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## **Enhancing Online Safety for Children**

Submission to the Department of Communications, Australian Government

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March 2014

## 1. UNICEF Australia

UNICEF Global is a multilateral organisation that works in over 190 countries to promote and protect the rights of children. UNICEF supports child health and nutrition, clean water and sanitation, quality basic education for all boys and girls, and the protection of children from violence, exploitation, and HIV.

UNICEF Global has the global reach to influence decision-makers, and the variety of partners at grassroots level to turn the most innovative ideas into reality. UNICEF is unique among world organisations and unique in our rights based and participatory approach to working with children and young people.

UNICEF Australia advocates for the rights of all children and works to improve public and government support for child rights and international development.

## 2. Introduction

UNICEF Australia welcomes the opportunity to make a submission to the Department of Communications, on the subject of enhancing online safety for children and building positive digital citizenship.

The Internet offers genuine benefits for children, including access to information and culture, new ways to participate in multiple areas of public life and to be heard. In particular, the Internet has provided an important access pathway for some children living in regional and remote Australia, and children who live with disabilities who are physically isolated. It has also enabled children to stay connected with family and extended family who are living overseas.

However, emerging digital technologies also present significant risks to children and young people including:

- being unclear how to share information and images related to themselves or others safely, appropriately and lawfully
- having explicit or offensive images of them being shared
- being bullied and harassed online
- accessing adult, unsafe, violent or potentially unlawful websites
- being targeted or groomed by adults to intend to exploit or harm them
- identity theft

These situations can cause shame, anxiety and distress and may have an acute effect on children's health, well-being and development.<sup>1</sup>

UNICEF Australia acknowledges the leadership of the Department of Communications in strengthening measures of online safety for children. UNICEF Australia considers child safety to be paramount in this context where emerging technologies mean that<sup>2</sup>:

- information and images can be shared with a potentially infinite audience
- information and images can be difficult to remove and can be permanently archived
- images can easily be shared with limited or no regard for the consent or privacy of the child in the image or their parent or guardian
- images can be tagged offensively by others
- cyber bullying, harassment, intimidation, trolling and other negative behaviours can be persistent and pervasive
- perpetrators of cyber bullying and harassment can remain anonymous
- content can be duplicated and is easy searchable

### 3. A Child Rights Based Approach (CRBA) to cyber-safety

#### *Child rights and guiding principles*

UNICEF Australia's mission is to advocate for the protection of children's rights as set out in the *Convention on the Rights of the Child 1989* (the CRC)<sup>3</sup>, noting that the Australian Government is a signatory. UNICEF Australia identifies the following rights as instrumental to children's engagement with online mediums:

- the right to non-discrimination (Article 2)
- the right to privacy (Article 16)
- the right to be free from emotional and physical violence (Article 19)
- the right to participate in education in a safe environment (Article 28)
- the right to safe leisure and play (Article 31)

UNICEF Australia identifies two key guiding principles as relevant to the way the Australian Government progresses decision making in relation to children and cyber safety:

<sup>1</sup> Teens Tips and Advice on Cyberbullying. ACMA. Viewed at: <http://www.cybersmart.gov.au/Teens/Tips%20and%20Advice/Cyberbullying.aspx> (viewed 6 March 2014)

<sup>2</sup> Cyber bullying, human rights and bystanders information sheet. Australian Human Rights Commission. View at: <https://bullying.humanrights.gov.au/cyberbullying-human-rights-and-bystanders> (last viewed on 6 March 2014)

<sup>3</sup> United Nations. *Convention on the Rights of the Child 1989*. View at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> (Last viewed on 6 March 2014).

- the best interest of the child: laws and actions affecting children should put their best interests first and benefit them in the best possible way
- child and youth participation: children and young people have a right to have their say in decisions that affect them and to have their opinions taken into account.

### *Child safety and business responsibilities*

In relation to the responsibilities of social media sites to promote cyber safety for children, UNICEF Australia refers to the *UN Guiding Principles on Business and Human Rights* which outlines businesses obligations to<sup>4</sup>:

- respect human rights
- seek to prevent and remedy adverse human rights impacts directly linked to their operations, products and services.

In line with the guiding principles, social media sites have a positive duty to develop and introduce new tools to make the internet safer for children.

### *UNICEF global framework for online safety*

In *Child Safety Online: Global Challenges and Strategies*, UNICEF Global support a strategic protection framework with four main objectives including<sup>5</sup>:

- empowering children and promoting resilience
- removing impunity for abusers
- reducing the availability of harmful material from the Internet
- promoting recovery and rehabilitation for children who have experienced harm.

In this report UNICEF Global stresses the importance, in all contexts, of building the ability of parents to support their children to be cyber safe. Parents are unlikely to have an aptitude for emerging technologies or a working knowledge of social media sites.

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<sup>4</sup> OHCHR. *Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy Framework*. View at: [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf) (Last viewed on 6 March 2014)

<sup>5</sup> UNICEF. 2013. *Child Safety Online: Global Strategies*. View at: [http://www.unicef.org/pacificislands/ict\\_eng.pdf](http://www.unicef.org/pacificislands/ict_eng.pdf) (Last viewed on 6 March 2014)

#### 4. Submission parameters

This submission focuses on thematic areas of child safety, cyber bullying and associated behaviours through emerging technologies, and suitable remedies. It responds to the following questions listed in the public consultation document: 1 and 7-15 and 20-24 in line with UNICEF's chief expertise.

#### 5. Participation

UNICEF notes that effective protection strategies require children's participation, particularly that of young people, in both their design and implementation. The empowerment of parents and other safe adults who work closely with young people is also required to enable them to support and understand children's ICT use and the risks and hazards they may encounter.

The Australian Government should conduct meaningful consultations directly with children and young people to identify (I) the safeguards that are practically important for cyber safety and (II) the likely effectiveness of the proposed model.

#### 6. Bullying and violence

UNICEF urges the Australian Government to maintain a pro-active, Whole of Government approach to the problem of bullying. While the Internet has changed the mode and scope of bullying, it is vital to address the bullying behaviour itself rather than focusing on modes of bullying. The Australian Government must address bullying at a core behavioural level and adopt a community-wide approach involving schools, parents, community leaders and children and young people to prevent bullying. Any measures that are cyber safety specific must be linked up to existing and emerging government policy on children and violence.

The proposed scheme outlined in the *Enhancing Online Safety for Children* document provides remedies after harmful material about a child has been posted or after a child has been subjected to cyber-bullying. It is important to recognise that, by that stage, the child could have already experienced considerable harm. A preventative approach encouraging behavioural change in children and young people must be adopted to prevent initial harm. This approach is critical to effectively addressing all forms of violence including cyber bullying, harassment and intimidation.

The Australian Government should address cyber-bullying through the development of initiatives that promote a commitment to zero tolerance of violence and abuse in schools and places of learning and that create educational measures based on principles of respect and non-discrimination among students. The government must also acknowledge that bullying occurs for a wide range of reasons including discriminatory reasons. Human rights

education is important to encourage children's tolerance, knowledge and empowerment. The National Children's Commissioner Megan Mitchell has commented on the importance of, 'fostering an anti-bullying culture that stems not from fear of punishment but from a genuine sense of communal responsibility'<sup>6</sup>.

## 7. Responses to *Enhancing online safety for children* (public consultation document)

*Question 1: What existing programmes and powers should the Commissioner take responsibility for?*

UNICEF welcomes a centralised role to handle complaints and undertake policy promotion as part of a whole of government approach to the issue of bullying and harmful online behaviour. In addition to the functions outlined at paragraph 1.1 of the Public Consultation Document, this role should have the power to:

- receive complaints about harmful online content and bullying
- investigate
- order removal of harmful content
- make a range of orders to deal with bullying and resolve complaints
- provide leadership, oversight and co-ordination of other departments and programmes which target bullying and harmful online behaviour to ensure a consistent whole of government approach
- engage in meaningful participation with children and young people; and
- work with schools and the community to deliver education programmes in human rights and anti-bullying to deal with bullying behaviour that occurs both in online and offline environments.

*Question 2: Considering the intended leadership role and functions of the Commissioner, which option would best serve to establish the Commissioner?*

UNICEF Australia acknowledges that these roles may be well positioned under the mandate and responsibility of a Children's e-Safety Commissioner. UNICEF also acknowledges that a range of other options may be suitable to undertake these roles and enhance online safety. UNICEF Australia is not well positioned to comment on which option would best serve to establish the Commissioner. The decision maker must consider the need to maximise the

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<sup>6</sup> *Children's Commissioner rejects bullying charges for 10-year-olds*. The Age. 13 July 2013. Viewed at: <http://www.theage.com.au/victoria/childrens-commissioner-rejects-bullying-charges-for-10yearolds-20130717-2q4cs.html> (Last viewed on 6 March 2014).

resources available to enhance safety for children and ensure that the best interests of children is a primary consideration.

The government must ensure that the body responsible for these functions is accessible to children, engages in meaningful participation with children and young people and adopts a child-friendly approach. All staff members must be trained in child protection and effective communication with children.

*Question 7: Should the scheme allow children who are unsupported by adults to be active participants (whether as complainants or notice recipients)? Having regard to the vulnerability of children what procedural safeguards should be in place?*

The child's right to be heard and taken seriously is one of the fundamental and guiding principles of the CRC.

Wherever possible, children should be supported by a parent, a guardian or a safe adult (as identified by the child or young person) to participate in the proposed scheme. Children should also have options to invite a teacher, a school counsellor, an extended family member or peer to support them through the complaints process. However, many children may not have a safe or supportive adult that they can ask for assistance and this should not exclude them from an entitlement to make a complaint under this scheme. However, children who are unsupported by *any* adult *should* be allowed to participate in the scheme. Identifying adult support as a requirement to make a complaint is likely to pose a barrier to some children and is therefore not in their best interests.

If complaints relate to explicit photographs of the affected young person, they may be reluctant or fearful to advise their parents of the situation. This is likely to pose a significant barrier to accessing the scheme. Again, UNICEF Australia stresses the importance of (I) having options for safe adults, not just parents or guardians, to support children and young people through the complaints process and (II) children being able to access the complaints process unsupported by an adult.

In situations where the child is unsupported by an adult and the complaint amounts to a serious child protection matter, complaint staff should discuss options for free and independent counselling such as Kids Helpline. If a child is unsupported by an adult, the body operating the scheme should have the power to notify parents and the police to prevent serious harm. Information regarding what would trigger a notification to parents and the police should be provided, in plain English, to the child or young person at the beginning of the complaints process.

Children have the right to be heard in any judicial or administrative proceedings affecting him or her. The right to be heard applies to all proceedings initiated by the child. The Committee on the Rights of the Child (the Committee) recommends that, wherever possible, the child must be given the opportunity to be heard directly in proceedings.

The Committee's General Comment on the Right of the Child to be Heard provides guidance on the procedural safeguards to be put in place when hearing a child.<sup>7</sup> The following safeguards are recommended by the Committee.

- The scheme must ensure that children are not interviewed more often than necessary, in particular when harmful events are explored. Investigators must be aware that the hearing of a child is a difficult process that can have a traumatic impact on the child.
- Any interviews, hearings and/or proceedings must not be conducted in an environment that is intimidating, hostile, insensitive or inappropriate for the child's age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child friendly information, adequate support for self-advocacy, appropriately trained staff, design of court/ investigation rooms, clothing of judges, lawyers and investigators, sight screens and separate waiting rooms.
- The hearing or interview must be enabling and encouraging so that the child can be sure that the adult who is responsible for the hearing is willing to listen and seriously consider what the child has decided to communicate. Experience indicates that the situation should have the format of a talk rather than a one-sided examination.
- Children have the right to be heard through a representative, i.e. a parent, a lawyer or another person. The scheme should provide a representative (if required) to represent or support the child in the event that they are unsupported by an adult in the proceedings. If a child is heard by a representative, it is of the utmost importance that the child's views are transmitted correctly to the decision maker by the representative. Representatives must have sufficient knowledge and understanding of the various aspects of the decision-making process and experience working with children. Codes of conduct should be developed for representatives who are appointed to represent the child's view.

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<sup>7</sup> Committee on the Rights of the Child, *General Comment No. 12 (2009) The right of the child to be heard*. View at: <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf> (Last viewed on 6 March 2014)



- Children must be informed about all the matters, options and possible decisions to be taken and their consequences by those responsible for hearing the child. The right to information is essential to allow the child to make an informed clarified decision.
- If the child is capable of forming her or his own views in a reasonable and independent manner, the decision maker must consider the views of the child as a significant factor in deciding the issue. The decision maker must inform the child of the outcome of the process and explain how the child's views were considered.
- Adequate time and resources should be made available to ensure that children are adequately prepared and have the confidence and opportunity to contribute their views. Consideration needs to be given to the fact that children will need differing levels of support and forms of involvement according to their age and evolving capacities.
- Adults have a responsibility towards the children they work with and must take every precaution to minimize the risk to children of violence, exploitation or any other negative consequence of their participation. Children must be made aware of their right to be protected from harm and where to go for help if needed.

*Question 8: 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 minimum investigation required?*

To make a complaint, complainants should provide the following information:

- name and contact details of the complainant
- details of complainant's relationship with the affected child (if applicable)
- name, age and contact details of the affected child
- name and contact details of the person/ people who posted the harmful material (if known)
- identification of the material and the participating social media site
- a short explanation of why the material is harmful/ offensive including indicating whether the material is highly sensitive (includes references to self-harm, suicide, threats of violence or sexual images of the child)
- whether there is a serious risk to the health and/or safety of the child (such as the risk of self-harm or family violence)
- whether the children involved attend the same school and, if so, the contact details of the school principal and details of any mediation/ conflict resolution processes or proactive support strategies undertaken by the school (if any)

- the outcome and details of attempted reports and requests lodged to the social media site to have the material removed
- outcome and details of attempted requests to the person who posted the material to have the material removed (if any such requests have been made).

The complaints process should allow the complainant to include any evidence they believe to be relevant in their application to minimise the amount of investigation required (though this evidence should not be a necessary requirement). A broad range of evidence should be allowed and encouraged including copies of correspondence and screen-shots of material or messages.

The child's right to privacy must be protected and confidentiality should be explained to the child in child-friendly language. UNICEF Australia recommends that staff assessing and then handling complaints should receive training in child protection and in communicating effectively with children and young people.

The Public Consultation Document indicates on page 14 that complaints would be lodged using a standardised online form. The complaints process should include alternative options for submitting a complaint. Complaints should also be accepted by telephone and by post. Complainants who have limited access to the Internet, literacy problems or disabilities may find it difficult to complete a standardised online form.

The Public Consultation Document also indicates on page 13 that only a child affected, the child's parent or guardian or another position of authority in relation to the child (for example, a teacher or carer) are eligible to make a complaint. Teachers, school counsellors or extended family members should also be specified as adults with authority to make a complaint on behalf of a child to make it clear to children they can turn to counsellors for help. UNICEF further encourages a peer support model. Friends, peers and siblings should be able to report harmful content on a child's behalf with the consent of that child being obtained. This would allow friends and peers to support the targeted child, encourage the child to report the abuse and assist the child to complete the application.

*Question 9: How would an eligible complainant demonstrate that the complainant has reported the content to the participating social media site?*

An eligible complainant could demonstrate that he or she has reported the content to the participating social media site by showing copies of emails, messages or screen shots of entering the complaint.

The scheme should recognise that often proof that a report has been made may not be available. Some social media sites feature a report button on each post so complainants can identify and report the harmful content. There may be no way of demonstrating that the complainant has pressed the report button. The scheme should accept a declaration from the complainant that a report has been made.

*Question 10: What should the timeframe be for social media sites to respond to reports from complainant? Is 48 hours a reasonable timeframe, or is it too short or too long?*

A forty eight hour period is a reasonable amount of to allow a realistic amount of time for social media sites to process and investigate a report and also ensure that harmful content is removed as quickly as possible.

The scheme should require a more immediate response if the content is highly sensitive. This includes content that involves suicide, self-harm, threats of violence or sexual images of a child. For example, a post of the Facebook wall where a child is being encouraged to commit suicide must be dealt with immediately by the social media site. In these circumstances, children should be allowed to make a complaint without waiting 48 hours for the social media site to respond. The Commissioner could then have discretion to decide what a reasonable amount of time before intervening depending on nature of the content or a shorter time frame could be set for highly sensitive content. The Commissioner should also immediately contact the police if the material is unlawful.

If a complainant is told to wait forty-eight hours for the social media site to respond before making a complaint, information should be given to the complainant about services available to support the child during and after this period such as counselling services. The complainant should also be given information about what type of content is illegal and should be reported to the police immediately.

*Question 11: What level of discretion should the Children's e-Safety Commissioner have in how he/she deals with complaints?*

The Commissioner should have the discretion to assess the seriousness of a complaint. In particular, the Commissioner should have the discretion to assess whether there is a child protection risk involved, whether an immediate response to highly sensitive content is required and to decide what is in the best interest of the child.

The Commissioner should have discretion to refuse to investigate complaints that the Commissioner considers to be frivolous, vexatious or not made in good faith. This threshold should be clearly stated and examples should be given of the types of complaints that will be

considered frivolous, vexatious or not made in good faith. A clear referral pathway should be established for complaints that do not meet the threshold to ensure children are properly protected and supported.

*Question 12: What is an appropriate timeframe for a response from the social media site to the initial referral of the complaint?*

Seventy-two hours could be an appropriate timeframe for the social media site to respond to the initial referral of a standard complaint. Adequate time should be given to encourage social media sites to take responsibility for the issue and deal with the harmful content itself with minimal intervention from the Australian Government. The Government should outline its commitment to corporate social responsibility and its expectation of social media sites to take responsibility to mitigate any adverse human rights impacts resulting from its services and operations. Social media sites should take a leadership role to remove harmful content.

The Commissioner should have the discretion to require a more immediate response of up to twenty- hours when the harmful material is highly sensitive. This includes material that involves suicide, self-harm, threats of violence and sexual images of children.

*Question 13: 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?*

The nominated factors are mostly appropriate to be taken into account when determining whether the statutory test has been met.

The first factor is that the material, which is the subject of the complaint, would have to relate directly to the child in question. The scheme should clarify what is meant by ‘related directly to the child’: is it sufficient for the material to identify the child by an obvious physical description or a widely known nickname?

The second factor is that a reasonable person would consider that the material would be likely to cause harm or distress to the child. In making this assessment the Commissioner must take into account a range of factors outlined in the Public Consultation Document. These factors are appropriate but the following additional factors should also be taken into account:

- the privacy of the child
- whether the material reveals the child’s location and there is a child protection issue requiring the child’s location to be kept confidential (such as a domestic violence order protecting the child from abuse)

- the risk of triggering self-harm or mental or physical health issues for the child (in addition to the risk of suicide and life-threatening mental health issues)
- whether the child has a disability
- whether the child is from an Aboriginal and Torres Strait Islander backgrounds or a culturally and linguistically diverse background
- whether the material undermines the child's dignity.

The third factor is that the material would have to be on a participating social media website. Participating social media sites will be sites determined by the Minister to be large social media sites with a presence in Australia. It also includes smaller sites that have volunteered to participate. The Minister should recognise that social media is constantly changing and evolving and ensure that the determination of 'large' sites is consistently monitored and the determination is based on up to date evidence.

The scheme should also provide for the situation where a complainant is unable to report harmful content because it was not posted on a participating social media site. Will the Commissioner still express concern to this social media site even if an investigation and infringement notice is not possible? Will the Minister encourage smaller sites to voluntarily participate in the scheme? Will the child be referred to another service for assistance? There should be a clear process and a referral pathway for people who have complaints in relation to non-participating sites.

The fourth factor is that the material would have to have been placed on the participating social media site by a third party. This factor is inappropriate as it may prevent children from reporting harmful content in the following cases:

- a child who posts material about themselves and then changes their mind but cannot remove it
- a child who posts material about themselves by accident and cannot remove it
- a child who posts material to a limited number of people which is then shared widely on social media causing harm to the child
- a child who was pressured into posting material which they now wish to be removed
- when material is posted by a hacker or a person with access to the child's account against the child's wishes.

If the statutory test is not met for whatever reason, referral pathways should be established to ensure the child is still supported and protected from harm. The child must have access to counselling and the complainant should be urged to report any illegal content to the police.

*Question 14: Is the test of 'material targeted at and likely to cause harm to an Australian child' appropriate?*

The test should be amended to 'material directed related to and likely to cause harm to a child in Australia.' The test should not require that the material is **targeted** at a child because the material may have been uploaded without the intent to target that particular child. It should be sufficient that the material is directly related to the child and is likely to cause harm.

The scheme should be available to all children in Australia. It should not be limited to 'Australian children.' The term 'Australian' children may lead children to believe they are only eligible if they are an Australian citizen. The scheme should be available to non-citizens and non-residents as long as the child is in Australia.

*Question 15: What is an appropriate timeframe for material to be removed?*

As discussed in answer to Question 12, there could be two separate timeframes for removing the material depending on the type of material.

Forty-eight hours could be an appropriate timeframe for the social media site to respond to take-down notice to encourage social media sites to take responsibility for the issue and deal with the harmful content itself.

The Commissioner should have the discretion to require a more immediate take-down of up to twenty-four hours when the harmful material is highly sensitive. This includes material that involves suicide, self-harm, threats of violence, a risk to the child's safety and sexual images of children.

*Question 20: 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?*

The current criminal laws relating to cyber-bullying could be amended so that the language is easier to understand and to make it clear that the laws relate to cyber-bullying and harmful online material. It could also be amended to include reference to using social media, email and other online communication to urge someone to commit suicide or cause self-harm. It should be worded in child-friendly language. The Department of Communication could raise awareness about the existing law and its application to cyber-bullying as part of broader anti-bullying education in schools and communities.

*Question 21: Is the penalty set out in section 474.17 of the Criminal Code appropriate for addressing cyber-bullying offences?*

The penalty under section 474.17 of imprisonment for 3 years is very high. While the offence is aimed to address the most serious forms of cyber-bullying, the penalty should also recognise that, in line with Article 37 (b) of the CRC, children should only be imprisoned as a measure of last resort and for the shortest appropriate period of time. Shorter maximum sentences could be set for defendants under 18 years of age and the law should make it clear that alternative sentencing options such as a community service order based on state or territory sentencing options should be preferred when the defendant is a minor.

*Question 22: Is there merit in establishing a new mid-range cyber-bullying offence applying to minors?*

UNICEF Australia does not support a new mid-range cyber-bullying offence applying to minors. Charging children with criminal offences should be a last resort and only for the most serious offences.

Cyber-bullying should be addressed with education, tolerance, knowledge and empowerment to bring about behavioural change in children rather than punitive measures.

*Question 23: Is there merit in establishing a civil enforcement regime (including an infringement notice scheme) to deal with cyber-bullying?*

A civil enforcement regime would be more appropriate to deal with cyber-bullying. The Commissioner should use mediation, education and counselling to address cyber-bullying.

The public should be able to complain directly to the Commissioner when their reports to the school have failed to stop the bullying or when a school is not involved (for example, if the children involved do not attend the same school). The scheme would have a wider reach and empower more children if it was not limited to receiving complaints from school principals or police. Children and parents should have the option of complaining to the Commissioner when they feel the school is not properly handling the bullying complaint.

Given the incidence and scope of bullying in the lives of Australian children, the Australian Government should consider extending the civil penalty enforcement regime to all bullying towards a child whether in person or online. It is the bullying behaviour that needs to be stopped, not the 'cyber' element to the bullying.

*Question 24: What penalties or remedies would be most appropriate for Options 2 and 3?*

Penalties and remedies such as mediation and issuing notices to individuals applying to a wide range of conduct are most appropriate. The Australian Government should avoid imposing fines that will cause hardship to low income families.

**8. Contact**

For more information please contact: Amy Lamoin, Advocacy Manager, UNICEF Australia at [alamoin@unicef.org.au](mailto:alamoin@unicef.org.au) or on telephone 02 8917 3220.