of offences and available remedies; collecting evidence; protecting accounts and information online; reporting to social media and gaming platforms; reporting to agencies including the eSafety Commissioner, the Australian Centre to Counter Child Exploitation, police and child protection authorities; preparing correspondence or notices to third parties to address the criminal behaviour; engaging with schools about risk management options; applying for restraining orders or other protective relief; and providing non-legal supports, referrals and strategies to deal with the impact of the online or technology facilitated harm.
11. In providing legal services to all children and young people under 25, we see the experiences of both under 18s and those in the 18-25 age range. We also have unique insights into the experiences of people who have been harmed in online spaces or by the misuse of technology as well as those who are fearful or anxious about their own misuse of technology or behaviour in online spaces. By providing advice and assistance to children and young people who may have caused harm to someone else online or via technology, we also engage in preventative education to reduce the risks of repeat behaviour and escalation.
12. Our approach to legal service delivery also enables us to engage with any child or young person in Australia with no entry threshold aside from age, which is critical when dealing with online behaviours where a child or young person may have been both harmed and caused harm or done something illegal and initially only be comfortable to engage anonymously. It is also our experience that when provided with free, confidential, trauma informed and child rights informed access to legal services, children and young people are proactive and engaged in help seeking and finding solutions to their legal problems and are mostly not afraid or uncomfortable to talk about online harm or exploitation within the context of a legal service where lawyers are not mandatory reporters.⁵
13. Children and young people are also often the cohort most likely to be impacted by emerging forms of sexual victimisation, particularly in relation to online sexual harm and exploitation. The Australian Child Maltreatment Study report noted that their forthcoming analyses of the data *“will show additional concerning trends, and new emerging forms of child sexual abuse requiring major national prevention efforts”*.⁶
14. We also note that in providing legal services as a technology-based legal practice, particularly via live webchat and our 24 hour webform, YLA staff also experience cyber bullying and abuse; trolling; online hate; harassment; pranks; gender-based violence and abuse; and receive unsolicited nudes and other sexualised content.

⁵ It is crucial to children’s safety to recognise, preserve and emphasise the confidentiality of communications with lawyers who are also not mandatory reporters, except for legal professionals in the NT pursuant to *Care and Protection of Children Act 2007* (NT), see sections 15, 16, 26 and 27.

⁶ Haslam D, Mathews B, Pacella R, Scott JG, Finkelhor D, Higgins DJ, Meinck F, Erskine HE, Thomas HJ, Lawrence D, Malacova E. (2023), *The prevalence and impact of child maltreatment in Australia: Findings from the Australian Child Maltreatment Study: Brief Report*, Australian Child Maltreatment Study, Queensland University of Technology, accessed at: http://www.acms.au/wp-content/uploads/2023/04/ACMS_BriefReport.pdf.

Responses to the Issues Paper

15. YLA acknowledges the detailed information provided in the Issues Paper and commends the ongoing efforts of the Australian Government, including via key agencies like the eSafety Commission and the Australian Centre to Counter Child Exploitation, to balance digital participation and safety online. YLA recommends the following:

- **Consideration of the best interests of children** - to be achieved by the implementation of measures for regulated service providers to ensure that the best interests of children are a primary consideration in the design and operations of services that are likely to be accessed by children. Any such measures should involve children and young people in co-design and incorporate considerations of rights to participation⁷, identity, privacy, freedom of expression and protection with reference to international best practice and inter-country enforcement and efforts to address digital poverty.
- **Safety by Design** - incorporation of an approach centred on Safety by Design, which is a core expectation under the Basic Online Safety Expectations, and which integrates recognition of the disproportionate harms arising from gender based violence and online harm directed at other groups of people most at risk including children and young people, First Nations people, people who identify as LGBTQIA+, people from culturally and linguistically diverse backgrounds and people with disability.
- **Statutory duty of care** - the introduction of a general statutory duty of care on social media platforms and digital services which places the regulatory responsibility and burden to ensure user safety on the entity controlling the regulated environment. This should be modelled on the best interests of the child principle and carry an obligation to exercise care through measures like risk assessment and mitigation.
- **More child friendly reporting and complaint options** - further consultation, including with children and young people is needed to determine how to effectively monitor their experiences of online harms and to engage children and young people in earlier help seeking.
- **A broader review be conducted on the harm experienced by children and young people in online spaces and via technology** - much of the harm experienced by children and young people online falls outside the scope or thresholds of the Act and other regulatory and justice frameworks, including, texting and direct messages, especially when using end to end encryption or falls into a grey area which causes additional distress and anxiety as there may not be a clear answer about the likely response.
- **Review of legislation that impacts the sexting behaviours of children and young people** and any unintended consequences and assess the opportunities to introduce harmonisation across the Commonwealth and state and territory jurisdictions and exceptions or defences.
- **Greater transparency and consistency in police processes and responses**
- **Consideration of restorative justice and victims support needs of children and young people harmed in online spaces or via technology**

⁷ Children and young people have a right to direct participation in the ongoing development of regulation of online spaces and technology to give effect to Articles 12 and 19 of the Convention on the Rights of the Child.

16. Our comments below reflect some of the key issues arising in our practice rather than responding directly to the consultation questions. We have primarily focused on the experiences reported to us by children and young people and the needs, gaps and priorities for reform in the overall online safety environment.

Legal help seeking behaviours of children and young people - "Will I get in trouble?"

17. In the 2023-2024 financial year YLA provided 1,532 legal services relating to online spaces and use of technology. Our webpages on topics including cyberbullying, sexting, image-based abuse, online privacy, getting into trouble on social media and porn and the law, have had 93,098 page views during that time.

18. Many of the children and young people who contact us are highly anxious and confused and want to know if they will get in trouble or ask questions like "does this make me a pedo" or "will I end up on a sex offender register?". This is a not uncommon scenario:

I ended up sextorting someone without realising and I feel horrible about it. I have deleted everything but what if they reported me. I didn't mean for it go that far, I was just in the moment and then it wore off. How much trouble am I in? Will I go to prison?

19-year-old

19. We are also seeing the ages of the children who are contacting us getting younger with 8-and 9-year-olds dealing with cyberbullying and group harassment.

20. Whilst YLA has referred 324 matters to the eSafety Commission, a lot of the matters we deal with are outside the scope of the Act, for example if they involve texts or direct messages or we determine that the behaviour will not meet the statutory thresholds.

21. Children and young people are often dealing with threats which may also be criminal offences, but in our experience, it is rare for police to take action in response to these sorts of messages, for example:

I have been threatened online that harmful things are going to happen to me, I'm really scared for my safety. They are saying I should watch out and that someone will want to kill me and I'm scared.

14-year-old

A post was uploaded with hurtful messages from a fake account saying my child should kill themselves. The bullying is coming from an ex friend and their friends. Some of these kids are still in primary school.

Parent of 12-year-old

22. Children and young people may also be struggling with emerging digital harms, for example:

I sent a story generated by chat gpt about a love story between two people in which the ai wrote an inappropriate comment to a group chat. I didn't read the story and I had no idea but somehow it got sent to the people in the story, am I in trouble?

13-year-old

Rights of children and young people in online spaces and using technology

23. There are lots of reasons that children and young people use online services and technology. This includes quick access to information, socialisation and relationship building, skills development, having fun and distracting from real world pressures and to be able to participate in society. Children and young people will also increasingly rely on online services in the future.
24. Children and young people have a right to *equal and effective access to the digital environment in ways that are meaningful for them*.⁸ With this in mind, future reform to the online safety framework, must ensure that measures are taken to overcome digital exclusion. This means that the rights of children and young people to be safe and free from exploitation must be balanced with the right to be curious and authentic and to learn and play in online spaces without being punished or demonised by blunt regulatory instruments.
25. This balancing is particularly challenging when it comes to children and young people and sex, particularly when it involves under 18s. There is a general inherent discomfort in seeing children and young people as capable of having thoughts and desires about sexual communication and activities. YLA believes that this discomfort must be acknowledged and addressed with more appropriate and meaningful opportunities for children and young people to directly participate in finding effective resources and solutions for common scenarios where they get into trouble with technology. For example, if you search online for phrases like “how to have sex” or “young people having sex”, the results are mostly a mix of academic or research content, media articles and social news websites and health services, and the occasional tips for better sex. The majority is of no assistance to a child or young person who is genuinely interested in learning more about sexual feelings and behaviours.
26. This lack of age and developmentally appropriate content to educate children and young people to be able to be safe and make informed choices as they negotiate relationships and sexual activity undermines their ability to be safe in online spaces and exposes them to greater risk of exposure to harmful content, exploitation and punishment. The following request that YLA received for assistance from a young person illustrates the impact on children and young people:

I accessed child abuse material looking for porn of people my own age. I know this was really stupid but did not know the law. I have now learnt about the abuse children go through for people to get this content. I am disgusted with myself and have reported the content. I live in fear, paranoia and anxiety not knowing what will happen to me. Should I go to the police? What will happen, I don't want to lose all the options in my future from being naïve and irresponsible.

14-year-old

27. YLA acknowledges the many fantastic organisations and programs currently providing respectful relationships education, but the feedback we receive from clients is that there is still a big gap in

⁸ UN Committee on the Rights of the Child (UNCRC), *General Comment No. 25 (2021) on Children's Rights in Relation to the Digital Environment*, CRC/C/GC/25 (2 March 2021) 9.

education about the actual mechanics of sex, particularly if you attend a school which does not provide access to respectful relationships programs. YLA recommends that the Australian government engage sexual health, lifestyle and respectful relationships experts to work with children and young people to develop education materials to provide detailed information and guidance about the physical and emotional aspects of safe and respectful sexual activity to be made available in conjunction with ongoing education about safe sex, affirmative consent and equal rights to pleasure for all participants.

Harm and exploitation in online spaces or when using technology in an education context

28. A significant percentage of the matters that we see relating to harms like cyberbullying, online child sexual exploitation material and abuse (mostly in the form of sexting) and non-consensual sharing of intimate images occurs in the context of education.
29. We observe an enormous variance in the ways that individual teachers and schools respond. For example, a young person sending an unsolicited dick pic in one school may be spoken to by a deputy principal, receive a one-day suspension and be asked to apologise, whilst a different school may see this as grounds for immediate expulsion with no discretion or right of review. In another school the matter may be immediately referred to police and devices confiscated with the school deferring the investigation and response to the police. This lack of consistency and transparency around what a proportionate response should be is a common issue raised by children and young people and their parents and carers. YLA has received the following requests for assistance:

Someone sent my 14-year-old son naked photos and said to come to their house on the weekend and have sex. My son showed his friend at school and next minute police turned up saying he had shared pornography. My son has never been in trouble before. Now he is being threatened with criminal charges and is traumatised. What do I do? The police have taken his phone.

Parent on behalf of 12-year-old

My son has been treated very badly by his school principal because he sent messages about another student to someone at a different school. He was taken out of class, and they took his phone and called a police officer. They wouldn't let him call me. He is really traumatised. Can the school do this and let him talk to a police officer without a parent? He didn't break the law and has never been in trouble before. What do we do?

Parent of 13 year old

Police responses to reports of harm and exploitation in online spaces or when using technology

30. One of the most challenging aspects of our work with children and young people in response to harm and exploitation in online spaces or via technology, is being able to provide advice about what actions the police are likely to take. This is generally easier for offences involving online child sexual exploitation or non-consensual sharing of intimate images where the person causing harm is an adult or an unknown person online. However, when the person causing harm and the victim are both children or young people, we have not observed any consistency or transparency in police responses. Police responses vary from no action, "a talking to", warnings, cautions, confiscation of devices and formal charges. Restraining orders are rare

outside of the context of tech facilitated abuse in an intimate partner context and despite the fears of many children and young people, the police are not routinely asking internet service providers or social media platforms for things like their browsing history or to retrieve deleted messages or images.

31. We are also aware that many children and young people do not report harms in online spaces like sexting which may have initially been mutual but has progressed to something like non-consensual sharing of intimate images, due to fear that they will also get in trouble because they have at some point sent or asked for nudes.
32. Contributing to the complexity in this space is the lack of harmonisation of laws relating to definitions, defences and age ranges for offences relating to child abuse material or online child sexual exploitation material. There is also very limited guidance on when state and territory police may also proceed with an offence under the *Criminal Code Act 1995* (Cth) which applies the offences to material showing or describing a child or young person under 18. This means that even if state or territory permits sexting by people aged 16 or 17 in line with their age of consent laws, lawyers and advocates advise children and young people that it is safest to wait until all people are aged at least 18 before sexting or exchanging nudes. This can be very confusing as state and territory legislative frameworks allows in person sexual activity between consenting 16 or 17 year olds but prohibits online sexual exchanges between the same young people. For example we received this enquiry from a young person:

I'm in a very consensual and safe relationship with a 17 year old. We have also shared nudes and always make sure we are ok and are feeling safe about it. Parents have found out and are angry. Did I go against the law?

16-year-old

33. YLA recommends a review of the intersection of Commonwealth and state and territory laws relating to child abuse material and online child sexual exploitation material and the potential for harmonisation or the addition of exceptions or defences to ensure wanted sexting between young people of at least the age of consent in that jurisdiction is not inappropriately or disproportionately criminalised.

Statutory thresholds

34. It is very common for children and young people who contact YLA to have experienced cyberbullying over a lengthy period of time, involving peers, often in groups, doing things like sending hurtful, abusive or threatening messages, spreading lies or embarrassing stories or images, or creating fake accounts and impersonating them. In the majority of these cases the statutory threshold in the Act of '*would be likely to have the effect of... seriously threatening, seriously intimidating, seriously harassing or seriously humiliating the Australian child*'⁹ is not met and the child or young person cannot access relief under the Act like removal notices.

⁹ *Online Safety Act 2021* (Cth), section 6.

35. In these matters, there are also rarely grounds for a police response so YLA will work with the child or young person to identify strategies to minimise the opportunities for the cyberbullying to continue, for example, block and report accounts to the social media platforms, work with schools to develop risk management plans and focus on building resilience and accessing therapeutic supports. Typically, the material will also be found to not breach the social media platforms' community guidelines or codes of conduct, so the child or young person may then have to exercise self-help like changing schools to get away from bullies or withdrawing from certain online spaces. In many cases our clients are self-harming or dealing with suicidal feelings on a regular basis.
36. YLA recommends that further consultation and consideration be given to alternative ways to address child cyberbullying with a focus on prevention, early detection and stronger guidelines to assist key agencies like schools and police to develop a consistent response. We do not want to see an increase of criminalisation of children and young people in these matters excepting where there may be grounds to establish offences like intimidation or stalking, but recognise the compounded harm that occurs when a child or young person is brave enough to ask for help and nothing happens and the cyberbullying continues. Such guidelines could also include child friendly resources for the collection of evidence to assist to demonstrate a pattern of ongoing bullying and harassment and child friendly complaint mechanisms.
37. We note that we also observe that many clients experiencing adult cyber-abuse do not meet the statutory threshold for relief under the Act being that an ordinary reasonable person in the position of the targeted Australian adult *would regard the material as being, in all the circumstances, menacing, harassing or offensive*.¹⁰

Restorative justice and sharing experiences

38. When faced with the reality that the eSafety Commissioner or the police are not going to be able to assist, children or young people ask about safety measures like restraining orders, cease and desist type correspondence or defamation proceedings. However, in general children and young people mostly want the violence to stop and to be safe and reassured of confidentiality.
39. Another type of restorative process that is very important to children and young people is the right to speak their truth and share their experiences in online spaces. Children and young people have the *right to freedom of expression including freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice*.¹¹ The option to openly share lived experience of cyberbullying, online child sexual exploitation or harassment can be a pathway to resilience and recovery for victim survivors, particularly children and young people, who often have strong online communities and global support networks.

¹⁰ *Online Safety Act 2021* (Cth), section 7.

¹¹ *Convention on the Rights of the Child*, 20 November 1989, articles 13.

40. YLA is regularly contacted by children and young people with lived experience of harm and exploitation in online spaces and regularly assesses their competency and capacity to understand the risks associated with sharing their experiences in online and public forums, including the potential for further abuse from a known or new offender, self-harm and suicide, defamation, online harassment and an assessment about the potential impact on current or future legal actions.
41. The development of any further regulatory measures, verification processes or other measures must also recognise this right of children and young people to heal and seek support in online spaces which will include posting and sharing content related to their experiences of cyberbullying and harassment and sexual and exploitative harms online.

State and Territory compensation schemes

42. YLA is aware of children and young people who have been unable to access state and territory based victims support or criminal compensation schemes where the act of violence has occurred solely online. YLA recommends that harm and exploitation in online spaces which also constitute a criminal offence, be eligible for compensation, subject to other eligibility criteria, under all state and territory based compensation schemes.

We look forward to reading the Review report and we are available to provide additional comments or information if that would be of assistance.

Yours faithfully,

Carolyn Jones
Principal Solicitor (Harm Practice)
Youth Law Australia

