Submission to *Enhancing Online Safety for Children*

1. Hard cases made bad law is a popular aphorism which finds its origins in Winterbottom v Wright[1] where Judge Robert Rolf stated:

> " This is one of those unfortunate cases...in which, it is, no doubt, a hardship upon the plaintiff to be without a remedy but by that consideration we ought not to be influenced. Hard cases, it has frequently been observed, are apt to introduce bad law."

2. It can equally apply to hard facts/cases make very bad policy. And that is what this proposal is from start to finish. The tragedy of teen suicide and hideous practice of bullying, in whatever forum, should not be a spur to legislate and regulate with the almost certain outcome of not making any change.

3. As the discussion paper makes clear there are ample laws in place which specifically deal with harassment and objectionable materials. There are also schools which should provide some common sense approach to cyber safety without the need for an additional office to provide some insight. There are also parents. It should not be beyond the wit of Federal and State Governments to undertake education campaigns. The Government was able to develop a community watch program without having a Community Watch commissioner. Any government program requires logistical support from within government. Why that can't be provided by ACMA or the Department of Health or Communications, depending on how the Government sees the issue as a matter of administration defies easy understanding.

4. The functions outlined for the Commissioner, set out at 1.1, can be done under existing administrative arrangements and where co operation with the States is necessary it can be organised through COAG or whatever other departmental arrangement. The

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[1] 10 Meeson & Welsby 109 (1842); pages 109-116

expertise should exist within departments and where they do not exist they can be acquired within them. A new carbuncle of bureaucracy on the body politic is not a solution. If history is any guide it will be a sump for taxpayer funds and a source of a new form of turf war between interested entities.

REGARDING THE SPECIFIC QUESTIONS

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

5. None. There should not be a Children's Safety Commissioner. The existing circumstances should remain as is. There is no need. If any educational task is required it should be undertaken by ACMA.

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

6. A Commissioner should not be in a leadership role. That is an entirely artificial role when dealing with cyber sphere. It betrays a lack of understanding how the rapidly evolving internet environment operates generally and social media in particular. So no option is the best option.

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

7. For the moment yes. But the problem with this analysis is that social media is developing at a rapid pace and this definition may prove to be too narrow.

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

8. No. Why expand the reach a of misconceived and badly structured scheme.

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?

9. The difficulty and artificiality of this analysis is that social media sites are evolving and adapting all the time. What may be the norm now will later be passé.

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

10. On the basis that it is poor policy and practically cumbersome, clearly not.

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?

11. The problem with having minors, particularly those under the age of 16 involved in the process is their lack of sophistication in prosecuting their cause. Children have representatives appointed for them in Family Law disputes for very good reason. Similarly they are represented in Children's court proceedings. To not have some form of support or representation to permit them to press a complaint is to reduce their voice. To have such a support network is both costly and administratively complex.

. To have children, especially young children, the recipients of notices is an odious concept that has no place in a modern society. It is surreal.

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?

12. Such a proposed system is misconceived. This form orientated process is without merit.

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

13. Their say so should be a good start. But again, when dealing with children unless there is some form of representation, by parents or a next friend it is a flawed system.

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?

14. An overseas based social media site will not limit themselves to a 48 hour turn around particularly if the issue is not clear cut.

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

15. If this position is established, which should not be the case, the Commissioner should have a very broad discretion.

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

16. Within 7 days if it is to be any time frame. Again, an overseas based operation would regard any response at its preferred time.

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?

17. On its face these factors may appear reasonable. But they also pose a grave threat to freedom of speech when dealing with adolescents who engage in robust exchanges. It is dangerous to place into the hands of a government appointee the right to decide whether material was likely to cause harm and distress and decide on context etc.. There is a broad range of behaviours from one dimensional bullying to a robust disagreement. It is where the two intersect, a potentially great swathe of greyness where the danger lies. A Commissioner treading over this ground may become the

censor as much as the protector. That is an appalling and unacceptable option. If that is a possibility the proposal should be rejected. As it should.

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

18. It is a woolly term which can be stretched to give the Commissioner broad discretion over many actions which others might consider irritating but not harmful. It is too broad.

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

19. Up to 3 business days if this misconceived process is to be undertaken.

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

20. There really is not one. This is the problem with this proposal. Many social media websites are based in the United States of America whose commitment to freedom of speech far exceeds the toleration that exists here. This proposal is misconceived because the regulations will have no effect and philosophically it is alien to the US experience.

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?

21. There should be no 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?

22. If the proposal is to be enacted then the AAT is the most appropriate venue. That said it is also artificial. The time taken to get a hearing and resolution would mean that it is likely to be a dead letter option.

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?

23. No comment.

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?

24. No. The laws are adequate. Their understanding, explanation and use are inadequate.

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

25. Yes.

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

26. No. The court will exercise the appropriate discretion.

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

27. This is a ridiculous proposal. Serving infringement notices on adolescents is foolish and surreal.

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

28. The proposal has no merit.

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