Submission on the Department of Communication's Discussion Paper on Enhancing Online Safety for Children

Introduction

Collective Shout: for a world free of sexploitation welcomes the opportunity to make a submission to the discussion paper on online child safety issued by the Department of Communications in January 2014.

Collective Shout (www.collectiveshout.org) is a grassroots movement challenging the objectification of women and sexualisation of girls in the media and popular culture.

We target corporations, advertisers, marketers and media which exploit the bodies of women and girls to sell products and services, and campaign to change their behaviour. More broadly we also engage in issues relating to other forms of sexploitation, including the inter-connected industries of pornography, prostitution and trafficking.

Australian children are growing up in a digital, interactive, internet-enabled society and culture. While the benefits of such connectivity can be great, Collective Shout and our supporters are also very conscious of the potential for the internet to enable malicious, and illegal activities against children, as well as more broadly exposing children to harmful and inappropriate content. We share in the growing expert concern about the experiences children and young people risk being exposed to online, and the consequences of these experiences on their wellbeing and healthy development.

We also hold significant concerns for those responsible for the welfare of children, particularly (although not only) parents, as they are attempting to maintain their childrens' online safety while helping them to navigate life in a digital world.

In this submission we respond to the matters of online child safety presented in the discussion paper, by calling for the implementation of proactive, effective, evidence-based measures to protect children and young people online.

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

Enhancing online safety for children is a shared community responsibility with appropriate roles for parents and guardians, for educational institutions, for industry, for law enforcement agencies and for government authorities including the Department of Communications, the Australian Communications and Media Authority and the National Children's Commissioner.

Specific functions and powers should be assigned to the proposed new Children's e-Safety Commissioner, including powers relating to the proposed new takedown scheme for material harmful to children on social media sites. However, it would be undesirable if the establishment of the Commissioner resulted in other government agencies stepping back from involvement in activities and programmes aimed at enhancing online safety for children.

The Commissioner's functions should be made broad enough to enable the Commissioner to have input into all matters affecting the online safety of children without necessarily centralising the actual provision of all online safety programmes in the Commissioner's office.

In particular, law enforcement agencies such as the Australian Federal Police have an irreplaceable role in enforcing laws relating to the online safety of children. Because of their expertise in alw enforcement they are also well placed to work with educational institutions and other parts of the community to implement sound protective measures and policies.

The *Broadcasting Services Act 1992* section 3(1)(m) provides that one of the objects of that Act is "*to protect children from exposure to internet content that is unsuitable for children*" and section 5 (1)(a) *charges the ACMA* [the Australian Communications and Media Authority] *with responsibility for monitoring the broadcasting industry, the datacasting industry, the internet industry and the commercial content service industry*.

In assigning functions and powers to the Commissioner it will be critical to ensure that if functions and powers overlap with ACMA or other agencies there are clear processes in place for facilitating cooperation and consistency in the performance of the functions and the use of the powers.

Q2 Considering the intended leadership role and functions of the Commissioner, which option would best serve to establish the Commissioner?

There is a good case for establishing the Children's e-Safety Commissioner within an existing body.

One option not mentioned in the discussion paper would be to establish the new Commissioner within the office of the Australian Human Rights Commission, alongside the National Children's Commissioner.

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Section 46MB of the *Australian Human Rights Commission Act 1996* assigns the following functions (among others) to the National Children's Commissioner:

- *to promote discussion and awareness of matters relating to the human rights of children in Australia;*
- *to undertake research, or educational or other programs, for the purpose of promoting respect for the human rights of children in Australia, and promoting the enjoyment and exercise of human rights by children in Australia;*
- *to examine existing and proposed Commonwealth enactments for the purpose of ascertaining whether they recognise and protect the human rights of children in Australia, and to report to the Minister the results of any such examination*.

The first report of the National Children's Commissioner, the *Children's Rights Report 2013*[1], incorporates information on children's online safety including the following:

- 33% of surveyed 13-17 year olds had witnessed or experienced racism online[2];
- Online bullying is experienced by one in five girls aged 10-14[3];
- Children's safety, including online safety, is a major concern for children in Australia today "*Many of the issues raised by children involved concern for their own safety and the safety of their siblings and friends, in the context of both the physical and the online world*."[4];
- The release of an online anti-racism resource for children developed by the Australian Human Rights Commission[5];
- "…*children should know the laws and their rights in respect of cyber safety and bullying, how they can be protected from online exploitation and abuse, and where they can go to for help*";[6]
- "…*the Commission has played a strong ongoing leadership role in helping children to deal with violence, bullying and harassment in their communities. This has involved research on the role of bystanders and the national* BackMeUp *campaign to encourage bystander action among children who witness cyberbullying. However, there is much work that remains to be done to ensure the protection of children in cyber space and to equip children to be able to engage safely online*.[7]

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[1] National Children's Commissioner, *Children's Rights Report 2013*, http://www.humanrights.gov.au/sites/default/files/document/publication/ChildrenRightsReport2013.pdf
[2] Ibid, p. 22
[3] Ibid., p. 31
[4] Ibid., p. 66
[5] Ibid., p. 77
[6] Ibid., p. 86
[7] Ibid., p. 87

It is clear that the National Children's Commissioner is already actively engaged in matters relating to enhancing the online safety of children.

Children are increasingly living simultaneously in two worlds: the cyber world and the real world. These worlds overlap. The child who is cyberbullied may encounter the bully in the real world the next day at school. The child who is being groomed online may be stalked in the real world by a paedophile.

Situating the Children's e-Safety Commissioner within the office of the agency charged more broadly with ensuring that children in Australia enjoy their rights, including the important right to safety which was the main theme of the National Children's Commissioner's first report, makes sense.

Collective Shout recommends that the new Children's e-Safety Commissioner be established within the Australian Human Rights Commission in close relationship with the National Children's Commissioner.

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

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

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?

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

The aim of the scheme is to facilitate the swift removal of any material targeted at a child in Australia and likely to cause harm to the child.

The definitions used should not focus on the overall nature of the sites (e.g. social networking, online gaming and so forth) but rather should be worded so as to apply to any site, regardless of its general nature, which has been identified as hosting material targeted at an individual child in Australia.

The nature of the online world changes rapidly. Ten years ago there was no Facebook yet it currently dominates our thinking about social media. Who knows what new developments will emerge in the next ten years? Legislation needs to be framed in such a way that it doesn't depend on definitions reflective of current notions of social media.

The notion of a large social media site is of limited value. A child can be harmed by material hosted on a small social media site if that is the site used by the child's friends and peers.

The legislation should apply universally and not be limited to a subset of internet sites defined by the services they offer or their size in the Australian market. This does not preclude signing up social media sites to a participatory scheme where, in return for establishing complaints mechanisms and publicising the take down scheme, the Commissioner issues advice to the public regarding their participation in the scheme.

Where sites do not have a clear complaints mechanism complainants should be able to refer the complaint directly to the Commissioner.

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?

The discussion paper suggests that "If the complaint has been lodged by a parent, guardian or another person in authority, the consent of the child that is the target of the harmful material would need to be obtained."

This is not appropriate. If a parent or guardian believes that a child is at risk of suicide or life threatening mental illness it should be possible to initiate a complaint directed at the swift removal of the harmful material without necessarily obtaining the formal consent of the child. A child subject to intense bullying may be terrorised and fearful of taking any action against the bullies. This would apply in particular to younger children but also in the most serious cases involving older children and adolescents.

Similarly a teacher may become aware of a network of online bullying in a school setting. It should be possible to initiate a complaint to the Commissioner without obtaining consent from all the victims of the network.

Nor should children and young people require the participation of an adult in order to make a complaint. Many children do not have an active adult carer in their life. There is no reason to exclude such children from a scheme meant to enhance the online safety of all children.

The scheme then should allow complaints by (a) the affected child; (b) a parent or guardian of the child; or (c) an adult in authority such as a teacher. No consent from anyone else should be necessary to lodge a complaint.

In regard to serving take down notices on children the notice should be directed at both the child and the child's parents or guardians. Penalties for children should be tailored appropriately and enforced with discretion. Locating the Commissioner within the Australian Human Rights Commission alongside the National Children's Commissioner would help ensure that the interests and rights of all children – victims and offenders alike – are adequately protected.

Q8 What type of information would it be necessary to collect from complainants in order to assess their eligibility under the proposed scheme (including age verification), and also to adequately process complaints with minimal investigation required?

Supplying a date of birth should be sufficient to establish the age of the child, provided there is a penalty for supplying false information in a complaint to the Commissioner. The other information required would be clear identification of the material that is the subject of the complaint and would be the subject of a takedown notice; and information about the nature of the harm likely to be experienced by the child.

The online form should be child friendly and easy to complete.

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

Participating sites should be required to issue an automatic complaint number in response to a complaint. Such a number should be sufficient evidence of the complaint.

In relation to non-participating sites, a simple statement about the time, date and means (email, phone, online form) used to make the complaint should suffice.

Q10 What should the timeframe be for social media sites to respond to reports from complainants? Is 48 hours a reasonable timeframe, or is it too short or too long?

The suggested 48-hour time period in which a social media outlet might act upon a complaint is too long.

The time period in which material is allowed to remain on a social networking site is crucial. Every hour in which material targeted at or likely to cause harm to a child remains online increases the possibility and likelihood for that material to be circulated or copied, or for the victim or other children to be exposed to the material in question. Once an image has been copied, it no longer suffices to simply remove the image from the original online account, and the ability to control this image is greatly diminished.

This is a very real concern - a 2012 UK study by the Internet Watch Foundation revealed that of sexually explicit images of children and young people posted by themselves online, including on social network sites, 88% of these images were subsequently taken from their original location and uploaded onto other 'parasite' websites.[8]

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[8] http://www.smh.com.au/technology/technology-news/parasite-porn-sites-stealing-images-and-videos-posted-by-teens-20121023-282bf.html

It is thus imperative in an online context to act as swiftly as possible on the reporting of material harmful to, exploitative of, or targeted at children. Social media outlets are possessed of the financial, human and international resources to dedicate themselves to child protection; it is not unreasonable to expect and require them to take immediate action on complaints of this nature**.**

Collective Shout recommends that 24 hours be set as the time period in which a site must take down material that is the subject of a complaint or otherwise respond to a complaint before the complainant can lodge a complaint with the Commissioner. A speedier turnaround time of 12 hours or less should be encouraged as the benchmark without being mandated by law. Sites which comply with a shorter turnaround time should be favourably mentioned by the Commissioner in reports.

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

Apart from the usual discretion to dismiss complaints that are frivolous, vexatious or not made in good faith, the Commissioner should be required to investigate and respond to all complaints.

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

Keeping in mind the matters mentioned above at Q10, a further 24 hours should be sufficient for the site to respond to the Commissioner.

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?

"Risk of triggering suicide or life-threatening mental health issues for the child" is far too high a threshold before the Commissioner could find that material was "likely to cause harm" to a child. Material that is likely to make a particular child suffer serious anxiety, distress or fear should be considered harmful enough to justify removal.

The scheme is only likely to reduce suicides from cyberbullying if it is aimed at the kinds of material that cause anxiety, fear and distress that potentially lead towards suicidal thoughts or life-threatening mental illnesses.

Collective Shout recommends that the following additional factors be added (i) risk of causing the child to suffer serious anxiety, fear or distress; and (ii) risk of inducing the child to engage in harmful behaviours including behaviours characteristic of eating disorders.

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

This test is appropriate in relation to this particular scheme, provided "likely" is clearly understood to have the usual legal meaning of "*a substantial or real chance as distinct from what is a mere possibility*"[9] and not read as meaning "more likely than not".

However, it must be kept in mind that material targeted at a particular child is only one kind of online material that is harmful to children. Sites dedicated to 'thinspiration', 'pro ana', 'pro mia', self-harm, suicide, sexting, violence against women, gambling, binge drinking and other issues may not target material at a particular child but still pose a serious risk to many Australian children. The Government needs to consider further measures to protect children in the online environment including requiring all providers of online content, regardless of delivery platforms, to provide a default filtered service for material that is or is likely to be classified MA15+ or higher. This scheme should provide for access to MA15+ and R18+ media content only to consumers who satisfy rigorous age verification protocols.

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

Removing material is not a complicated process. Once a takedown order is received a site or person should have 24 hours to comply before penalties are incurred.

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

While there are a range of measures that may be considered, the ultimate sanction for a site that a sovereign nation can impose is to require all internet service providers to block access to the site for Australian end users. If the Government continues to dismiss this approach as unworkable or undesirable then any measures directed at protecting children in the online environment will ultimately prove futile or at least inadequate.

Q17 Should the proposed scheme offer safe harbour provisions to social media sites which have a complying scheme, and if so, what should they be?

Social media sites need to take more, not less, responsibility for content on their sites. Providing legal immunities is not desirable as it is likely to create a shield behind which social media sites hide to avoid responsibility.

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[9] *Boughey v R* [1986] HCA 29; (1986) 161 CLR 10 (6 June 1986) at 18

Q18 Is merits review by the Administrative Appeals Tribunal the most appropriate review mechanism and if so, which parties and in relation to which types of decision is it appropriate? What are the alternatives?

Merits review is appropriate as long as the process is equally accessible by complainants and by sites and persons subject to takedown notices.

It is appropriate that a takedown notice remain in effect until an appeal is finalised.

Q20 In light of the Government's proposed initiatives targeting cyber-bullying set out in Chapters 1 and 2; do the current criminal laws relating to cyber-bullying require amendment*?*

Q21 Is the penalty set out in section 474.17 of the Criminal Code appropriate for addressing cyber-bullying offences?

Q22 Is there merit in establishing a new mid-range cyber-bullying offence applying to minors?

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

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

The existing provisions in the Criminal Code are appropriately constructed and have appropriate penalties for dealing with the more serious offences involving the use of a carriage service to make threats, to menace, harass or cause offence.

There is merit in introducing a new provision in the Criminal Code to deal with less serious offences when they are committed against a minor.

The "offence of posting a harmful digital communication with the intention to cause harm" in New Zealand's *Harmful Digital Communications Bill* is a useful model for the proposed new offence.

A civil enforcement regime with emphasis on mediation also has merit.

Locating the Children's e-Safety Commissioner within the Australian Human Rights Agency would assist in the implementation of such a regime as the AHRC already has considerable experience with mediating similar matters.

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