

27 January 2014

Ms Christine McDonald
Committee Secretary
Senate Standing Committees on Environment and Communications
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Parliament House
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Dear Ms McDonald

INQUIRY INTO THE ENHANCING ONLINE SAFETY FOR CHILDREN BILL 2014

Thank you for the opportunity to comment on the Enhancing Online Safety for Children Bill 2014 and the Enhancing Online Safety for Children (Consequential Amendments) Bill 2014 (the Bill).

The Law Council has restricted its comments to how the Bill addresses the issues raised in the Law Council's [submission](#) to the public consultation by the Department of Communications (the Department) on Enhancing Online Safety for Children.

The Law Council welcomes efforts to better ensure the online safety of children. It considers that there is need for a common understanding of conduct that constitutes cyberbullying to allow for an effective assessment of possible policy responses to online bullying.

Any legislative response to cyberbullying must have careful regard to certain guiding principles, including human rights and rule of law principles. It is necessary to achieve balance to ensure that limitations on individuals' rights are necessary, reasonable and proportionate. The role of the Children's e-Safety Commissioner (the Commissioner) will be essential in ensuring this outcome.

Public Consultation on Enhancing Online Safety for Children

The Explanatory Memorandum sets out that the Bill was developed following consultation with civil society and stakeholders. On 7 March 2014 the Law Council provided a submission to the Department's public consultation on Enhancing Online Safety for Children.¹ Certain issues raised in that submission remain relevant to the Committee's consideration of the Bill:

- the need for a legislative framework to outline the role of the Commissioner;
- the need for both administrative and judicial review to ensure proper oversight of the role;
- the need for increased education and awareness of the possible consequences of cyberbullying, including criminal prosecution under the existing offences. These educational measures should explain the application of existing offences, and the relevant terminology involved, in a clear, accessible manner as well as providing broader training to police and judicial staff to ensure that serious cyberbullying conduct is appropriately prosecuted under existing offences;

¹ The Law Council was assisted in the preparation of this submission by the Law Society of New South Wales, the Law Society of South Australia and its National Human Rights Committee.

- focus on the outstanding recommendations of the Australian Law Reform Commission (the ALRC) in response to concerns raised about federal sentencing laws. The ALRC's recommendations emphasise the need for federal sentencing legislation to establish minimum standards for the sentencing of young offenders. They also recommend that when sentencing a young offender, the court should be required to have regard to his or her wellbeing; and to the requirement that children be detained only as a measure of last resort, and only for the shortest appropriate period; and
- the Law Council's general support for a new civil penalty regime to target cyberbullying, noting that there are several considerations that should be addressed to ensure an effective regime, such as resourcing for the provision of counselling and other support for affected individuals.

The Bill

The Law Council welcomes the outcome of the Department's consultation, particularly:

- the omission of a new criminal cyberbullying offence given that alternative options are available and there is a lack of evidence that a gap in the federal law exists;
- the Bill contains a tighter and more appropriate definition of 'cyberbullying' for the purposes of the Commissioner and the civil penalties compliance scheme for removal of harmful material;
- the emphasis in the Explanatory Memorandum on ensuring natural justice/procedural fairness is available to parties, which reflects the Law Council's suggestions. In its submission, the Law Council also sought clarification that a child could directly make a complaint to the Commissioner, which is addressed in the Bill. Further, the Law Council suggested that the consent of the child should be obtained where complaints were lodged by a person such as a school principal or the police, and this is reflected. The Law Council notes that parents and guardians can make complaints without such consent; and
- the measure that the Minister must cause a review to be conducted of the operation of the Bill, if enacted, within 3 years after its commencement,² which accords with the Law Council's suggestion.

However, certain issues raised by the Law Council are not addressed in the Bill:

- the Law Council argued that the Commissioner should explicitly have regard to the principle of the best interests of the child.³ Although the Explanatory Memorandum states that '[i]n performing his or her functions under clause 15, the Commissioner will be expected to balance the rights and responsibilities of all stakeholders with the need to take proportionate and appropriate action in the best interests of children',⁴ this is not explicit in the Bill;
- the Law Council argued that in appointing a Commissioner it would be important to ensure that he or she would have an appropriate level of skills and expertise in recognising and responding to the rights and needs of children, their families and the other individuals involved. The criteria for the appointment of the Commissioner⁵ do not currently appear to place any particular emphasis on such skills. A Commissioner is required to possess technical skills, such as those in relation to the operation of the internet industry and public policy in relation to the communications sector. Given the position is focused on ensuring the wellbeing of children and that the Commissioner will have the ability to disclose material to, for example, teachers, parents, principals, police and guardians in order to resolve a complaint, it would seem

² Pursuant to cl 107.

³ At art 3.1 of the *Convention on the Rights of the Child*.

⁴ At p 71.

⁵ At cl 50.

essential that the Commissioner is required to possess appropriate skills and expertise with respect to young people; and

- the Law Council suggested that criteria should be included to guide the way the Commissioner conducts inquiries, such as ensuring that any limitations on an individual's rights are necessary, proportionate and reasonable in the circumstances. The Bill as currently drafted provides the Commissioner with open discretion to conduct inquiries as he or she sees fit.⁶

The Law Council considers that as currently drafted the purpose of the Bill may be undermined by the way the civil penalty scheme can be enforced:

- the Commissioner may request that a tier 1 social media service remove material, but there are no enforcement mechanisms if it fails to do so.⁷ For a social media service to be declared as a tier 1 service it must satisfy the Commissioner that it complies with "basic online safety requirements". These requirements have a very low threshold⁸ and do not include other safeguards which would promote online safety, such as record keeping about complaints and their handling or timeframes for responding to complaints to ensure a prompt response. Such safeguards may be important in ensuring that the purpose of the Bill is achieved;
- revocation of a tier 1 declaration of social media service requires at least 12 months to have passed since the declaration was made, and that during that time the provider has repeatedly failed to comply with requests given to the provider to remove material.⁹ This is a long period in which serious consequences could occur from cyberbullying. The Bill does not appear to provide for any discretionary provisions enabling the Commissioner to revoke the tier 1 status if the provider has clearly failed to remove material with potentially serious consequences. This may undermine the object of the Bill to ensure that harmful material is removed quickly;
- tier 2 providers have to be declared by the Commissioner and the Commissioner can enforce requests for removal if a tier 2 provider fails to comply with them. The Law Council is uncertain why such powers would not apply to all providers who do not meet tier 1 status; and
- it does not appear that the tier 2 enforcement scheme applies to small providers.¹⁰ The characterisation of a 'large social media service' is unclear and is subject to the Commissioner's discretion, having regard to certain factors.¹¹ In addition, the Law Council questions whether small providers should also be captured to permit the Commissioner to enforce requests.

Thank you once again for the opportunity to make these preliminary observations.

Yours faithfully



MARTYN HAGAN
SECRETARY GENERAL

⁶ Pursuant to cl 19(2).

⁷ Under the Bill, enforcement mechanisms only apply to tier 2 services.

⁸ For example, cl 21 sets out that the terms of use of a service must prohibit cyber-bullying material, there must also be a complaints scheme and a contact person.

⁹ Pursuant to cl 25.

¹⁰ Pursuant to cl 31(3)(a), which requires that tier 2 providers must be 'large'.

¹¹ Pursuant to cl 31(8).