

Submission to the
Department of Communications
Public consultation on
Enhancing Online Safety for Children

Pirate Party Australia

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Introduction

Pirate Party Australia would like to thank the Department of Communications for the opportunity to submit on the important issue enhancing online safety for children. The enormous uptake of the Internet and the ubiquitous nature of communications technologies have fundamentally changed the nature of our society. Online service providers offer a range of services to connect individuals globally, and we now live in a world where cultures have minimal reliance on geographic proximity. It is no surprise that children are among those using the Internet and social media services to explore the possibilities of a globally connected society, and we are now at that stage where many children treat the Internet and social media as socially ingrained as the telephone.

However, the Pirate Party recognises that new technologies are, while capable of bringing positive social change, can pose many challenges to legislators and courts as there is always scope for abuse. This much was true of the telephone, and remains true of the Internet and social media services. Pirate Party Australia recognises there is a need, particularly considering vulnerable parties like children are involved, to ensure that the Internet is a safe environment. While ensuring this, we must remember not to sacrifice the freedom that the Internet has provided, and to make sure that whatever measures are taken to enhance online safety for children, they actually work.

About Pirate Party Australia

Pirate Party Australia is a federal political party registered under the *Commonwealth Electoral Act 1918*. The Party was founded in late 2008, and contested its first Federal Election in 2013. The Party's main areas of focus are intellectual property rights reform, privacy rights, increased governmental transparency, and opposition to censorship.

Pirate Party Australia is a member of a worldwide movement that began in Sweden in 2006, and has since spread to more than 40 different countries. Pirate Parties have been elected to all levels government — local, state, national and supranational — with 45 state seats in Germany, three seats in the Icelandic Parliament, and two Members of the European Parliament at the time of writing.

1 Recommendations

We support the Government's objective of improving the standard of behaviour by social media participants, and particularly of combatting abuse aimed at children. In Pirate Party Australia's view, an office within ACMA could usefully pursue the aims of:

- acting on behalf of users when a site's complaints procedure fails to deal with an instance (or, especially, *repeated* instances) of abuse,
- setting out clear expectations for the systems and processes a site should adopt to combat abuse, and
- coordinating Federal Government initiatives to encourage good online citizenship and education programmes.

It seems best for such an office to deal with *all* users in Australia, but to give priority to children and others who are particularly vulnerable. Thus, a title along the lines of 'Social Media Commissioner' would be more appropriate than the proposed 'Children's e-Safety Commissioner.'

The Pirate Party notes that most schools and many community organisations already run programmes to combat bullying in all forms, not just the online. The best use of the Commissioner's resources would be to enhance these existing programs through provision of online educational materials.

2 Criticism

The current proposal seems to be largely motivated by a media-driven moral panic about online child safety, hinging on the digital illiteracy of many parents. Notably, the primary justification appears to be media reports about a small number (13 cases over three years) of teenagers who committed suicide after being bullied online.¹ Any instance of suicide is tragic for all concerned, but in formulating a policy response it is vital that actual causes are established and addressed. We note that there are approximately 1.5 million Australians aged between 15–

¹Greg Stolz and Tanya Chilcott, '13 child suicides in three years prompt call for action as bullying victims take their own lives', *The Courier Mail* (online) 24 May 2013, <http://www.couriermail.com.au/news/queensland/child-suicides-in-three-years-prompt-call-for-action-as-bullying-victims-take-their-own-lives/story-e6freoof-1226649545952> cited in Department of Communications, 'Enhancing Online Safety for Children' (Discussion Paper, Australian Government, January 2014), 4, http://www.communications.gov.au/__data/assets/pdf_file/0016/204064/Discussion_Paper_-_Enhancing_Online_Safety_for_Children.pdf

19,² and about 150 (10 per 100,000) of these commit suicide each year.³ Moreover, the rates of teen suicide appear to have declined over the years when the Internet and social networking developed.⁴ An effective policy response to teen suicide needs to deal with all causes, and the emphasis given to each should reflect the available evidence of its relative importance. Fear of the new and unknown is a poor guide to action.

The discussion paper canvasses several enforcement options that might be provided for the Children's e-Safety Commissioner. However, the Pirate Party has serious reservations about the wisdom of using civil litigation and fines as remedies for disputes between children. These could easily become effective routes for rebellious children to punish their own parents with no consequence for themselves, as it is likely that parents will have the burden of paying the fine. The potential for abuse is high due to difficulties in firmly establishing online identities, and such an approach does not address the core issue of poorly socialised children. As stated in 'Cyberbullying in Australia: Clarifying the Problem, Considering the Solutions':

[M]any experts who provided evidence to the *Commonwealth Parliament's Joint Select Committee* were of the view that regulating technology or taking legal action would not change behaviour. For example, Professor Hemphill (2011), in her evidence, suggested there should be less legal interventions, with more emphasis on the right way to behave, because of the risk of putting young people on the path to criminal behaviour.⁵

A meta-study of methods for changing aggressive behaviour among young people, 'Review of the Roots of Youth Violence: Literature Reviews' by the Ontario Ministry of Children and Youth Services found that the most effective approach is to establish a connection with society and to develop better social skills; under the heading "What doesn't work", it primarily lists punitive measures.⁶

²Australian Bureau of Statistics, *Australian Demographic Statistics 3101.0*, '7. Estimated Resident Population, age groups—Australia(a)—at 30 June' (December 2012), 62, [http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/38032DC18D0BAA1FCA257B8F001D9591/\\$File/31010_dec%202012.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/38032DC18D0BAA1FCA257B8F001D9591/$File/31010_dec%202012.pdf)

³Australian Bureau of Statistics, *1370.0 Measures of Australia's Progress, 2010*, 'Family, community & social cohesion: Suicide' (2010), [http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1370.0~2010~Chapter~Suicide%20\(4.5.4\)](http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1370.0~2010~Chapter~Suicide%20(4.5.4))

⁴Ibid.

⁵Aashish Srivastava, Roger H. Gamble and Janice Boey, 'Cyberbullying in Australia: Clarifying the Problem, Considering the Solutions' (2013) 21 *International Journal of Children's Rights* 25, 41, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2342944

⁶Ontario Ministry of Children and Youth Services, 'Review of the Roots of Youth Violence: Literature Reviews', http://www.children.gov.on.ca/htdocs/English/topics/youthandthelaw/roots/volume5/preventing05_rehabilitation_strategies.aspx

The Pirate Party has identified numerous practical difficulties in the proposals for rapid take-down of offensive material, including:

- The volume of complaints could overwhelm the Commissioner's resources.
- Material posted to a site can be downloaded immediately to multiple devices, therefore removing the original would be ineffective even if done almost immediately.
- Material removed from one site can simply be posted on another site.
- Teenagers will route around censorship (ask any school IT administrator).
- Many sites operate without a strong concept of user identity, making attribution of material to creators or originators quite problematic.
- Experience with the takedown notice regime created for copyright under the *Digital Millennium Copyright Act* (DMCA)⁷ suggests that any system of automatic removal will be abused by sending frivolous and vexatious takedown requests designed which in themselves could be considered cyberbullying, and that this abuse will not be effectively penalised.⁸
- Establishing the true identity of children (or even adults) on the Internet is very difficult, if not impossible.

The last point is of particular concern. Identification difficulties could easily undermine the effectiveness of the proposed processes if prank postings via fake user accounts generate complaints against innocent third parties, but any site that enforces strict identity checks will not be frequented by children or teenagers (or adults for that matter). We are particularly concerned that official attempts to resolve these identity problems will cause more harm than good, since they would necessarily require quite draconian methods. For these reasons, it seems better if social media businesses police their own sites, since they are in the best position to respond quickly and can take steps to remove offending material without first determining the real identity of the person responsible. The Commissioner could still play a valuable supporting role by developing the existing voluntary guidelines for dealing with abuse, and providing an avenue for appeal in serious disputes between users and social media sites.

By considering only Internet bullying, the Discussion Paper fails to address abusive phone calls and text and multimedia messages. The report 'Cyber-bullying in Australia: Clarifying the Problem', explicitly

⁷17 USC (1998)

⁸Electronic Frontier Foundation, 'Fifteen Years of DMCA Abuse', *Electronic Frontier Foundation* (online) 12 March 2013, <https://www.eff.org/press/releases/fifteen-years-dmca-abuse>

highlights that this latter form is more prevalent than internet bullying.⁹ It also proposed a practical solution: individuals should notify their service provider about abuse (because that triggered the provider's legal liability). Although a customer cannot easily block an abusive sender who hides his or her caller identification, the service provider must know the real identity of a sender (regardless of caller identification blocking) in order to bill calls. The customer ought therefore be able to lodge a service request to 'block whichever number sent the last message to this phone.'

The discussion paper attempts to provide a precise definition of 'social media site,' based (it would seem) on Facebook as an exemplar. However, sites like Facebook are losing popularity among teenagers perhaps as a result of increased use by their parents. Instead, teenagers are favouring services like SnapChat¹⁰ to communicate via pictures and captions. The posted messages automatically disappear after 10 seconds, so takedown requests make little sense. Other emerging social media sites employ distributed peer-to-peer protocols and so have no central organisation to which a commissioner could send a takedown notice.

Another danger of the current proposals is the problem of data retention. As envisaged in the discussion paper, the Commissioner would collect vast amounts of information about the most embarrassing events of the lives of entire generations, but no mention is made as to how this material would be protected or what the response would be if the information security is breached or the stored information abused.

3 Responses to specific questions

Q1. What existing programmes and powers should the Commissioner take responsibility for? As mentioned above, the Pirate Party would like the Commissioner to deal with all users in Australia, but give priority to children and others who are particularly vulnerable.

Q2. Considering the intended leadership role and functions of the Commissioner, which option would best serve to establish the Commissioner? Option 3 — designation of a member of the ACMA as the Commissioner.

⁹Aashish Srivastava, Roger H. Gamble and Janice Boey, 'Cyberbullying in Australia: Clarifying the Problem, Considering the Solutions' (2013) 21 *International Journal of Children's Rights* 25, 41, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2342944

¹⁰<http://en.wikipedia.org/wiki/Snapchat>; <http://www.snapchat.com/>

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

Pirate Party Australia feels that attempting a legally precise definition is inherently impossible given the rapidly evolving nature of social media. Any definition will soon fail to include new sites given new and innovative forms of social media appear (see the earlier remarks about SnapChat for an example).

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

No. Most game chat content usually lasts only for the duration of a game that may itself last for only a few minutes, making takedown processes that take days to complete absurd. A far better approach would be for the Commissioner to set and enforce expectations that online gaming businesses take measures to address complaints and to remove abusive players from games or ban them for repeated poor behaviour. There should also be consideration given to the fact that many online games with a social element allow for the formation of self-regulating communities where moderators actively remove badly behaved individuals and abusive content. Much of this occurs in real time, and given such communities are more often than not spread around the world, there is almost always a moderator available to resolve issues.

Q5. What is the best criterion for defining a “large social media site”, and what available sources of data or information might be readily available to make this assessment?

The Pirate Party believes that defining, or attempting to define, “large social media site” is unnecessary. An alternative and more appropriate strategy is to focus attention on sites that are actually complained about, and in proportion to the number and seriousness of the complaints. Due attention should be paid to determining whether complaints are legitimate or are themselves created by online ‘trolls’ whose aim is to disrupt and exasperate other users.

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

No. It is not workable, primarily for reasons already stated above.

Q7. Should the scheme allow children who are unsupported by adults to be active participants (either as complainants or notice recipients)? Having regard to the vulnerability of children, what procedural safeguards should be in place?

Expecting children to

engage with their parents prior to any complaint about online bullying would eliminate a large number of legitimate complaints. Establishing that a complaint originates from a parent, child, unknown third party, automated system or that it even originated in Australia will entail substantial difficulty. There would be significant potential for the scheme to be abused by corporate competitors who may post complaints against competitors or by submitting large numbers of complaints as an effective deliberate denial of service attack. Individual pranksters may also submit bogus complaints.

Under these circumstances, any requirement to service all complaints would render the entire system ineffective. There would also be significant potential for the scheme to be abused by individual children using other children's identities to create invalid complaints. Children are particularly lax in the security of their online identity. There is a perpetual gag played among teenagers of posting stupid material on friends' social media accounts by temporarily taking control of their mobile phones. It would be impossible in most cases to differentiate between posts actually made by a social media account owner and an unauthorised post made by their friends from their account.

Q8. What type of information would it be necessary to collect from complainants in order to assess their eligibility under the proposed scheme (including age verification), and also to adequately process complaints with minimal investigation required? As explained previously, this question raises a large data retention issue. The media content (abusive postings) used to cyberbully children is typically whatever is most embarrassing to them. This agency's databases of complaints would be a truly awful thing in the wrong hands. Imagine quite how repressively this could be abused. What individual penalties will exist in law for exposure of this complaint material outside of processes absolutely necessary for the processing of each complaint? What will happen in the event of a massive data breach, resulting in the large scale release of material held by this proposed agency?

Q9. How would an eligible complainant demonstrate that the complainant has reported the content to the participating social media site? A screenshot, displaying the offending material, could be attached to the complaint.

Q10. What should the timeframe be for social media sites to respond to reports from complainants? Is 48 hours a reasonable timeframe, or is it too short or too long? 48 hours is much too

long. 48 hours is a very long time in social media. The material is already ancient history and the bullies have moved on to their next victims. A better response in some cases may be immediate removal upon complaint, followed by review and reinstatement of the material in the event that the complaint is found to be invalid. This would need to be backed by a secondary scheme to penalise repeated vexatious complaints (e.g., blocking access for progressively longer periods).

Q11. What level of discretion should the Childrens' e-Safety Commissioner have in how he/she deals with complaints? Discretion is a good thing, so long as the guiding principles that underpin that discretion focussed on the overall greater good of the community and are clearly understood by all parties. The Pirate Party objects in principle to mandatory punitive measures being thoughtlessly applied.

Q12. What is an appropriate time frame for a response from the social media site to the initial referral of the complaint? See the response to Q10 above.

Q13. Are the nominated factors, the appropriate factors to be taken into account when determining whether the statutory test has been met? Should other factors be considered in this test? The nominated factors seem generally reasonable as far as they go. There has been no mention of processing a complaint generated by one person on behalf of another. It seems likely that individuals who are sensitive enough to be strongly impacted by insensitive online bullying are also unlikely to want to draw attention to themselves by complaining.

Q14. Is the test of material targeted at and likely to cause harm to an Australian child appropriate? No. The term 'likely to cause harm' seems open to abuse. The Pirate Party would prefer that the test be based on evidence of such material having actually caused harm in the past, in similar contexts. Without a sound basis in evidence, vast amounts of resources will be wasted chasing the media panic of the day.

Q15. What is an appropriate time frame for material to be removed? See the response to Q10 above.

Q16. What would be the best way of encouraging regulatory compliance by participating social media sites that lack an Australian presence? The Pirate Party recognises two potential ways of encouraging compliance by social media sites that lack an Australian presence:

1. the provision of model guidelines for new and existing social media sites. This would benefit the sites, as they would not need to develop their own, and allow them to adopt appropriate procedures (as far as is necessary). This may provide an incentive for social media sites outside Australia to comply with regulations, and
2. non-compliant social media sites could become the subject of formal studies, outlining the consequences of their non-compliance and any potential user harm would be detailed. These reports would then be made freely available to the news and current affairs media, educational organisations and freely available online for parents to view. This would lead to a public assessment of the social media sites, including their suitability for use.

Together, these may be effective measures to help shape a safe online environment. However, the Pirate Party stresses that any approach must focus on education and not be sensationalised. The outcome must be the creation a positive online environment and awareness about the suitability of social media sites, in much the same way as the classification system in Australia is not intended to demonise content, but instead to provide consumers with guidelines as to the suitability of content.

Q17. Should the proposed scheme offer safe harbour provisions to social media sites which have a complying scheme, and if so, what should they be? Only if their compliance also includes reasonable anti-abuse mechanisms. The Pirate Party is particularly concerned that takedown notices could be abused in an anti-competitive or vexatious manner (refer to previous remarks about the abuse of DMCA takedown notices).

Q18. Is merits review by the Administrative Appeals Tribunal the most appropriate review mechanism and if so, which parties and in relation to which types of decision is it appropriate? What are the alternatives? This appears to be a reasonable review mechanism.

Q19. What do industry representatives consider are the estimated financial and administrative impacts of compliance with the pro-

posed scheme? How are these estimated impacts derived? The Pirate Party has no position on this question.

Q20. In light of the Governments proposed initiatives targeting cyber-bullying set out in Chapters 1 and 2; do the current criminal laws relating to cyber-bullying require amendment? Pirate Party Australia believes the current criminal laws relating to cyber-bullying are appropriate and do not require amendment.

Q21. Is the penalty set out in section 474.17 of the Criminal Code appropriate for addressing cyber-bullying offences? There is no apparent reason for the difference in penalties between 474.17 and the equivalent offence under section 471.12 ('Using a postal or similar service to menace, harass or cause offence'). The Pirate Party believes that a non-mandatory sentence of liability to imprisonment to two years at most is appropriate. Pirate Party Australia also notes that under the *Crimes Act 1900* (NSW), the penalty for common assault (including threats, but 'not occasioning actual bodily harm') is liability 'to imprisonment for two years.'¹¹

Specifically, the Pirate Party opposes mandatory sentencing for any offence, as it undermines an important function of the judicial system (the ability to judge each case on its own merits as necessary) and creates injustice by ignoring the typically complex situations that real-world cases actually entail.

Q22. Is there merit in establishing a new mid-range cyber-bullying offence applying to minors? Yes, assuming that the identity of the offending child can be established (a significant assumption) and that they are a repeat offender. However, in dealing with children formal criminal or civil proceedings should be processes of absolute last resort. The existing offences are confusingly worded and inclusion of incarceration-based penalties for minors is inappropriate for such offences.

Fines are unlikely to be effective, as they will impact the parents rather than the child, and the child will have plausible deniability in the case of criminal charges.

A more appropriate penalty for a young offender could be some kind of community service administered at their school and some well-planned activities focused on developing their social skills. Even if they were only guilty of lax online security, they would learn a lesson and

¹¹*Crimes Act 1900* (NSW) s 61.

improve their social skills. The Pirate Party believes that any legal penalties should apply equally to online and offline forms of bullying.

The Pirate Party is, however, more in favour of 'alternative' dispute resolution processes such as mediation and perhaps arbitration if the severity of the issue is great enough. An approach that keeps young people out of prison and out of the formal legal system is preferable, and would in some cases provide 'offenders' with an ability to see the harm they have caused and make amends with victims. These dispute resolution processes also have the advantage of being able to be kept confidential, protecting the identities of perpetrators and victims, and reducing the long-term negative effects that facing legal proceedings can have.

Q23. Is there merit in establishing a civil enforcement regime (including an infringement notice scheme) to deal with cyber-bullying? An infringement notice scheme may be a good idea, in that it provides a progressive escalation of warnings before any more serious criminal proceedings are invoked. However, civil enforcement processes for cyber-bullying will waste enormous amounts of court resources to settle squabbles between teenagers. The Pirate Party would prefer infringement notices, education, mediation and monitoring of problem cases.

Q24. What penalties or remedies would be most appropriate for Options 2 and 3? See the response to Q22 above.