

## Enhancing Online Safety for Children – Public Consultation Process

### Submission by

Lelia Green, PhD

Co-Chief Investigator, ARC Centre of Excellence for Creative Industries and Innovation

Lead author, *AU Kids Online* (2011): <http://cultural-science.org/journal/index.php/culturalscience/article/view/49/129>

Lead author, *What bothers Australian kids online? Children comment on bullies, porn and violence* (2013), <http://www.cci.edu.au/reports/WhatBothersAusKidsFIN.pdf>

Professor of Communications

School of Communications and Arts

Edith Cowan University

Mt Lawley WA 6050

[l.green@ecu.edu.au](mailto:l.green@ecu.edu.au)

+618 6304 6204

#### Submissions to be lodged:

**Email:** [onlinesafety@communications.gov.au](mailto:onlinesafety@communications.gov.au)

**Post:** The Director, Cyber Safety Policy and Programs  
Department of Communications  
GPO Box 2154  
CANBERRA ACT 2601

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

The Commissioner should take responsibility for existing programmes managed by the Department of Communications and other transfers should be held in abeyance pending assessment of the commissioner's workload and the take up of services administered by this role.

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

An NGO such as the Alannah and Madeline Foundation would provide an arms-length and highly committed support structure for the effective operation of the Commissioner. They have campaigned passionately on the issue of cyber-bullying, in particular.

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

Yes, these definitions of social network sites are applicable within this context.

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

Yes, the proposed scheme should apply to such games. Incidentally, under 16s are increasingly using Skype and SnapChat as a social media 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?*

It is likely that the drafters of the legislation will have better information on working definitions and criteria than I do.

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

It is of concern that limiting the number of social media sites to a specific list is likely to exclude the dynamic adoption of online resources by young people for the purposes of social networking. This is a fast evolving area and the risk is that the legislation which only applies to 'large social media sites' will not necessarily capture the chosen social media locales of young people. The Commissioner should have the powers to communicate, and open negotiations with, all organisations operating online services which children and young people use for social media purposes. Even if they are not members of the scheme, such organisations should risk public sanction (even in the form of a reprimand or blacklist) if they do not respond appropriately to the Commissioner's communications.

*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?*

Children who are unsupported by adults should still be able to speak to a range of organisations and be given the opportunity to put forward their cases. If relevant NGOs are prepared to advocate for the child then that should be seen as a supported complaint. Possible NGOs include Childline, National Children's and Youth Law Centre. Pointers to relevant organisation should be included on the Commissioner's website to support a child in making a complaint. At the same time, research tells us that children who engage in bullying behaviours are often disadvantaged themselves and come from challenging environments. They are often themselves the victims of bullying, and sometimes the child victims of adult bullies. It would be helpful if the Commissioner's site were also able to offer a list of organisations that might support a child who is accused of bullying behaviour in negotiating the processes to be put in place. Such organisations might include the Smith Family or St Vincent de Paul, for example, since the challenging environment within which a bully operated may well be multi-generational and multi-faceted. (See 6.5, 'Poor home environment' pp. 43-4, Enhancing child safety and online technologies, Final report of the Internet Safety Technical Taskforce 2008, US, Berkman Center for Internet and Society, available from <http://www.danah.org/papers/ISTTF-RABLitReview.pdf>)

*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?*

This is a big question but the list of conditions required for the Commissioner to assess the complaint would appear to be a useful starting point. It would be good to feel that the processes to be adopted would be regularly reviewed and updated according to whether they were proving fit for purpose.

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

Social media sites participating in this scheme should be obliged to acknowledge any complaints made by users. Such acknowledgement could be forwarded as part of the materials establishing a complainant's eligibility under the scheme. If no acknowledgement is forthcoming then evidence of the complaint's submission should be acceptable.

*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?*

48 hours would appear to be a reasonable time frame for a social media site to respond to complainants' reports. A complainant should be able to contact the Commission 48 hours after lodging a complaint, with a copy of the complaint lodged.

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

A child's complaint supported by an adult should be investigated, or a reason provided as to what else is required for that investigation to proceed. It would be good if a complainant that the Commissioner rejects could be referred to a list of resources for support and/or counselling. The Commissioner's view of what is frivolous or vexatious may not be the same as a child's view of these matters.

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

The time frame allowable for a response from to the social media site should reflect that established in response to question 10, for example, 48 hours.

*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?*

These nominated factors are appropriate, however it is possible that a child can be put under duress to place material on a participating social media site themselves, and thus the provision that the material would have to be placed by a third party should be struck out. It should be possible for the Commissioner to order that material posted by a child themselves is also the result of bullying and should be taken down.

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

Yes, with the caveat explained in the answer to question 13.

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

Again, it would seem appropriate to reflect the same time frame from Q12 and Q10, for example 48 hours.

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

The kinds of strategies suggested in the ACMA paper referenced in footnote 30 would appear to be a good starting point to assist with compliance.

*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?*

The New Zealand safe harbour provisions would appear to offer a useful model for a future Australian scheme.

*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?*

A review by the Administrative Appeals Tribunal would appear to be appropriate. Both the complainant and the appellant should be able to make their case. More formal or expensive alternatives should be considered only if the Administrative Appeals Tribunal fails to deliver satisfactory outcomes.

*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?*

This Q19 is directed at industry representatives and I am unable to comment. However, maintaining user safety is an everyday cost of business and should be associated with organisational sustainability and made a high priority by reputable businesses.

*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?*

Yes, the current criminal laws require either amendment or augmentation to take into account that cyber-bullying can be a deliberate and harmful act by minors who are not necessarily dealt with best under criminal provisions.

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

The option of a wide range of penalties, including alternative sentencing options and referrals to support and intervention agencies, should be considered in addition to the penalties set out in section 474.17. I would support the creation of a mid-range cyber-bullying offence and the establishment of a civil enforcement regime.

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

The merit in establishing such a mid-range offence applies to minors as perpetrators where there is a significant age gap between perpetrator and victim. When the victim is a child and the perpetrator is an adult and there is a significant difference in age, stronger penalties under 474.17 should be available.

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

Yes, there is merit in establishing a civil enforcement regime (including an infringement notice scheme) to deal with cyber-bullying, backed up by education and conciliation. There would be many advantages to creating such a regime, as much bullying behaviour by minors or relatively young adults may reflect situation-specific or development-stage behaviour. In these circumstances, and noting that bullies are often victims in their own lives, criminal sanctions might not be the most appropriate response. Even so, no civil scheme should prevent equitable access by involving, for example, significant fees.

*Q24 What penalties or remedies would be most appropriate for Option 2 – Create a separate cyber-bullying offence covering conduct where the victim is a minor (under 18 years), with a lesser maximum penalty such as a fine and Option 3 – Create a separate civil enforcement regime to deal with cyber-bullying modelled on the New Zealand ‘Approved Agency’ approach ?*

A separate cyber-bullying offence as canvassed under option 2 should only apply where the victim is a minor and where the perpetrator is a minor, or aged within 2 years of the victim. Where a perpetrator is much older than the victim and not a minor, consideration should be given to the validity of more severe consequences and penalties.

Lelia Green

7 March 2014