



Commissioner for Children and Young People
Western Australia

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Ms Christine McDonald
Secretary
Standing Committee on Environment and Communications – Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Ms McDonald

**Inquiry into the Enhancing Online Safety for Children Bill 2014 and the
Enhancing Online Safety for Children (Consequential Amendments) Bill 2014**

Thank you for the opportunity to provide a submission to this Inquiry.

Under the *Commissioner for Children and Young People Act 2006* my statutory functions include advocating for children and young people, and monitoring and reviewing written laws, draft laws, policies, practices and services affecting the wellbeing of children and young people. I must give priority to, and have special regard to, the interests and needs of Aboriginal children and young people and those who are vulnerable or disadvantaged for any reason. I am also required to have regard to the United Nations Convention on the Rights of the Child. Children and young people are defined in the *Commissioner for Children and Young People Act 2006* as people under 18 years of age.

As Commissioner, I broadly support measures to address bullying in all forms. Bullying was one of the prevalent concerns raised by children and young people during this office's research into the wellbeing of children and young people. In that research, around 60 per cent of respondents in an online survey indicated that they had been bullied at some point. Data from this survey and from qualitative research confirmed that children and young people are bullied in a range of environments, including school and the online environment.^{1 2} It is important to recognise that, from the perspective

¹ Commissioner for Children and Young People 2010, *Speaking out about wellbeing: the views of Western Australian children and young people*, Commissioner for Children and Young People.

² Commissioner for Children and Young People 2010, *Research Report: Speaking out about wellbeing: the views of Western Australian children and young people*, Commissioner for Children and Young People, pp.49-51 and 84.

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of the young people involved, cyber-bullying is not seen as separate from other bullying, but rather as one method among many by which a person can be bullied.

The best interests of the child

In all of my advocacy work the overarching principle is the best interests of the child. In the context of the proposed legislation, I have considered the interests not only of the child who is the subject of material, but also the child or children who may be posting or distributing that material.

Clearly it is in the best interests of any child not to be the subject of bullying. However, it is unlikely that all bullying could be prevented, and so the next preferred outcome would be to minimise the impact of bullying behaviour and to provide children and young people with the skills to report and to cope with bullying behaviour.

These outcomes would be most appropriately achieved by a stronger emphasis on preventative education and programs. These programs could focus on three areas:

- Prevention of bullying behaviour
- Enhancement of resilience in young people so the effects of bullying behaviours where they occur are mitigated
- Addressing the role of 'bystanders' in bullying

The work of Winthrop Professor Donna Cross of the Telethon Kids Institute and colleagues on bullying and cyber-bullying may be particularly instructive in relation to processes to address these three areas.³

The principle of 'best interests of the child' also includes the best interests of the child who is carrying out the bullying behaviour. Without excusing or diminishing the impact of bullying, the effects of any response on the child or young person who is seen as the bully should be very carefully considered. Responses which emphasise prevention and education should be preferred over primarily punitive responses, giving the child an opportunity to learn from and address their behaviour in a positive manner.

Any legislation which could cause children and young people to be subject to civil or criminal penalties or sanctions must be very carefully considered, and should only be enacted if it can be demonstrated that such regulation would have a practical effect. While the removal of the bullying material is a visible effect, it is not clear that it actually achieves the desired outcome, to address the issue of bullying behaviour by the perpetrator/s. As previously stated, such outcomes are far more likely to be achieved through a preventative and educative focus.

The views of children and young people

In my submission to the public consultation on Enhancing Online Safety for Children, conducted by the Department of Communications in March 2014, I referred to the

³ A list of Professor Cross' recent work on bullying and cyber-bullying can be found at <http://telethonkids.org.au/our-people/staff-student-index/c/donna-cross/>

importance of allowing children and young people the opportunity to have their views heard on matters that affect them. I highlighted a number of existing consultative mechanisms which could be drawn on to gather the diverse views of children and young people.

In responding to the 2010 Joint Select Committee on Cyber-Safety, former Commissioner Michelle Scott emphasised the need for children and young people to have the opportunity to have input on matters relating to their wellbeing. Of particular note, Commissioner Scott reported that children and young people who were consulted on wellbeing were concerned about bullying in general, and the survey and qualitative research confirmed that children and young people were bullied in a range of environments including school and online spaces.⁴

In addressing issues around cyber-bullying and bullying in general, it is imperative that the views of children and young people are sought and those views taken into account in the development of programs and services.

The role of the proposed e-Safety Commissioner

I agree that the online safety of children and young people is important. The National Children's Commissioner has recently conducted research and consultation on cyber-bullying and related issues, in keeping with her duties under the *Australian Human Rights Commission Act 1986* to undertake research for the purpose of promoting respect for the human rights of children in Australia. In this context Article 16 (the right to privacy and protection of reputation) and Article 19 (the right to protection from physical and mental injury and abuse) are particularly relevant.

The commonalities between the roles of the e-Safety Commissioner and the National Children's Commissioner mean that the two offices could effectively be positioned together, or with the e-Safety Commissioner under the auspices of the National Children's Commissioner.

In addition there are potential overlaps with the roles of the Children's Commissioners and Child Guardians in Australian states and territories, with the role of the Australian Communications and Media Authority, and with the investigative role of the Australian Federal Police.

Regardless of where the role is positioned, I agree with the focus areas for the e-Safety Commissioner, namely research, education and advice to government on the online safety of children. It is important that there is a strong emphasis on online safety education, online privacy education, and how to be a good 'corporate citizen' in the online space. The emphasis in the legislation on the regulatory powers of the e-Safety Commissioner tends to obscure these other functions. It would be useful if the legislation included a strong statement of principles which underpin the way in which the e-Safety Commissioner operates. The *Commissioner for Children and Young People*

⁴ Commissioner for Children and Young People 2010, Submission to the Joint Select Committee on Cyber-Safety, 22 December 2010.

Act 2006 (WA) provides an example of a statement of principles which could be used as guidance.⁵

I would also add that the e-Safety Commissioner should be required to engage with children and young people to ensure that their views are given serious consideration and taken into account.

Qualifications of the e-Safety Commissioner

I note the proposed qualifications for a person to be appointed to the role. According to s. 50 of the Bill, the e-Safety Commissioner would have to have 'substantial experience or knowledge' and 'significant standing' in at least one of the named areas – operation of social media services; operation of the internet industry; public engagement on issues related to online safety; public policy in relation to the communications sector.

There is somewhat of a disconnection between these proposed qualifications and the role intended for the e-Safety Commissioner, which includes: collection, analysis and interpretation of information related to online safety for children (s.15 (e)); the conduct and evaluation of awareness programs relevant to online safety (s.15 (f)); and supporting, encouraging, conducting and evaluating research on online safety for children (s.15 (h)).

I suggest that the qualifications of the position should also include a requirement for experience in or knowledge of child welfare or wellbeing, particularly with a focus on research or advocacy.

Cyber-bullying as defined in the Bill

The Bill defines 'cyber-bullying material' as material posted or made available via social media or another electronic service, which a reasonable person would consider to have a 'seriously threatening, seriously intimidating, seriously harassing or seriously humiliating' effect on a particular child. There is no mention in the legislation of the frequency or intensity of incidents to reach a threshold for 'serious' behaviour.

The term 'cyber-bullying' itself is widely used in the media and in discussions of bullying and aggression using the internet and electronic means. However, for children and young people, distinguishing between types of bullying in this way is artificial. Many of the children and young people who are subjected by electronic bullying are also victims of face-to-face bullying. Professor Donna Cross has suggested that the term 'cyber aggression' is preferred by children and young people as a way of describing how they perceive the use of electronic methods to harass and bully.⁶

As noted above, children and young people who the former Commissioner consulted on wellbeing were concerned about bullying, and saw cyber-bullying as one way among several that bullying could take place. It is important in examining this to consider carefully whether setting cyber-bullying apart from other forms of bullying is

⁵ *Commissioner for Children and Young People Act 2006*, s. 4.

⁶ Personal communication, Professor Donna Cross, 14 January 2015.

appropriate. It has not been made clear why there is a need for a legislated response to non-criminal activity using electronic means while no such response is required where non-electronic means are used for the same activities.

As previously stated, a focus on addressing bullying behaviour, regardless of the medium, would be the preferred approach in terms of the most appropriate outcome for children and young people.

Complaints procedures

Any complaints procedure must be accessible to and acknowledge the needs of children and young people. My office has produced guidelines on the development of appropriate complaints procedures, available in my publication *Are you listening? – Guidelines for making complaints systems accessible and responsive to children and young people.*⁷

These guidelines arose from consultations with children and young people on the issues and challenged they face when making complaints. In summary, complaints systems intended for use by children and young people should:

- Be accessible to them
- Take them seriously
- Be responsive to them
- Support them and their advocates
- Be respectful and avoid additional barriers.

In summary

- In any matter affecting or impacting children and young people, their views should be sought, taken into account, and given serious consideration in the development of any response to that matter. The best interests of the child should be the primary concern.
- A much stronger emphasis could be placed on education and prevention rather than on legislative action to address bullying behaviour. Existing programs and research which address bullying behaviour should be supported.
- Consideration should be given to positioning the e-Safety Commissioner under the auspices of the National Children's Commissioner.
- The inclusion of guiding principles in the legislation could be beneficial in defining the scope of the e-Safety Commissioner's role.
- The qualifications for appointment to the role of e-Safety Commissioner could be strengthened by incorporating a child welfare and wellbeing focus.

⁷ Commissioner for Children and Young People 2013, *Are you listening? – Guidelines for making complaints systems accessible and responsive to children and young people*, Commissioner for Children and Young People.

- Cyber-bullying should not be artificially separated from bullying overall, but should be considered as one possible way a person could be bullied, which will influence the way in which programs and education services are delivered.
- The process for reporting material to the e-Safety Commissioner should be accessible to children and respectful of their needs.

Thank you again for the opportunity to present this submission. Should you require any further information or wish to discuss any of the points raised in more detail, please contact my office.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jenni Perkins', written over the typed name.

JENNI PERKINS
A/Commissioner

20 January 2015