

7 March 2014

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

By email: onlinesafety@communications.gov.au

Dear Sir or Madam

Public Consultation on Enhancing Online Safety for Children

Attached is a copy of the Law Council's submission in respect of the above inquiry.

The Law Council is grateful for the opportunity to contribute to this inquiry. Please contact Ms Leonie Campbell on 02 6246 3733 or leonie.campbell@lawcouncil.asn.au for any questions.

Yours sincerely



MARTYN HAGAN
SECRETARY-GENERAL

Enhancing Online Safety for Children Inquiry

Submission to the Department of Communications

7 March 2013

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Acknowledgment

The Law Council acknowledges the assistance of the Law Society of New South Wales (LS NSW), the Law Society of South Australia (LSSA) and its Human Rights Committee in the preparation of this submission.

Executive Summary

1. The Law Council welcomes and strongly supports efforts to better ensure the online safety of children. There are strong levels of community concern about the widespread nature of cyberbullying and the fact that in its most serious form, cyberbullying results in tragic consequences. The Law Council emphasises however, the need for common understanding of conduct which constitutes cyberbullying, and the perpetrators involved, as a necessary basis for assessing possible policy responses.
2. In developing these responses, the Law Council considers that the Australian Government needs to identify, and have careful regard to, certain guiding principles. These include a number of important human rights obligations as well as rule of law principles. Noting the tensions which necessarily exist between the competing interests involved, the Australian response should seek to balance these interests in a manner which ensures that any limitations on individuals' rights are necessary, reasonable and proportionate. If established, the Children's E-Safety Commissioner's (the Commissioner's) role will be essential in ensuring this outcome.
3. The Law Council supports implementing a legislative framework which would outline the role of the Commissioner, if established. This would clarify the functions, role and powers of the Commissioner, and help to ensure that the role is subject to appropriate levels of scrutiny. Both administrative and judicial review are necessary to ensure proper oversight of the role.
4. In respect of proposals for the removal of online content which would be harmful to children, the Law Council considers that:
 - (a) the proposed statutory test is overly broad and reliant upon the Commissioner's discretion. It should be amended to more appropriately target conduct that is appropriately classed as cyberbullying;
 - (b) the Commissioner should be required to have regard to a number of key factors in deciding whether online material meets the statutory test;
 - (c) notwithstanding the desire for rapid removal of harmful online content, there should be a requirement that the Commissioner observe procedural fairness requirements as part of the decision making process;
 - (d) investigations of complaints under this proposal raise a number of complex issues which require careful consideration and resolution. These include evidentiary issues, as well as the rights to privacy of not only the complainant, but the alleged perpetrator and innocent bystanders (who, for example, may be part of an online group);
 - (e) the proposed penalties and enforcement mechanisms should provide the Commissioner with greater flexibility to respond appropriately where the perpetrator is a child. Such responses may, for example, draw upon mediation and restorative justice mechanisms.
5. The Law Council does not support the introduction of a new federal cyberbullying offence. It considers that the Discussion Paper has not made a sufficient case that introducing a new criminal offence is necessary, reasonable and proportionate, having regard to the alternative options available. Its concerns in this area relate to:

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- (a) the lack of evidence that a gap in the federal law exists;
 - (b) the lack of evidence that existing federal offences do not operate, or are not able to operate, appropriately in respect of serious cyberbullying conduct;
 - (c) the possibility of overlap with existing offences; and
 - (d) the undesirability of introducing a new broader offence aimed at the behaviour of minors, having regard to the undesirable consequences of bringing greater numbers of minors into contact with the criminal justice system.
6. The Law Council does consider that there is strong support for increased education and awareness of the possible consequences of cyberbullying, including criminal prosecution under the existing offences. It recommends that educational measures be implemented to draw attention to these consequences. These measures should explain the application of these offences, and the relevant terminology involved, in a clear, accessible manner. Broader training may also be necessary amongst police and judicial staff to ensure that serious cyberbullying conduct is appropriately prosecuted under existing offences.
7. In discussing the existing criminal laws, the Law Council refers to the outstanding recommendations of the Australian Law Reform Commission (the ALRC) in response to concerns which have been raised about current federal sentencing laws. These 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 federal 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. The Law Council supports an Australian Government response to these recommendations.
8. In respect of the proposal for a new civil penalty regime to target cyberbullying, the Law Council considers that:
- (a) its emphasis on investigation, mediation and dispute resolution are welcome, prior to the use of the proposed enforcement mechanisms. However, this will require the Commissioner to be adequately resourced;
 - (b) resourcing will also be important in relation to the provision of counselling and other support for affected individuals;
 - (c) it is unclear whether a child, his or her parent or guardian, or another adult in authority could make complaints directly to the Commissioner under this proposal, as with the proposal for removal of online content, noting that their complaints may involve equally distressing circumstances;
 - (d) a range of threshold issues for resolution also exist in relation to this proposal, including in relation to privacy and consent. In certain respects, however, these may be less complex than those raised in relation to the removal of harmful content proposal;
 - (e) under this proposal, the Commissioner should also be required to have regard to a range of matters, including the rights of the individuals involved and the need to observe procedural fairness requirements;
 - (f) with respect to the proposed penalties and enforcement mechanisms should provide the Commissioner with greater flexibility to respond appropriately

where the perpetrator is a child. Such responses may, for example, draw upon mediation and restorative justice mechanisms. The Law Council also suggests that the level of the proposed civil penalty may be unduly onerous for a child.

9. Finally, the Law Council supports an independently conducted review of any cyberbullying responses adopted by the Australian Government, to be conducted three years after their implementation.

Introduction

10. The Law Council is pleased to have the opportunity to provide a submission to the Department of Communications (the Department) regarding its Enhancing Online Safety for Children: Discussion Paper (the Discussion Paper).
11. The Law Council welcomes and strongly supports efforts to better ensure the online safety of children. In particular, it notes the strong level of community concern about the widespread nature of cyberbullying, and the fact that in its most serious form, cyberbullying results in tragic consequences. It is therefore timely and appropriate that the Australian Government is seeking to consult the Australian community on the best possible response to this issue by releasing the Discussion Paper.
12. The Law Council has previously provided a number of submissions which are relevant to various themes raised in the Discussion Paper. These include its:
 - (a) Submission to the Senate Select Committee on Cyber-Safety regarding its Inquiry into Options for Addressing the Issue of Sexting by Minors (2013);¹
 - (b) Submission to the Senate Legal and Constitutional Affairs Committee regarding the Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010; ² and
 - (c) Submission to the Senate Legal and Constitutional Affairs Committee regarding the Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012.³
13. This previous advocacy helps to inform the Law Council's comments in response to the Discussion Paper below.

¹ Law Council of Australia, Submission to the Senate Select Committee on Cyber-Safety regarding its Inquiry into Options for Addressing the Issue of Sexting by Minors (6 August 2013), available at: http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2700-/2749_-_Sexting_Inquiry.pdf

² Submission to the Senate Legal and Constitutional Affairs Committee regarding the Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010
<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2200-2299/2248%20Crimes%20Legislation%20Amendment%20%28Sexual%20Offences%20Against%20Children%29%20Bill%202010.pdf>

³ Submission to the Senate Legal and Constitutional Affairs Committee regarding the Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012 (1 June 2012), [http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2500-2599/2593%20-%20Australian%20Human%20Rights%20Commission%20Amendment%20\(National%20Children's%20Commissioner\)%20Bill%202012.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2500-2599/2593%20-%20Australian%20Human%20Rights%20Commission%20Amendment%20(National%20Children's%20Commissioner)%20Bill%202012.pdf)

Discussion Paper – overview

14. The Discussion Paper responds to the Australian Government’s policy commitment, as set out in the Coalition’s Policy to Enhance Online Safety for Children (September 2013), to implement a range of measures to improve the online safety of children in Australia. It contains proposals regarding the:
- (a) establishment of a Children’s E-Safety Commissioner (the Commissioner);
 - (b) development of an effective complaints system, backed by legislation, to remove harmful material quickly from large social media sites;
 - (c) examining existing Commonwealth legislation to determine whether to create a new, simplified cyberbullying offence; and
 - (d) creating a separate civil enforcement regime to deal with cyberbullying.
15. The Discussion Paper invites comment on these proposals, and includes a number of specific questions seeking feedback.

Response to Discussion Paper

General comments

16. Prior to commenting on the specific proposals contained in the Discussion Paper, the Law Council wishes to make a number of general remarks.

Guiding human rights and rule of law principles

17. Firstly, the Law Council considers that the development of an Australian Government response to cyberbullying issues needs to identify, and have careful regard to, certain key principles which are clearly relevant to discussions of how best to combat cyberbullying in Australia. This includes a number of human rights obligations, which have been voluntarily assumed by Australia under key international instruments, as well as particular rule of law principles.
18. It considers that identifying these principles and obligations at the outset helps to identify the different interests involved in relation to cyberbullying, and to resolve in a principled manner the evitable tensions which arise when seeking to determine the most appropriate policy responses.
19. While the list below is non-exhaustive, the Law Council considers that in particular, the Australian Government’s response should be framed in light of the human rights obligations set out below. These include in particular the rights of the child:
- (a) to be ensured by the State such protection and care as is necessary for his or her well being;⁴
 - (b) in all actions concerning the child, for his or her best interests to be a primary consideration;⁵

⁴ Art 3.2, *Convention on the Rights of the Child* (CROC)

⁵ Art 3.1 CROC

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- (c) to life, and to survival and development to the maximum extent possible;⁶
 - (d) where a child is capable of forming his or her own views, the right to express those views freely in all matters affecting him or her;⁷
 - (e) to freedom of expression. This right may be subject to certain restrictions, but only as provided by law and where necessary either for the respect of the rights or reputations of others; or the protection of national security, public order, public health or morals;⁸
 - (f) to freedom of association;⁹
 - (g) to privacy;¹⁰ and
 - (h) to the highest possible standard of health.¹¹

20. In discussions of cyberbullying, the above rights will carry a different resonance depending on whether the child involved is:

- (a) a victim, or possible victim, of cyberbullying;
- (b) a perpetrator, or possible perpetrator, of cyberbullying; or
- (c) a bystander whose rights are nevertheless engaged in a possible cyberbullying incident (for instance, whose rights to privacy are engaged because of an investigation into online group communications).

21. In relation to a perpetrator who has been accused or charged with a criminal offence, the Law Council emphasises in particular the following principles, as set out in its Detention Principles in the Criminal Law Context:¹²

- (a) in all actions concerning children, the best interests of the child shall be a primary consideration.¹³
- (b) the arrest, detention or imprisonment of a child should be used only as a measure of last resort and for the shortest appropriate period of time.¹⁴ Pre-trial detention of children should be avoided to the greatest extent possible.¹⁵
- (c) every child accused of or convicted of a criminal offence should be treated in a manner which:
 - (i) is consistent with the promotion of the child's sense of dignity and worth;

⁶ Art 6, CROC

⁷ Art 12, CROC

⁸ Art 13, CROC

⁹ Art 15, CROC

¹⁰ Art 16, CROC

¹¹ Art 24, CROC

¹² Law Council of Australia, *Detention Principles in the Criminal Law Context*, 2013, available at:

http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Final_PDF_18_Oct_13_Criminal_Detention_Principles.pdf

¹³ Art 3, CROC

¹⁴ Art 37(b), CROC; Rule 17, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (Beijing Rules) (see also Rule 11)

¹⁵ Rule 13, Beijing Rules

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- (ii) reinforces the child's respect for the human rights and freedoms of others; and
 - (iii) takes into account the child's age, sex or gender and needs and the desirability of promoting the child reintegrating and assuming a constructive role in society.¹⁶

22. While the Discussion Paper appears to be mostly focused on cyberbullying by children or minors, the Law Council further notes the need to consider the rights of adults, such as those that appear in in the *International Covenant on Civil and Political Rights* (ICCPR), such as:

- (a) the right to be free from arbitrary or unlawful interference with a person's privacy, family, home or correspondence;¹⁷
- (b) the right to freedom of expression;¹⁸ and
- (c) the right to freedom of association.¹⁹

23. The Law Council considers that any Australian Government response to cyberbullying should explicitly address these competing interests, noting the necessary tensions which exist between them. It should then seek to balance these interests in a manner which ensures that any limitations placed on individuals' rights are necessary, reasonable and proportionate.²⁰

24. Further relevant principles which should be highlighted, and are relevant to the Law Council's consideration of these issues include key Rule of Law Principles such as:

- (a) executive decision making should comply with the principles of natural justice and be subject to meaningful judicial review;²¹ and
- (b) the law must be both readily known and available, and certain and clear. This means that the intended scope and operation of offence provisions should be unambiguous and key terms should be defined, so as to avoid dependence on police and prosecutorial discretion. In addition, the fault element for each element of an offence should be clear.²²

25. These principles are further discussed in context below.

Outline and definition of the relevant problem and perpetrators

26. The Discussion Paper provides a relevant definition of "cyberbullying" in its introductory paragraphs as:

... "any communication, with the intent to coerce, intimidate, harass or cause substantial emotional distress to a person, using electronic means to support severe, repeated and hostile behaviour".

¹⁶ Articles 37(c) and 40.1, CROC, see also Rule 26, Beijing Rules

¹⁷ Art 17, ICCPR

¹⁸ Art 19(2), ICCPR

¹⁹ Art 22, ICCPR

²⁰ In this respect, the Law Council notes that the ICCPR provides that certain rights cannot be derogated from, such as the right to life, and the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

²¹ Law Council of Australia, *Policy Statement on Rule of Law Principles* (2011), Principle 6

²² *Ibid.*, Principle 1

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27. The Law Council understands that the definition of cyberbullying is not universal and open to debate. There may be, therefore, a more appropriate definition provided to this inquiry by experts in the field.
 28. Notwithstanding this point, the Law Council is concerned that the definition which is provided upfront in the Discussion Paper is significantly more specific and targeted than the proposed definitions which appear later in relation to proposed responses to cyberbullying. These concerns are discussed further below.
 29. Moreover, there are currently no examples provided of conduct which would fall within this definition. The Law Council considers that it would be useful to provide such examples, in order to better inform the Australian debate of such issues.
 30. In particular, it would be valuable to illustrate with examples the range of possible conduct which may constitute cyberbullying. It would also be helpful to emphasise that depending upon the severity of the conduct, a different kind of policy response may be required.
 31. In this respect, the Law Council notes that the LS NSW has suggested that the unauthorised distribution of nudity or pornographic images and video footage without consent should specifically be addressed as part of the Australian Government's response.
 32. The material provided by the LSSA also indicates that cyberbullying can exist in a wide range of manifestations, from harassment to cyberstalking.
 33. It is also important to emphasise, using examples, conduct which would not fall within the definition. Otherwise, there may be a danger of public misunderstanding as to the scope of this inquiry.
 34. The Law Council is particularly concerned that the paper is vague in its discussion about the common perpetrators of cyberbullying. It appears to be assumed later in the paper that the key perpetrators of cyberbullying are other children, or minors.²³
 35. Providing the community with an evidence base regarding the perpetrators involved is central to any analysis of proposals of the most appropriate policy responses to this issue. Information and relevant evidence must be included upfront regarding the common perpetrators of cyberbullying, including their age group and other key known characteristics.

Previous relevant work in this area

36. The Law Council recognises that the recommendations in the paper partly respond to the recommendations made by the National Bullying, Young People and the Law Symposium in 2012 (the Symposium).²⁴ The Symposium, which was chaired by the Hon Alastair Nicholson AO QC RFD, concluded by making a number of recommendations for addressing bullying, including cyberbullying. These focused upon the need for:

- (a) education;

²³ For example, Question 22 asks whether there is "merit in establishing a new mid-range cyberbullying offence applying to minors".

²⁴ The 2012 National Bullying, Young People and Law Symposium was a joint initiative between The Alannah and Madeline Foundation's National Centre Against Bullying (NCAB), the Australian Federal Police and the Sir Zelman Cowen Centre.

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- (b) appropriate responses by organisations to incidences of bullying and cyberbullying;
 - (c) the establishment of a national digital communication tribunal; and
 - (d) an appropriate legal framework to address bullying and cyberbullying.

37. In particular, the Symposium recommended that all governments consider the introduction of a specific, and readily understandable, criminal offence of bullying, including cyberbullying, involving a comparatively minor penalty to supplement existing laws which are designed to deal with more serious forms of conduct. In developing the above approaches, the Symposium recommended that it was necessary to take into account:

- (a) the voices of children and human rights;
- (b) summary offences that do not require proof of specific intent to cause harm;
- (c) appropriate penalties that in the case of children do not include incarceration; and
- (d) the Federal Government establish a national digital communication tribunal with the power to act, speedily and in an informal manner, to direct the immediate removal of offensive material from the internet.

38. However, the Law Council considers that the Discussion Paper needs to better draw upon other recent and comprehensive work that has been undertaken in this area. This would include the work undertaken by the:

- (a) the Joint Select Committee on Cyber-Safety in its High Wire Act – Cyber-Safety and the Young interim report (2011);²⁵ and
- (b) the Standing Council on Law and Justice’s 2012 consideration of cyberbullying and related issues. The Standing Council’s communique notes that Ministers made a number of conclusions including about:
 - (i) their consideration of existing Commonwealth, State and Territory offences to deal with cyberbullying and agreement that they provide appropriate coverage while requesting that officers continue to monitor the adequacy of those laws; and
 - (ii) the importance of education for Australians about ways to prevent and address cyberbullying.

Constitutional basis for Commonwealth response

39. The Law Council notes that consideration is required as to the Constitutional basis for the Australian Government’s responses in this area.

40. Under the Australian Constitution (the Constitution), the Commonwealth Government may make laws and govern in respect of those matters for which it has responsibility, or a specific head of power, under either section 51 or some other express provision of the Constitution.

²⁵ Joint Standing Committee on Cyber-Safety, *High Wire Act: Cyber-Safety and the Young: Interim Report* (June 2011)

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41. Where the Constitution does not provide a specific grant of authority to the Commonwealth to legislate in that area, and therefore the States and Territories retain legislative responsibility, the Commonwealth may assume legislative responsibility pursuant to section 51 (xxxvii), where States and Territories refer such responsibility to the federal parliament.
 42. It is further noted that the recent High Court decision of *Williams v Commonwealth*²⁶ overturned a longstanding assumption about the scope of Commonwealth executive power was overturned. The court held that, subject to certain limited exceptions, the Commonwealth executive could not contract and spend public money without prior authorisation from parliament. Before the case, it had been assumed that this legislative authorisation was not required.
 43. While the Law Council has not had the opportunity to consider how these Constitutional issues may apply to the proposals contained in the Discussion Paper, it raises them as a threshold issue for consideration.

Establishment of the Commissioner role

44. The Discussion Paper proposes that the Commissioner would be a single point of contact for online safety issues for industry, Australian children and those charged with their welfare. The Commissioner would have responsibility for a range of functions, including:
 - (a) implementing a scheme for the rapid removal of material that is harmful to a child from large social media sites;
 - (b) working with industry to ensure that better options for smartphones and other devices and internet access services are available for parents to protect children from harmful content;
 - (c) establishing an advice platform with guidelines for parents about the appropriateness of media content;
 - (d) establishing a research fund to consider the effects of internet use on children, how support services can be provided online and how to mitigate children's online risks;
 - (e) establishing a voluntary process for the certification of online safety programmes offered within schools; and
 - (f) establishing a funding programme for schools to deliver online safety education.

Functions of Commissioner

45. Under the New Zealand regime, the Discussion paper notes that an "Approved Agency" conducts similar functions to those listed above. The Approved Agency's functions also include using negotiation, mediation and persuasion (where appropriate) to resolve complaints.
46. The Law Council also considers that if appointed, the Commissioner should also use mediation and dispute resolution to resolve complaints, where this is appropriate in the

²⁶ *Williams v Commonwealth* (2012) 288 ALR 410

circumstances. It also suggests that restorative justice responses may be useful in its more detailed comments below.

Options for implementing Commissioner role

47. The Discussion Paper proposes a number of possible options for implementing the Commissioner role. These include creating an independent statutory authority, designating a member of the Australian Communications and Media Authority (ACMA) as the Commissioner, or designating a non-governmental organisation with expertise in online child safety. The Discussion Paper seeks comments on the most appropriate option to fulfil the Commissioner's functions.
48. The Law Council considers that in weighing such options, it is important to identify the different criteria which would enable the Commissioner to carry out the role effectively and appropriately. In particular, it notes that the Commissioner may be expected to deal directly with children, and their parents and guardians, in rapid, volatile situations. Both the children who are the victims of cyberbullying, as well as those who are alleged perpetrators, may be particularly vulnerable in such situations. Depending upon the subject matter, the involvement of their parents and guardians may add to the sensitivity of the situation. In this regard, it will be important that the Commissioner has the appropriate level of skills and expertise to recognise and respond to the rights and needs of children, their families and the other individuals involved.
49. With this in mind, the Law Council suggests that the National Children's Commissioner may be able to assist in identifying a set of criteria which would ensure that an appropriate Commissioner is appointed to the role.
50. It will also be also important to consider the Commissioner's skills and expertise in relation to dispute resolution and mediation.
51. Whichever model is adopted, the Law Council supports implementing a legislative framework which outlines the role of the Commissioner, if established. This will clarify the functions, role and powers of the Commissioner, and help to ensure that the role is subject to appropriate levels of scrutiny.

Removal of harmful content

52. The Discussion Paper proposes a new scheme under which eligible complainants could report and request removal of harmful material from large social media sites. In the first instance, such requests would be made to the participating social media site via its own established complaints system. If dissatisfied with the site's response, a complaint could then be made to the Commissioner who would then assess the complaint and the relevant material.
53. The Discussion Paper proposes that the statutory test for such material would require:
 - (a) that the material which is the subject of the complaint would have to relate directly to the child in question;
 - (b) 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 would be able to take a range of factors into account, such as:
 - (i) the occasion, context and content of the material;

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- (ii) the circumstances under which the material was placed on the social media site;
 - (iii) the risk of triggering suicide or life-threatening mental health issues for the child;
 - (iv) the age and characteristics of the child; and
 - (v) any other matter which the Commissioner may consider relevant.

54. If the material met the proposed statutory test, the Commissioner would have the options of:

- (a) issuing a notice to the individual(s) that posted the material on the social media site to remove the material; and/or
- (b) issuing a notice to the participating social media site to remove the material.

Proposed harm test

55. The Law Council welcomes the adoption of an objective “reasonable person” test into this decision making process. However, it is concerned that the proposed harm test, which refers to the material being “likely to cause harm or distress to the child” is overly broad and ambiguous. In particular, it is far broader than that used in the Discussion Paper’s introduction to define cyberbullying, which refers to:

“...any communication, with the intent to coerce, intimidate, harass or cause substantial emotional distress to a person, using electronic means to support severe, repeated and hostile behaviour”.

56. The proposed definition may apply to behaviour which is not commonly understood to be cyberbullying – such as a situation in which a child posts a comment online that he or she simply dislikes another child, or relays a mildly embarrassing story about their behaviour in class. While such conduct may cause some harm or distress to the other child, it would surely be unreasonable to class such conduct as “cyberbullying” and limit the author’s freedom of expression, or his or her other relevant rights, accordingly by ordering the content to be removed. As noted in material provided by the LSSA, “there are many ‘shades of harm’ associated with cyberbullying”, ranging from harm which is trivial in nature to protracted psychological injury.

57. The Law Council notes that while the additional matters listed which can be taken into account by the Commissioner²⁷ indicate that it is not intended that he or she act upon all forms of “harm” to a child, the proposed definition remains broad and subject to discretion. It is also broader than the test later in the Discussion Paper in respect of a possible civil penalty regime, which refers to “serious emotional distress”.

58. The Law Council recommends that further consideration be given to the test for determining whether action by the Commissioner is required, in order to better target conduct which is appropriately classed as cyberbullying, and avoid including unintended conduct.

²⁷ Such as the occasion, context and content of the material; the circumstances under which the material was placed on the social website, etc (Discussion paper, page 15).

Decision making process

59. The Law Council also considers that the Commissioner should be required to have regard to the following proposed factors as part of his or her decision making process:
- (a) the occasion, context and content of the material;
 - (b) the circumstances under which the material was placed on the social media site;
 - (c) the risk of triggering suicide or life-threatening mental health issues for the child; and
 - (d) the age and characteristics of the child.
60. In the Law Council's view, these are all important factors in ensuring that decisions taken by the Commissioner are reasonable in the circumstances. In relation to the "context" of the material, it would also draw attention to the relationships of the parties involved.
61. In addition, as part of the decision making process, the Commissioner should be required to:
- (a) have regard to the human rights of the complainant, the alleged author, and other individuals whose rights are engaged (such as bystanders whose privacy as an online group member is affected); and
 - (b) take decisions which ensure that any limitations which are placed on an individual's rights are necessary, reasonable and proportionate in the circumstances.
62. Critically, the Commissioner should also be required to observe procedural fairness requirements in the process of making decisions.
63. For example, this would include ensuring that the child who is the alleged perpetrator is informed about the allegations, and given an opportunity to respond to them. It would also involve acting on the basis of logically probative evidence.
64. In this respect, the Law Council notes that the full meaning of an online communication may not be clear until the Commissioner, who is a stranger to the relationship between the persons involved, is more fully apprised of the context in which it is made. This context should not be considered just from the complainant's perspective.
65. It is important to emphasise the need for procedural fairness requirements to be respected given the emphasis in the Discussion Paper on ensuring swift responses to cyberbullying.
66. The Law Council agrees that in certain circumstances, where it is reasonably feared that delay would result in severe consequences to a child's wellbeing, the Commissioner may need to act quickly to order the removal of online content. It also notes that prompt, informal action was a key recommendation put forward by the Symposium.
67. Therefore, some consideration will need to be given to how best to access and notify an online author of a complaint and to provide an opportunity to respond, within the tight timeframes which are contemplated. For example, the Commissioner may need

to approach the author of material using the email addresses provided to the social media site. Issues of accessing content would need to be overcome in this regard (see further below).

68. The Discussion Paper includes the proposal that affected parties should have a right of appeal to the Administrative Appeals Tribunal, this would only occur after material has been removed (where successful, the removed material could then be reinstated). The Law Council considers that access to both administrative and judicial review will be important in ensuring oversight of the Commissioner's role.

Investigation of a complaint

69. The Discussion Paper does not currently discuss in detail the process in which the proposed Commissioner would conduct an investigation into a complaint. However, a decision to investigate a complaint is likely to raise a number of complex issues.
70. For example, investigations into complaints may be necessarily intrusive, involving the Commissioner and his or her staff accessing the personal information of the complainant, the alleged perpetrator, and other bystanders. This raises questions about when it will be reasonable, proportionate and necessary in the circumstances for the Commissioner to infringe the privacy of the individuals involved as part of an investigation, as well as practical matters for consideration. Relevant questions in this context include:
- (a) On what basis would the Commissioner decide to further investigate? Would the Commissioner accept screen shots of content as the basis for such decisions? This may raise evidentiary issues, including hearsay and the possibility of fake screen shots. How would these issues be addressed?
 - (b) How would the Commissioner assess the relevant content where it requires certain information or permissions to access it – for example, because it is in an invite-only Facebook group, a private Twitter account?
 - (c) While the complainant's consent to access personal information would be provided to the Commissioner, how would the consent of the other individuals involved be sought?
 - (d) If complainants were to be required to hand over their passwords (or those of others) for the purposes of investigation, this would enable access to an unwarrantedly broad range of material. However, in the alternative, the Commissioner would be relying upon cooperation from the social media sites for access to the specific material required.

Privacy issues

71. The above questions raise further issues of privacy and confidentiality. In this respect, the Law Council acknowledges the statement in the Discussion Paper that:

the proposed scheme would ensure that complainants are made aware of the way in which their personal information is collected and used to process complaints.

72. Requirements under the *Privacy Act 1988* (Cth) (the Privacy Act) would be taken into consideration in drafting the legislation for the proposed scheme to ensure that personal information is handled appropriately.

73. The Law Council comments that it will be necessary to carefully consider how the personal information of not only complainants, but of alleged perpetrators and other bystanders, will be accessed and handled. This will require consideration of the Commissioner's role at a number of different stages, including in relation to:

- (a) the initial investigation of complaints;
- (b) when and how personal information may be shared, including between agencies; and
- (c) the handling, storage and destruction of personal information obtained.

Service of notices to remove content

74. As previously discussed, it appears to be contemplated that for the purposes of the Commissioner's role, the key perpetrators of cyberbullying would themselves be children.

75. Given this, consideration needs to be given to how the Commissioner would issue a notice for removal of content to children. In other situations which do not involve online content, such notices may ordinarily be provided to parents on behalf of their children. However, on social media, the details of the parents would be unknown.

76. In such circumstances, how could a notice be provided in an appropriate manner?

Penalties and enforcement mechanisms

77. This section proposes that a range of penalties may apply if social media sites or individuals fail to comply with the Commissioner's notices. For individuals, this may include:

- (a) publishing statements about non-compliance with notices to remove material;
- (b) issuing formal warnings; and
- (c) issuing infringement notices to individuals, which may include an appropriate fine.

78. The Discussion Paper notes, and the Law Council agrees, that careful consideration will be given to circumstances under which the Commissioner might serve an infringement notice to an individual under 18 years old.

79. Given the variety of conduct which will be investigated by the Commissioner, the Law Council recognises that the Commissioner needs to have a broad range of tools at his or her disposal to appropriately respond to the circumstances of any particular complaint. In the most grave cases, the Commissioner will need to refer possible criminal conduct to the police.

80. However, it considers that in deciding the most appropriate enforcement mechanisms in situations where the perpetrator is a child, the Commissioner should have regard to the:

- (a) best interests of the child; and
- (b) need to promote the likelihood that the child will reintegrate and assume a constructive role in society.

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81. With these principles in mind, the Law Council notes that other responses by the Commissioner may be appropriate beyond those proposed in the Discussion Paper, including mediation and negotiation (at least, as initial steps prior to the proposed mechanisms above). For example, it has been suggested to the Law Council that conferencing which draws on restorative justice principles, may be appropriate in certain circumstances. This would provide an opportunity for:
- (a) the affected child to explain the harm that has been done, and the consequences of that harm;
 - (b) the offender to acknowledge the harm, and to apologise for his or conduct, as well as to commit to specific undertakings as reparation.
82. Restorative justice programs also received support amongst several contributors to the Joint Standing Committee's inquiry regarding cybersafety amongst the young. It was noted in this respect that:
- (a) restorative justice programs take the form of conferences involving a range of people, including community representatives, perpetrators, victims, parents/carers, law enforcement, teachers and school staff;
 - (b) incidents are discussed, as are ways of resolving them, and perpetrators are present when victims explain the impact incidents had on them;
 - (c) this process seeks to be educative, rather than punitive; and
 - (d) it will not, however, work in all cases.²⁸
83. The Law Council recommends that the Commissioner be provided with greater flexibility regarding the range of appropriate penalties, enforcement mechanisms and other responses in order to deal with individuals in the most appropriate manner, having regard to the above examples.

Resourcing issues

84. The LS NSW has further commented that bullying and harassment, particularly in circumstances where unauthorised nudity is involved, often spreads on a "viral" basis on both social media sites and throughout the internet more generally. This issue has also been raised in material provided by the LSSA.
85. This lends weight to the view that Commissioner's office, if established, would need to be sufficiently resourced to respond to such events as they unfold.

Options for dealing with cyber-bullying under Commonwealth legislation

Possible Commonwealth Cyber-bullying Offence

86. The Discussion Paper notes the Australian Government's election commitment to examine existing Commonwealth legislation to determine whether to create a new, simplified cyber-bullying offence.

²⁸ Joint Standing Committee on Cyber-Safety, *High Wire Act: Cyber-Safety and the Young: Interim Report* (June 2011), pages 345-347

Current Commonwealth offences

87. As noted in the Discussion paper, the most relevant existing offences in the *Criminal Code Act 1995* (Cth) (the Criminal Code) are sections 474.17 (using a carriage service to menace, harass or cause offence) and 474.15 (using a carriage service to make a threat).
88. Under subsection 474.17(1), a person is guilty of an offence if the person uses a carriage service²⁹ in a way that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive. The maximum penalty for this offence is imprisonment for three years.
89. Under section 474.15, a person is guilty of an offence to use a carriage service to make to another person a threat to kill, or harm, the second person or a third person. The first person must intend the second person to fear that the threat will be carried out.³⁰ The maximum penalty for this offence is imprisonment for 10 years (for threats to kill) or seven years (for threats to cause serious harm).
90. In referring to these offences, the Law Council also notes that Chapter Two of the Criminal Code codifies the general principles of criminal responsibility under laws of the Commonwealth. It contains all the general principles of criminal responsibility that apply to any offence, irrespective of how the offence is created.
91. Division 5 of the Criminal Code 5.6 provides for the mental elements of responsibility which apply in respect of Commonwealth offences. In particular, section 5.6 provides for the mental elements of responsibility which apply for offences which do not specify fault elements. It states that:
- (1) if the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element; and
 - (2) if the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.
92. The Law Council notes that in particular, the offence under section 474.17 does not specify the relevant fault element. However:
- (e) paragraph 474.17(1)(a) contains a physical element of conduct. By application of the default fault elements of section 5.6 of the Criminal Code the fault element of intention will automatically apply. This means that a person must intentionally use the carriage service to be found guilty of the offence; and
 - (f) paragraph 474.17(1)(b) contains a physical element of circumstance. The fact that the use of the carriage service occurs in a way that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive constitutes a circumstance in which the offending conduct must occur. By application of the default fault elements in section 5.6, the fault element of recklessness will apply to a physical element of an offence that is a

²⁹ "Carriage service" is defined in section 7 of the *Telecommunications Act 2007* (Cth) as "a service for carrying communications by means of guided and/or unguided electromagnetic energy".

³⁰ However, it is not necessary to prove that the person receiving the treat actually feared that the threat would be carried out: subsection 474.15(3)

circumstance. "Recklessness" as it applies to a circumstance is defined in section 5.4 of the Criminal Code.

93. It is also worth noting that under the *Crimes Act 1914* (Cth) (the Crimes Act), a child under 10 years old cannot be liable for an offence against a law of the Commonwealth.³¹ A child aged 10 years or more, but under 14 years old, can only be liable for an offence against a law of the Commonwealth if the child knows that his or her conduct is wrong.³² The question whether a child knows that his or her conduct is wrong is one of fact. The burden of proving this is on the prosecution.³³

Proposal for a new cyberbullying offence

94. The Discussion Paper notes that while there are existing laws in Australia that arguably apply to cyberbullying conduct, many people, especially minors, may not be aware that the existing laws may apply. In addition, it notes commentary suggesting that the language of these provisions is difficult to understand: for example, most people would not know what a 'carriage service' means.

95. The Discussion Paper proposes that consideration be given to a new separate cyberbullying offence which covers conduct where the victim is a minor (under 18 years), with a lesser maximum penalty, such as a fine. It suggests that such an offence could be based on section 474.17 of the Criminal Code, and that this would still allow recourse to the existing offence for particularly serious incidents.

96. Specific reference in this regard is made to a new offence proposed by the New Zealand Government in its recently introduced Harmful Digital Communications Bill 2013 (NZ) (the NZ Bill). Under clause 19 of the NZ Bill, a person commits an offence if:

- (a) the person posts a digital communication with the intention that it cause harm to a victim; and
- (b) posting the communication would cause harm³⁴ to an ordinary reasonable person in the position of the victim; and
- (c) posting the communication causes harm to the victim.

97. The penalty for this offence is imprisonment for a term not exceeding three months, or a fine not exceeding \$2000.

Law Council comments

98. The Law Council agrees that there is a place for the criminal law in addressing the most serious forms of cyberbullying.

99. However, it is concerned that the case for a new Commonwealth offence has not been demonstrated in the Discussion Paper. Its concerns in this respect relate to:

- (a) the lack of evidence provided that a gap in the Commonwealth law exists;

³¹ Section 4M, *Crimes Act 1914* (Cth)

³² Subsection 4N(1), *Crimes Act 1914* (Cth)

³³ Subsection 4N(2), *Crimes Act 1914* (Cth)

³⁴ Under clause 4 of the NZ Bill, "harm" is defined as "serious emotional distress".

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- (b) the lack of evidence provided that the current offences do not operate as they should, including in relation to offenders who are minors. Rather, the key issue identified in the Discussion Paper appears to be that there is a lack of awareness amongst the broader community about the applicability of the existing laws to cyberbullying conduct. The Law Council does not dispute that this is a problem. However, it considers that it can be better dealt with by education and awareness raising initiatives, which summarise how the existing offences operate in plain English terms;
 - (c) the undesirability of introducing a new offence which seeks to criminalise the behaviour of minors more broadly; and
 - (d) the potential for a new offence to create confusion in terms of overlap with the existing laws.

100. Each of these concerns is discussed in greater depth in below.

Is there a gap in the existing law which needs to be addressed?

101. The Law Council is concerned that the Discussion Paper has not made the case that a relevant gap in the Commonwealth law actually exists.

102. The definition of “cyberbullying” provided at the outset of the Discussion Paper is:

“any communication, with the intent to coerce, intimidate, harass or cause substantial emotional distress to a person, using electronic means to support severe, repeated and hostile behaviour”.

103. It is noted that this definition is intended to describe a range of conduct, from criminal conduct at the highest end of the spectrum to lower level conduct which would be dealt without outside the criminal justice system. It informs the full range of responses proposed in the Discussion Paper, including proposals which are regulatory or civil in nature.

104. It appears that under this definition, the gravest kinds of conduct envisaged would fall within the ambit of the section 474.17 offence in particular, which refers to “use of a carriage service in a way that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.”

105. In this respect, the Law Council refers to the Standing Council's examination of existing Commonwealth, State and Territory offences to deal with cyberbullying in 2012. The Standing Council agreed that the existing laws provided appropriate coverage, but requested that officers continued to monitor the adequacy of those laws.

106. It also notes that this examination followed the Joint Standing Committee's recommendation in 2011 that the Attorney-General in conjunction with the National Working Group on Cybercrime undertake a review of legislation in Australian jurisdictions relating to cybercrime.³⁵ The Joint Standing Committee did not, however, make a finding that there was an existing gap in criminal law which needed to be addressed.

³⁵ Recommendation 22, Joint Standing Committee on Cyber-Safety, *High Wire Act: Cyber-Safety and the Young: Interim Report* (June 2011)

107. The Law Council further refers to the statement by academics Aashish Srivastava, Roger Gamble and Janice Boey, in their journal article “Cyberbullying in Australia: Clarifying the Problem, Considering the Solutions”, that:

*The Commonwealth Criminal Code contains a number of serious criminal offences for engaging in conduct using telecommunication services that would almost certainly satisfy any reasonable definition of “cyberbullying”.*³⁶

108. It is worth emphasising that the “harm” offence introduced under the NZ Bill, along with other offences, were clearly intended to address a gap, in that NZ’s existing legislation did not address the effect of harmful digital communications. The Explanatory Memorandum states that a key purpose of the NZ Bill is to “create new criminal offences to deal with the most serious harmful digital communications”.³⁷

109. However, the Law Council considers that the Discussion Paper has not adequately demonstrated a relevant gap in Australian federal legislation which needs to be addressed.

Are the laws operating as intended?

110. The Law Council also considers that the Discussion Paper does not sufficiently make the case that the existing Commonwealth offences do not operate, or are not able to operate, appropriately in respect of serious cyberbullying conduct.

111. It notes the Discussion Paper’s reference to 308 successful prosecutions under sections 474.15 and 474.17 for a broad range of conduct involving the internet, including eight prosecutions involving defendants under 18 years of age.

112. It considers that further analysis is required of how the existing offences have been applied, in particular in relation to the eight cases involving minors.

113. In this regard, the Law Council has not conducted detailed research into the relevant caselaw in the short timeframes available for the current consultation. However, it appears from a brief search that the details of most of these eight cases are not readily available, probably because they are subject to suppression orders.

114. It recognises that there may be community concerns that the maximum penalty available under section 474.17 is imprisonment for three years. Such concerns would refer to the need ensure that the imprisonment of a child should only be used as a measure of last resort, and for the shortest appropriate period of time.³⁸ The need to avoid imprisoning children was, for example, reflected in the recommendations of the Symposium.

115. The Law Council emphasises that some important concerns about the operation of current sentencing laws with respect to young offenders were identified by the ALRC as part of its 2006 *Same Time, Same Crime: Sentencing of Federal Offenders*

³⁶ Aashish Srivastava, Roger Gamble and Janice Boey, “Cyberbullying in Australia: Clarifying the Problem, Considering the Solutions”, *International Journal of Children’s Rights* 21 (2013) 25-45, at page 34

³⁷ Explanatory Memorandum to the NZ Bill,

<http://www.legislation.govt.nz/bill/government/2013/0168/6.0/versions.aspx>

³⁸ Art 37(b), CROC

report.³⁹ The ALRC proposed a number of important changes in this regard, including that:

- (a) federal sentencing legislation should establish minimum standards for the sentencing, administration and release of young federal offenders; and
- (b) when sentencing a young federal offender, the court should be required to have regard to: the young person's wellbeing; and the requirement that children be detained only as a measure of last resort, and only for the shortest appropriate period.⁴⁰

116. As yet, there has been no Australian Government response to this report. The Law Council would support such a response, and in particular supports the above recommendations made by the ALRC.

117. However, in the current context, several aspects of the Crimes Act are worth noting in respect of concerns about the sentencing of minors. These include that:

- (a) the court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence.⁴¹ The matters that the court must take into account in reaching this decision include the age of the person;⁴²
- (b) where a period of imprisonment only is specified as the maximum penalty a fine may nevertheless be imposed;⁴³
- (c) a period of imprisonment may not be imposed unless the court is satisfied, after having considered all other sentencing options, that no other sentence is appropriate in all the circumstances of the case;⁴⁴
- (d) a child or young person who, in a State or Territory, is charged with or convicted of an offence against a law of the Commonwealth may be tried, punished or otherwise dealt with as if the offence were an offence against a law of the State or Territory.⁴⁵ This enables young federal offenders to be dealt with by the specialist juvenile justice systems which are established in the states and territories. In particular, judges would be able to utilise State and Territory alternative sentencing options for young offenders, which may include community service orders and other diversionary options. It is noted, however, that the available options will vary depending upon the jurisdiction involved.

118. If further analysis of the sentences and relevant circumstances of the eight young offenders prosecuted under sections 474.15 and 474.17 could be provided in a manner which does not transgress any suppression orders in place, the Law Council considers that this would assist deliberations about whether the existing offences are operating as they are intended in relation to serious cyberbullying conduct. This would include information on whether the sentences handed down are appropriate.

³⁹ Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* report, ALRC Report 103 (tabled 13 September 2006), Chapter 27 (Young Federal Offenders).

⁴⁰ *Ibid.*, recommendation 27-1

⁴¹ Section 16A(1), *Crimes Act 1914* (Cth)

⁴² Section 16A(2)(m), *Crimes Act 1914* (Cth)

⁴³ Sections 4B(2) and 4B(2A), *Crimes Act 1914* (Cth)

⁴⁴ Section 17A(1), *Crimes Act 1914* (Cth)

⁴⁵ Section 20C, *Crimes Act 1914* (Cth)

119. However, there may be further relevant issues which lead to the perception that existing offences are “not working”. For example, the Law Council notes that the Joint Standing Committee’s recommendations included that additional training in cybersafety issues should be conducted amongst Australian police forces, judicial officers and court staff.⁴⁶ This seems to indicate that there may be a lack of awareness amongst enforcement officers about the potential applicability of existing offences to cyberbullying conduct, with few cases prosecuted as a result.

Proposed offence aimed at conduct by minors

120. The Law Council is particularly concerned by the proposal in the Discussion Paper that there be a “new mid-range cyberbullying offence applying to minors”.

121. The Law Council is troubled by this proposal to introduce an offence which is specifically directed to minors. Even if any new offence is framed more generally in its application to adults as well as minors (as under the NZ offence), the rationale appears to be that it is still principally aimed at the conduct of minors.

122. Depending upon the exact terminology used, the offence may have the effect that far greater numbers of children are prosecuted in respect of conduct which is of a lesser severity than that captured by the existing Commonwealth offences. The consequences of coming into contact with the criminal justice system at an early age may be serious and long-term. In this respect, it notes the findings of a NSW longitudinal study that a high proportion of juveniles making their first appearance in a Children’s Court continued their offending into adulthood, particularly if their first court appearance occurred when they were young.⁴⁷

123. As noted above, the Law Council shares the Australian Government’s concerns about the effects of cyberbullying on young Australians, noting that at its worst, these effects involve tragic consequences.

124. However, it considers that there is a need to conduct a difficult balancing exercise with regards to the rights of all relevant individuals regarding the best policy response to cyberbullying. Having regard to this balancing exercise, the Law Council is concerned that the Discussion Paper has not made a sufficient case for why introducing a new criminal offence as proposed is necessary, reasonable and proportionate, having regard to the alternative options. These include the other options put forward in the Discussion Paper, as well as increasing awareness and understanding of the possible criminal consequences of existing offences under legislation.

Overlap with existing offences

125. The Law Council considers that a key principle of the rule of law is that the law must be both readily known and available, and certain and clear. This means that the intended scope and operation of offence provisions should be unambiguous and key terms should be defined, so as to avoid dependence on police and prosecutorial discretion.

⁴⁶ Recommendations 21 and 22, *Ibid.*

⁴⁷ Shulung Chen, Tania Matruglio, Don Weatherburn and Jiuzhao Hua, “The transition from juvenile to adult criminal careers”⁸⁶ *NSW Bureau of Crimes Statistics and Research Crime and Justice Bulletin* (May 2005)

126. In this respect, the Law Council is concerned that if a new federal offence is introduced, depending upon the terminology used, there may be overlap of its potential coverage with that under the existing offence under section 474.17.

127. This is likely to lead to confusion about the likely scope and operation of the new offence versus the existing offence.

Need for increased awareness of existing offences

128. For the reasons above, the Law Council does not support the introduction of a new federal offence as proposed in the Discussion Paper.

129. The Law Council does consider that there is strong support for increased education and awareness of the possible consequences of cyberbullying, especially among young people. This appears to be a strong theme underlying the concerns raised in the Discussion Paper. More generally, several of the Joint Standing Committee's recommendations were concerned with increased education and awareness about cybersafety amongst young people.

130. In this respect, the Law Council welcomes the proposal that the Commissioner would establish a funding program for schools to deliver online safety education. As part of this program, the Law Council recommends that educational measures should seek to increase awareness of the fact that the most serious instances of cyberbullying may constitute criminal conduct under existing Commonwealth legislation. Such messages should explain the application of these offences, and the relevant terminology, in a clear, accessible manner.

131. The Law Council also recommends that the Australian Government should consider adopting the Joint Standing Committee's recommendation that additional training in cybersafety issues should be conducted amongst Australian police forces, judicial officers and court staff.

132. More generally, the Discussion Paper prompts questions about the federal sentencing legislation as it applies to young federal offenders. The Law Council would support consideration of the ALRC's outstanding recommendations in this respect.

133. The Law Council also refers to the LS NSW's recommendation that an appropriate compensation scheme should be in force in addition to criminal penalties.

Options for a Commonwealth civil penalty regime

134. The Discussion Paper proposes the introduction of a civil penalty regime to target cyber-bullying behaviour (the Civil Regime).

135. Under the Civil Regime, the Commissioner would be given the power to:

- (a) receive and assess complaints about cyber-bullying;
- (b) investigate those complaints; and
- (c) facilitate negotiation and mediation between parties to a complaint.

136. The Commissioner would only have the discretion to exercise these powers for complaints about conduct that:

- (a) occurs through electronic communications to, or relating to, an Australian child; and

-
- (b) a reasonable person would regard as being, in all the circumstances, likely to cause harm to the child. "Harm" would be defined to mean "serious emotional distress".

137. The Commissioner would receive cyber-bullying complaints either from school principals or police. It is noted that in a limited range of circumstances, the Commissioner may also receive complaints directly from the public.

138. In circumstances where the negotiations/ mediation activities did not result in a satisfactory outcome, the Commissioner would be able to make a decision about the dispute, and issue notices to individuals who are a party to the dispute to:

- (a) remove, take down or delete material;
- (b) cease the specific conduct concerned; or
- (c) other actions that the Commissioner thinks are appropriate to prevent cyber-bullying from continuing.

139. A civil penalty provision of failing to comply with a notice from the Commissioner would attach to non-compliance. The Commissioner would have the power to issue infringement notices for failure to comply. The proposed penalty in this respect would be a fine of \$1000.

140. The Discussion Paper notes that the Civil Regime could parallel the proposed scheme for removal of harmful content by the Commissioner (the Removal of Content proposal), with the following key differences:

- (a) it would not be restricted to material posted on participating social media sites, but would instead capture a wider range of electronic communication, such as email and SMS;
- (b) the Commissioner's ability to facilitate a range of activities with the individuals involved in the cyber-bullying dispute, such as mediation sessions, allows the parties to participate in the dispute resolution and assist in reaching a mutually beneficial outcome; and
- (c) the Commissioner could issue notices applying to a wider range of conduct that contributes to the alleged cyber-bullying.

Comments about the proposed scheme

141. The Discussion Paper's outline of the proposed scheme is brief, and the Law Council would welcome more detail about this proposal, which is preferable to the introduction of a new federal offence. In certain respects, it also appears to be somewhat more straightforward than the Removal of Content proposal, although the Law Council raises several threshold issues with the proposal as discussed below.

142. If the Civil Regime is introduced, the Law Council would welcome in particular its emphasis on investigation, mediation and dispute resolution, as important first steps prior to issuing notices to individuals, which if not complied with will lead to the issuing of infringement notices. As acknowledged in the Discussion Paper, it will be essential to ensure that the Commissioner is adequately resourced to undertake this role.

143. Additional resourcing will also be important for organisations such as Kids Helpline to ensure that children requiring counselling or support are able to receive appropriate

levels of support. The Discussion Paper currently does not refer to such funding being provided.

144. It is noted that the Commissioner would receive cyber-bullying complaints either from school principals or police, as well as the public in a more limited range of circumstances. However, the Discussion Paper does not make it clear why a child, his or her parent or guardian, or another adult in authority could not make complaints directly to the Commissioner (as under the Removal of Content proposal), noting that they may not always wish to involve either school principals or the police. It may be confusing for the Commissioner to provide a clear central contact point for young people in respect of one kind of complaint, and not for another, noting that both kinds of complaint may involve equally distressing scenarios.
145. In respect of the definitions proposed regarding the Civil Regime, the Law Council comments as follows:
- (a) It is proposed that the Civil Regime be based on a definition of harm as being “serious emotional distress”. The Law Council notes that this is significantly narrower than the harm definition proposed under the Removal of Content, and is consequentially less likely to inadvertently capture unintended conduct.
 - (b) However, there is no relevant definition of cyber-bullying relied upon in this context. Would the definition of cyber-bullying provided in the introduction be adopted, which in itself includes a reference to “substantial emotional distress”? In this case, there would be no need for a separate “serious emotional distress” definition.
146. The Law Council assumes that in referring to the Civil Regime as applying in respect of an “Australian child”, this would include any child who is ordinarily resident in Australia, rather than a child who has Australian citizenship.
147. A range of further threshold issues arise in relation to the Civil Regime proposal, along the lines of those already above in relation to the Removal of Content proposal.
148. For example, the proposal raises issues of privacy and consent, such as:
- (a) where complaints are lodged by a school principal or the police, would the consent of the child who is the target of the relevant material be obtained?
 - (b) how will broader privacy considerations be dealt with – in relation to accessing, handling, storing, sharing and destroying personal information?
149. The Law Council further considers that the Commissioner, as part of any decision making process, should be required to consider:
- (a) the occasion, context (including the relationships between the parties) and content of the material;
 - (b) the circumstances under which the material was placed on the social media site;
 - (c) the risk of triggering suicide or life-threatening mental health issues for the child involved; and

(d) the age and characteristics of the child.

150. In addition, the Commissioner should further be required to have regard to:

- (a) the human rights of the complainant, the alleged perpetrator, and other individuals whose rights are engaged (such as bystanders whose privacy as an online group member is affected);
- (b) the need to ensure that any limitations which are placed on an individual's rights are necessary, reasonable and proportionate in the circumstances; and
- (c) the need to observe the principles of procedural fairness.

151. In certain respects, some of these issues regarding the Civil Regime proposal may be less complex than under the Removal of Content proposal. For example:

- (a) In relation to content on email and SMS, there are less complex privacy and consent issues than in relation to material posted on a social media site, which may involve groups of individuals other than the alleged perpetrator; and
- (b) the proposal may involve longer timeframes of investigation and deliberation than the Removal of Content proposal, which envisages rapid responses. While it will be necessary to respond in a timely manner, particularly having regard to the level of distress of the complainant, this may afford an easier opportunity to afford procedural fairness as part of the process; and
- (c) where the perpetrator is a child, it may generally be easier to identify the parents, which may assist when it is more appropriate to issue a notice to the parents rather than the child.

152. As with the Removal of Content proposal, the Law Council considers that the access of affected individuals to administrative and judicial review would ensure an appropriate level of oversight over the Commissioner's role.

153. The Civil Regime proposal envisages that following mediation and dispute resolution processes, the Commissioner would be able to issue notices to individuals, with civil penalties to apply where they do not comply.

154. As with the Removal of Content proposal, the Law Council considers that the Commissioner be provided with flexibility regarding a broader range of responses in order to deal with individual cases of cyberbullying in the most appropriate manner. In determining the appropriate responses, the Commissioner should have regard to:

- (a) best interests of the child; and
- (b) need to promote the likelihood that the child will reintegrate and assume a constructive role in society.

155. In this regard, other responses which may be appropriate depending on the circumstances include restorative justice approaches and family conferencing, as identified above. Again, resourcing will be required to ensure that these are options which are practically available to the Commissioner. It will be necessary to consider how such approaches, together with mediation and dispute resolution, can be implemented at the local as well as national level.

156. While the Law Council is not opposed to infringement notices in order to enforce the Commissioner's directions, noting the need for a broad range of tools to be at the

Commissioner's initial disposal to respond to complaints, it notes that \$1000 may be an unduly onerous penalty for a child. It queries whether a lower amount would be more appropriate in this respect.

157. As with the Removal of Content proposal, in the gravest cases, the Commissioner will need to refer possible criminal conduct to the police.

Review of Schemes

158. The Discussion Paper notes that the Department will review the Removal of Content scheme three years after implementation. The Law Council considers that any broader response, including the proposed Civil Regime scheme, should also be reviewed.

159. However, the Law Council supports an independent review, rather than a review conducted by the Department, noting that the proposals contained in the Discussion Paper raise certain issues which fall outside the ambit of the Department's usual functions and expertise.

Conclusion

The safety of our young people is of fundamental concern and the Law Council welcomes efforts to respond to the community's concerns about emerging threats to children's wellbeing which have arisen with technological advances. In this submission it has sought to highlight, however, that there are a number of important interests to weigh when determining the most appropriate responses to this complex policy issue. These include the wellbeing and best interests of the children involved, as well as the rights to privacy and freedom of expression. The Law Council also emphasises the need to ensure that imprisonment of a child should be used only as a measure of last resort and for the shortest appropriate period of time.

In light of these factors, the Law Council considers in particular that the case has not been made for why a new federal offence addressing cyberbullying is necessary, reasonable and proportionate, in light of the alternative options available. These include measures to raise awareness of the possible consequences under existing offences and responding to existing recommendations about federal sentencing and young offenders.

The Law Council has made a number of recommendations to ensure that key interests and principles are better taken into account in developing civil responses to cyberbullying. In doing so, it has also sought to ensure that cyberbullying conduct is better targeted, that relevant decision making processes are fair and subject to appropriate levels of oversight and that the proposed civil responses take into account the best interests of the children involved. It has also raised a number of threshold issues for further consideration and resolution should these proposals progress.

The Law Council thanks the Department for the opportunity to comment on its Discussion Paper and would be pleased to discuss this submission.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12-month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.