

The Director, Cyber Safety Policy and Programs
Department of Communications
GPO Box 2154, Canberra ACT 2601

Via email to: onlinesafety@communications.gov.au

11th March 2014

Dear Director,

Re: Public consultation on Enhancing Online Safety for Children

EFA welcomes the opportunity to provide input into this review. Please find our submission on the following pages. Please do not hesitate to contact me should you require any further information.

About EFA

Celebrating its 20th Anniversary in 2014, Electronic Frontiers Australia, Inc. (EFA) is a national, membership-based non-profit organisation representing Internet users concerned with online freedoms and rights.

EFA is independent of government and commerce, and is funded by membership subscriptions and donations from individuals and organisations with an altruistic interest in promoting online civil liberties. EFA members and supporters come from all parts of Australia and from diverse backgrounds.

Our major objectives are to protect and promote the civil liberties of users of computer-based communications systems (such as the Internet) and of those affected by their use and to educate the community at large about the social, political and civil liberties issues involved in the use of computer-based communications systems.

EFA's website is at: www.efa.org.au.

Yours sincerely,



Jon Lawrence
Executive Officer

Introduction

EFA welcomes the government's focus on this important area of public concern, and appreciates the opportunity to participate in this consultation process.

EFA strongly supports efforts to ensure that all Australians, but particularly children, are able to enjoy the overwhelmingly positive benefits that are offered by the Internet, particularly social media services, while being protected from harm.

EFA is however concerned that this Discussion Paper may place an undue emphasis on the harmful aspects of the Internet and social media services, and may therefore underplay the positive aspects of these services. As a review by the Young and Well CRC found in 2011, "there are a number of significant benefits associated with the use of SNS [Social Networking Services] including: delivering educational outcomes; facilitating supportive relationships; identity formation; and, promoting a sense of belonging and self-esteem."

EFA believes that creating a central point of coordination to address issues relating to harmful behaviour and content could potentially be beneficial by ensuring efficient and effective liaison with social media providers relating to addressing issues about the removal of content that does not meet providers' content take-down policies. This central point of coordination would also potentially be of benefit in providing an holistic view and better coordination of the wide variety of educational programmes currently in place that promote online safety. That said, EFA recognises that there is no 'silver bullet' in relation to educational programmes, and that there is significant value in funding and cultivating a variety of approaches.

EFA believes that education and parental supervision are the most effective tools for combating harm to children online, and therefore urges the government to continue resourcing programmes that provide education and empowerment to children, and that generally promote the concept of good digital citizenship. The government should also promote greater understanding within the community of personal rights and responsibilities, and of the existing laws that cover bullying, harassment, defamation and related issues.

EFA does not believe that new legislation is required to create such a central point of coordination and that it could readily be established within the Australian Communications and Media Authority or by designating an NGO or a group of NGOs to take on this role.

EFA is strongly opposed to any new legislation relating to the take-down of content as this would represent a serious threat to freedom of expression. EFA also believes that any such legislation would also potentially be unworkable, inflexible and ultimately ineffective in addressing issues of harm.

It is well-established that legislation is not an effective response to industries undergoing rapid evolution in technology and service models, and EFA believes that cooperative arrangements are far more likely to provide the responsiveness, adaptability and flexibility that is required in this context.

It should also be noted that any new legislation would only effectively apply to those social media service providers that already have operations in Australia, the majority of which already have relatively robust processes in place for dealing with harmful content, and which are also actively cooperating with government and other groups in this regard.

It is EFA's understanding that a significant proportion of current issues involving harmful content on social media sites is related to newer services that do not have operations in Australia, and which would therefore fall outside the effective remit of any such legislation.

EFA is therefore also concerned that any such legislation would potentially create an expectation that the government has the capability to remove material from sites and services from which it would not in fact be able to. This creates the very significant danger that well-intentioned parents may therefore make unwarranted assumptions about the government's ability to protect their children from harm in the online context, and therefore, based on that unwarranted assumption, may inadvertently expose their children to harm.

EFA is also concerned about the likelihood of 'mission creep' should any legislation be introduced in this context. It is in the very nature of bureaucracies to extend the scope of their mission over time, and to use legislation for uses other than the original intention.

A recent and pertinent example of mission creep is that of the use of section 313 of the Telecommunications Act by the Australian Securities and Investments Commission (ASIC) to block access to websites. This action, which followed within a few short months of the announcement by the then Minister of Communications, on 9th November 2012, that he was dropping the then government's mandatory Internet filtering policy and replacing it with a request to ISPs to block 'the worst of the worst' of child exploitation material, based on a blacklist maintained by INTERPOL.

It is apparent that ASIC felt this announcement gave them the freedom to start blocking websites allegedly involved in financial fraud. Very unfortunately, this not only represented a classic example of bureaucratic mission creep, due to ASIC's technical ineptitude, it also resulted in a number of Australian ISPs blocking access to many thousands of 'bystander' websites.

EFA does not believe that a new 'cyber-bullying' offence is required, because 'cyber-bullying' is simply a component of 'bullying' and existing offences are in place that cover this and related activities. There may however be a case for better standardisation of offences and penalties across Australia's various jurisdictions, as well as a need for promoting better community awareness of these existing offences.

Responses to Questions

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

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

EFA strongly supports better mechanisms for coordination and cooperation between industry, government, non-governmental organisations working in this area and the wider community. EFA does not however necessarily support the creation of a Commissioner as such, but believes that leveraging existing expertise within the ACMA or by designating one or more NGOs with this coordination role would be appropriate (ie option 3 or 4).

This role could provide benefit in terms of:

- Cooperating with industry to quickly resolve cases of cyber bullying, building on the existing cooperative framework
- Coordinating existing cyber-safety resources and initiatives
- Educating the community and law enforcement bodies about cyber bullying (the remedies already in place and the nature of Australia's existing laws against cyber bullying)

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?*

EFA believes the definitions of 'social networking sites' are both inappropriate and unworkable. In a context of rapid transformation of technologies and online services, any attempt to 'lock-in' definitions such as these will likely be outdated by the time they are finalised. An increasing proportion of websites meet at least part of the definition provided in the Discussion Paper and that proportion is likely to increase over time.

EFA believes the definition of 'large social media site' is particularly inappropriate and unhelpful as it ignores the reality that serious harm can occur on any site, large or small. It also ignores the reality, noted in the introduction above, that a significant proportion of issues currently being reported are from newer sites that may not fall under this definition.

Q7 - Q19

EFA is opposed to any legislative-backed scheme in this regard, and therefore offers no comment in relation to these questions.

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?*

EFA is generally concerned when governments problematise 'the Internet' by proposing legislation that is 'Internet-specific', and is proud of the organisation's track record over the last two decades of successfully opposing such, usually ill-considered, approaches to issues that are neither created by, nor exclusive to the online context.

EFA asserts that there is in fact no such thing as 'cyber-bullying'. It is 'bullying', regardless of whether it occurs in the schoolyard, in the workplace, via text message, or via an online service. Any examination of bullying in the context of school-age children particularly will show that, with isolated, but unfortunately high-profile exceptions, the vast majority of bullying occurs across a variety of communication mediums, including, often most egregiously, in a person to person context.

EFA therefore believes that any proposal for 'Internet' or 'cyber' specific offences relating to bullying, harassment, defamation or related behaviours, is inherently flawed. The Internet is not the problem. Bullying is the problem.

We now have people well into adulthood that did not experience the world before the Internet became a part of life, and it is time that government recognise, as these people do, that the Internet is not 'a special place' requiring 'special rules'. The Internet is real life and should be covered by the same rules that cover all aspects of society.

EFA is therefore strongly opposed to any new 'cyber-bullying' offence. Each Australian jurisdiction already has in place criminal and civil laws that cover bullying, harassment and defamation.

EFA does however recognise that there may be value in standardisation between State and Territory offences and penalties in this regard, and encourages the government to explore this through the COAG process.