

## Enhancing Online Safety for Children - Centre for Internet Safety submission relating to January 2014 discussion paper

### Key points

- A Children's eSafety Commissioner will enhance the safety of Australian children online
- The Children's eSafety Commissioner will have a positive impact by developing working relationships with large and non-large social networking providers, the bulk of whom are offshore
- We should avoid further criminalisation of bullying and similar behaviours and instead look to a civil infringement regime - to be directed at unresponsive social networking providers and those who post damaging material
- The financial and administrative burden on social networking providers of a Children's eSafety Commissioner will be small for those providers who already have good customer support systems in place

## Introduction

We are pleased to submit the views of the Centre for Internet Safety at the University of Canberra in relation to the Enhancing Online Safety for Children - Public consultation on key election commitments discussion paper dated January 2014.

Where we believe our comments will add value we reference the question and then provide our feedback. Where we do not hold a strong view or believe we cannot add sufficient value at this time we have excluded the question.

We are happy to expand on our views and welcome any approaches by the government to do so.

### Q1 - What existing programmes and powers should the Commissioner take responsibility for?

We support the Children's eSafety Commissioner having direct control over new takedown and other regulatory (non-law enforcement) levers as well as oversight of child safety programs in as broad a context as possible.

We recognise that in some instances the online safety education of children will form only part of some broader educational efforts and initiatives, and in those instances we support the Children's eSafety Commissioner playing an active advisory role,

## About the Authors

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Nigel Phair is an influential analyst on the intersection of technology, crime and society. He has published two acclaimed books on the international impact of cybercrime, is a regular media commentator and provides executive advice on cyber security issues. In a 21 year career with the Australian Federal Police he achieved the rank of Detective Superintendent and headed up investigations at the Australian High Tech Crime Centre for four years.

## About the Centre for Internet Safety

The Centre for Internet Safety at the University of Canberra was created to foster a safer, more trusted Internet by providing thought leadership and policy advice on the social, legal, political and economic impacts of cybercrime and threats to cyber security.

The Centre for Internet Safety is hosted within the Faculty of Law at the University of Canberra. The University of Canberra is Australia's capital university and focuses on preparing students for a successful and rewarding career.

[www.canberra.edu.au/cis](http://www.canberra.edu.au/cis)

advocating for children within those programs and initiatives.

## Q2 - Establishment of the Commissioner

The importance and influence of Internet and mobile communications technologies on the lives of Australian children is only going to increase in coming years which means that the problem set to be addressed by the Children's eSafety Commissioner will grow too.

As a consequence we believe the government should pursue the best long term option for establishing the office of the Children's eSafety Commissioner which ensures the office's ability to carry out the work envisioned. Setup costs and expediency in terms of administrative arrangements should only be factors influencing, rather than dictating, the office structure.

Therefore we support option 1, the establishment of an independent statutory authority. We can understand why Option 2 would be of interest to the government to reduce costs but in our view there will only be a marginal difference in terms of cost, with the tradeoff of being potentially seen as too close to other government communications policies, detracting from the mission of the office.

Option 1, followed by option 2, best allow the Children's eSafety Commissioner to show leadership and to work as an equal with large international technology companies.

We believe options 3 & 4 are less desirable. Regarding Option 4, non-government organisations, while playing an important role in policy advice and advocacy, are not best suited to deal with the regulatory and administrative functions of the new office.

## Q3 - Are these definitions of 'social networking sites' suitable for defining 'social media sites' for the purposes of this scheme?

We understand and support the focus of the Children's eSafety Commissioner on social media.

We contend, however, that the definition of these services as only web-based is too narrow: the growth of apps and mobile devices and potential new technologies and methods of communication could leave the Children's eSafety Commissioner powerless on important matters. As a consequence we suggest a broader technology neutral definition for social networking be crafted.

When considering the Children's eSafety Commissioner powers, we suggest that one of the most effective mechanisms will be for the Commissioner's office to contact the party posting harmful material - who is likely to be (a) known to the complainant and (b) within Australia - to take down the harmful material and desist their activities.

Should that party refuse to take down the material, we believe the Commissioner should have the power to issue infringement notices, of a monetary value similar to parking tickets: even though small in value this is likely

to have a significant impact on behaviour.

We are not in favour of extending the criminal law in this area relating to misuse of telecommunications services as we believe the existing law is adequate and is available for egregious matters (and has been successfully used already on such matters). Most importantly, we do not believe law enforcement agencies have the resources nor inclination to become more involved in these matters than they already are.

#### Q4 - Should the proposed scheme apply to online games with chat functions?

The focus of the Children's eSafety Commissioner on bullying via social networks means that from time to time in-game messaging may become a problem, although we expect most efforts will be on the full blown social sharing sites.

#### Q5 - What is the best criterion for defining a 'large social media site', and what available sources of data or information might be readily available to make this assessment?

Popularity in Australia of web services, apps and other functions can be - with varying degrees of accuracy - divined by web scoring companies, published download figures by app marketplaces, reading comments on popular information exchange sites and media reporting.

The Commissioner should establish in the early stages of operation, a method of

benchmarking and measuring uptake of various services.

#### Q6 - Is the coverage of social media sites proposed by the Government appropriate and workable?

We believe the coverage proposed is sufficient to make a positive impact for Australian children while being realistic about resourcing availability for the Commissioner's office.

#### Q7 - Should the scheme allow children who are unsupported by adults to be active participants (either as complainants or notice recipients)? Having regard to the vulnerability of children, what procedural safeguards should be in place?

Accepting complaints will be a very difficult process: establishing identity and proof of age, along with authenticity of consent, especially in a national "customer not present" scheme.

How can the Commissioner be satisfied that the child has indeed consented to the complaint? Without parental authority is it appropriate for the Commissioner to take action? We believe the government could consider models like the medical profession's consent to medical procedures for minors.

#### Q9 - How would an eligible complainant demonstrate that the complainant has reported the content to the participating social media site?

Complainants should be in a position to upload relevant emails, chat logs and other

communications, and/or a complaint reference number. This may depend on the maturity of the service being complained about: they may not provide reference numbers for matters, they may not respond to complaints from users, they may not have functionality to even solicit complaints of abuse. As such, decisions will have to be the Commissioner's discretion. And the decisions and rationale behind them should be recorded by the Office.

**Q10 - What should the timeframe be for social media sites to respond to reports from complainants?**

Response time to complaints must reasonably be determined by the severity of the threat to the child as determined by the Children's eSafety Commissioner.

For serious matters we would expect services to act in less than 24 hours, in some circumstances significantly less than 24 hours. This should not be burdensome for industry: by the time these services are considered "large" by the Commissioner they will be sufficiently staffed and resourced such that rapidly responding will be well within their capacity.

**Q11 - What level of discretion should the Children's e-Safety Commissioner have in how he/she deals with complaints?**

We suspect demand for action will be high on the Children's eSafety Commissioner and it is likely that demand will outstrip the office's capacity to actively pursue many of those matters.

The Commissioner will have to apply rigorous rules to determine which matters will be actioned, and which matters will not.

**Q12 - What is an appropriate timeframe for a response from the social media site to the initial referral of the complaint?**

See our answer to question 10.

**Q13 - Are the nominated factors, the appropriate factors to be taken into account when determining whether the statutory test has been met? Should other factors be considered in this test?**

We believe the factors and considerations outlined in the discussion paper are sufficient and appropriate.

**Q14 - Is the test of 'material targeted at and likely to cause harm to an Australian child' appropriate?**

Yes.

**Q15 - What is an appropriate timeframe for material to be removed?**

See our answer to question 10.

**Q16 - What would be the best way of encouraging regulatory compliance by participating social media sites that lack an Australian presence?**

To be most effective, the Children's eSafety Commissioner will have to develop trusted relationships with social network services, including where possible

the “non large” services and those with a presence outside Australia. If necessary the Commissioner may choose to make public statements to help focus the attention of unresponsive social networking services.

In addition, we support the Commissioner having the authority to issue infringement notices to unresponsive services. Offshore services may believe they are beyond the reach of Australian laws but infringement notices will accrue and could be served on company executives or representatives when they enter Australia at a later date.

**Q19 - What do industry representatives consider are the estimated financial and administrative impacts of compliance with the proposed scheme? How are these estimated impacts derived?**

If - as key industry groups like AIMIA claim - they already handle these matters appropriately, the financial and regulatory impact upon industry will be minimal, if not trivial. The matters handled by the Children’s eSafety Commissioner will be “edge cases” where matters have potentially fallen through the cracks of the social networking providers, or wrong determinations have been made in how the provider reacts to complaints.

If, however, industry - or parts of industry - have overstated the amount of effort and resources and commitment they have to protecting Australian children, then there will indeed be a financial and regulatory impact on

those services under the proposed Children’s eSafety Commissioner arrangements. We contend then, that if such an impost is incurred it is a good thing: either the social networking services industry is adequately protecting Australian children or it isn’t.

In fact, we suggest that the emotive language used by the representatives of the social networking industry in media responding to this discussion paper has been inappropriate: referring to this discussion as “red tape” and to a potential Children’s eSafety Commissioner as a “bureaucrat in Canberra” is not a constructive approach.

**Q23 - Is there merit in establishing a civil enforcement regime (including an infringement notice scheme) to deal with cyber-bullying?**

There is great merit in establishing an infringement regime which takes matters out of the criminal courts and will help to change behaviour.

**Q24 - What penalties or remedies would be most appropriate for Options 2 and 3?**

The infringement penalties should be akin to parking tickets: substantial enough to bring about change, but small enough to avoid costly legal appeals in most cases. We suspect those on notice that they may receive an infringement notice will remove posts and refrain from further provocative actions, and where they continue, will be fined and pay.

Revenue raised from  
infringements could be re-directed  
to child safety education initiatives  
and research.