

Chapter 1

Background

Introduction

1.1 On 4 December 2014, the Selection of Bills Committee referred the Enhancing Online Safety for Children Bill 2014 and the Enhancing Online Safety for Children (Consequential Amendments) Bill 2014 (the bills) to the Senate Environment and Communications Legislation Committee (the committee) for inquiry and report by 3 March 2015.¹

1.2 The reason for referral were that:

- this is the first legislation of this kind proposed in the Parliament;
- to allow for public consultation, including with industry, community groups and education providers;
- enable public input into the impact of technological developments on this new area of law;
- scrutiny of the practical issues surrounding the implementation of the scheme;
- there is substantial disagreement within the wider community about whether the legislation has merit;
- the legislation would benefit from scrutiny and debate over its approach; and
- the consequences for the many stakeholders affected by the legislation need to be examined.

Conduct of the inquiry

1.3 In accordance with usual practice, the committee advertised the inquiry on its website and wrote to relevant organisations inviting submissions by 12 January 2015.

1.4 The committee received 29 submissions relating to the bills and these are listed at Appendix 1. The submissions may be accessed through the committee's website at:

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Online_safety/Submissions

1.5 The committee agreed not to hold a public hearing for this inquiry. However, it requested the Department of Communications to respond to relevant issues raised in the submissions. The information received from the Department of Communications is available on the committee's website.²

1 Senate Standing Committee for Selection of Bills, *Report No. 16 of 2014*, 4 December 2014, Appendices 5 & 6.

2 See Mr Rohan Buettel, Assistant Secretary, Department of Communications, letter dated 9 February 2015, *Additional Document 1*.

1.6 The committee would like to thank all the organisations that contributed to the inquiry.

Background to the bills

1.7 The bills seek to implement a number of commitments made by the Coalition during the 2013 Federal election in relation to enhancing online safety for children.

1.8 *The Coalition's Policy to Enhance Online Safety for Children*, while noting the benefits of internet use, commented on the potential for cyberbullying:

But the internet's freedom, anonymity and relative lack of regulation can make it a dangerous place for children, be that through exposure to age-inappropriate or otherwise damaging content, through falling victim to harassment and cyber-bullying, or through vulnerability to approaches online from those motivated to do them harm.³

1.9 The Coalition undertook to introduce a range of measures to improve the online safety of children in Australia, including:

- establishing a Children's e-Safety Commissioner;
- developing an effective complaints system, backed by legislation, to quickly remove harmful material from large social media sites; and
- examining existing Commonwealth legislation to determine whether to create a new, simplified cyber-bullying offence.⁴

1.10 In August 2014, at the National Centre Against Bullying Conference, the Parliamentary Secretary to the Minister for Communications, the Hon Paul Fletcher MP, commented that the Coalition had, in Government, 'taken the opportunity to build an even more comprehensive evidence base, commissioning three major pieces of research on cyberbullying from research experts' to assist in policy development in this area.⁵

1.11 The first report, dealing with the prevalence of cyberbullying was undertaken by the UNSW Social Policy Research Centre with researchers from the University of South Australia, the University of Western Sydney, the Young and Well Cooperative Research Centre and the National Children's and Youth Law Centre. The second report addressed the question of how much awareness do children have of the current laws governing cyberbullying. Thirdly, the Government commissioned a survey of schools on how they deal with cyberbullying.

3 *The Coalition's Policy to Enhance Online Safety for Children*, September 2013, p. 3
<http://lpaweb-static.s3.amazonaws.com/Coalition%202013%20Election%20Policy%20-%20Enhance%20Online%20Safety%20for%20Children.pdf>.

4 *The Coalition's Policy to Enhance Online Safety for Children*, September 2013, pp 4–8.

5 The Hon Paul Fletcher MP, Parliamentary Secretary to the Minister for Communications, 'National Centre Against Bullying' Conference, Wednesday, August 6, 2014.
<http://paulfletcher.com.au/speeches/portfolio-speeches/item/1107-national-centre-against-bullying-conference-wednesday-august-6-2014.html>.

1.12 In January 2014, the Department of Communications released a public discussion paper seeking feedback on these three proposals.⁶ Over 80 submissions were received from a range of stakeholders, including community organisations, industry, education bodies, government bodies, legal bodies, academics and individuals.

1.13 The Parliamentary Secretary noted that the feedback gathered in this process has been very valuable, and together with the research commissioned by the Government, had assisted in further developing the details of the government policy on improving online safety for children. One important outcome of this process was the findings relating to the option of introducing a new, simplified cyberbullying offence. The Parliamentary Secretary commented that:

The researchers concluded that several factors might undermine the effectiveness of a purely legal approach in changing the behaviour of cyberbullies. Because young people have reduced impulse control compared to adults; because they tend not to be aware of relevant laws; and because historically there have been few criminal convictions for cyberbullying; extra criminal provisions may have a limited impact.

There were mixed views among stakeholders as to whether and how the existing laws should be changed and what deterrence effect a change would have – although there was significant support for a more simplified legal framework.

Interestingly, the majority of police officers involved in the research were opposed to the creation of a new offence for cyberbullying. This may well be linked to the typical, and understandable, reluctance of police to lay criminal charges against a young person unless it is absolutely necessary – given that if you are convicted of a crime early in life, it can seriously damage your life prospects.

1.14 The Parliamentary Secretary concluded that 'there was a preference for measures including counselling and restorative justice as the first means of redress before treating a cyberbullying matter as a criminal offence'. In addition, the research found that respondents 'clearly favoured the creation of an e-Safety Commissioner to oversee rapid take-down and act where a social network site or a cyberbully have not taken down cyberbullying content on request'.⁷

1.15 The Government therefor decided not to proceed with the creation of a new offence.⁸

6 Department of Communications, *Enhancing Online Safety for Children: Public consultation on key election commitments*, January 2014, available at: http://www.communications.gov.au/_data/assets/pdf_file/0016/204064/Discussion_Paper_-_Enhancing_Online_Safety_for_Children.pdf (accessed on 27 January 2015).

7 The Hon Paul Fletcher MP, Parliamentary Secretary to the Minister for Communications, 'National Centre Against Bullying' Conference, Wednesday, August 6, 2014.

8 See also, Explanatory Memorandum, pp 51 and 54.

Overview of bill provisions

1.16 The Enhancing Online Safety for Children Bill 2014 (Online Safety bill) establishes a Children's e-Safety Commissioner (Commissioner) as an independent statutory office. The Commissioner will administer a complaints system for cyber-bullying material and take a leadership role in promoting online safety. The Online Safety bill also establishes a complaints and enforcement system designed to assist in the quick removal of harmful cyber-bullying material targeted at an Australian child.

1.17 The Enhancing Online Safety for Children (Consequential Amendments) Bill 2014 deals with consequential matters arising from the Online Safety bill. The consequential bill also amends the *Broadcasting Services Act 1992* to give the new Commissioner information gathering powers similar to those currently possessed by the Australian Communications and Media Authority (ACMA).

Children's e-Safety Commissioner

1.18 The Online Safety bill creates the Commissioner as an independent statutory office within the ACMA. A key function of the Commissioner will be to administer a complaints system for cyber-bullying material targeted at an Australian child. The Commissioner is also tasked with promoting and helping to improve online safety for children; to coordinate government activities; to accredit children's online safety awareness programs; to make financial grants on online safety; and to formulate guidelines on facilitating resolution of cyber-bullying incidents.⁹

1.19 The person to be appointed as Commissioner must have experience, knowledge or significant standing in the operation of social media services or the internet industry; public engagement on issues relating to online safety; or public policy in relation to the communications sector.¹⁰ The Online Safety bill also provides that the Commissioner must, in performing his or her functions, have regard to the Convention on the Rights of the Child.¹¹

Definition of cyber-bullying and making of complaints

1.20 An Australian child (one who is ordinarily resident in Australia) can make a complaint to the Commissioner if he or she believes they were the target of cyber-bullying material. A complaint can also be made by the child's parent or guardian or by any other person authorised by the child to make the complaint.¹²

1.21 A complaint can be made in relation to material provided on a social media site or other electronic communications site (such as email, text messages, instant messaging, or messages through online gaming). The material will be considered to be cyber-bullying material if it is intended and likely to have the effect of seriously threatening, seriously intimidating, seriously harassing or seriously humiliating an

9 Online Safety bill, cl. 15.

10 Online Safety bill, sub-cl. 50(2).

11 Online Safety bill, cl. 12.

12 Online Safety bill, cl. 18.

Australian child.¹³ The Commissioner has broad discretionary powers to investigate a complaint.¹⁴

Definition of social media service

1.22 A social media service is defined in clause 9 of the Online Safety bill as being an electronic service if it satisfies the following conditions (or those set out in legislative rules):

- its sole or primary purpose is to enable online social interaction between two or more end-users (this includes interaction enabling end-users to share material for social, not business, purposes); or
- it allows end-users to link to, or interact with, other end-users; or
- it allows end-users to post material on the service; or
- it is an electronic service as specified in the legislative rules.

1.23 This definition does not cover services that are exempt. Exempt services are those where none of the material on the service is accessible to, or delivered to, end-users in Australia, or where it is specified as exempt in the legislative rules.

Two-tiered system for removal of cyber-bullying material

1.24 The Online Safety bill establishes a two-tiered system for the removal of cyber-bullying material from large social media services. Social media services participating under tier 1 will do so on a co-operative basis. The Commissioner may declare a service to be a tier 1 service if it has applied to be recognised as such and the Commissioner is satisfied it complies with basic online safety requirements (namely that it has terms of use prohibiting the posting of cyber-bullying material and has an appropriate complaints process).¹⁵ If a complaint is made in relation to cyber-bullying material posted on a tier 1 social media service (and the material has not been removed within 48 hours), the Commissioner can give a written notice requesting that the provider remove the material within 48 hours.¹⁶ However, there is no legal obligation on the tier 1 service to comply with the notice (although the Commissioner can revoke the service's tier 1 status if it repeatedly fails to remove material over a 12 month period¹⁷).

1.25 In contrast, tier 2 services that fail to remove cyber-bullying material within 48 hours after being given notice by the Commissioner, face a penalty of 100 civil penalty units.¹⁸ A specified social media service may be declared in a legislative instrument to be a tier 2 service if it is a large social media service (which has not

13 Online Safety bill, cl. 5.

14 Online Safety bill, cl. 19.

15 Online Safety bill, cl. 23.

16 Online Safety bill, cl. 29.

17 Online Safety bill, cl. 25.

18 Online Safety bill, cl. 36.

made an application for approval as a tier 1 service) or if the provider itself requests it be declared as a tier 2 service.¹⁹

1.26 The Parliamentary Secretary to the Minister for Communications explained the reason for the two-tier scheme in his second reading speech:

The two-tier scheme in the Bill allows for a light touch regulatory scheme in circumstances where the social media service has an effective complaints scheme and it is working well; but it enables the government to require cyber-bullying material targeted at an Australian child be removed in circumstances where a social media service does not have an effective and well-resourced complaints system.²⁰

End-user notices

1.27 The Commissioner also has the power to issue an end-user notice to a person who posts cyber-bullying material targeted at an Australian child. This notice can require the end-user to take reasonable steps to remove the material; refrain from posting any further cyber-bullying material; and apologise for posting the material.²¹ If the end-user fails to comply with the notice the Commissioner can seek an injunction from the Federal Circuit Court of Australia. Enforcement is governed by the *Regulatory Powers (Standard Provisions) Act 2014*.

Reports of other committees

1.28 On 11 February 2015, the Senate Standing Committee for the Scrutiny of Bills raised concerns about the delegation of legislative power in the Online Safety bill. It noted that paragraph 5(1)(c) of the Online Safety bill provides that legislative rules may add to the conditions which must be satisfied for material to constitute 'cyber-bullying material'. It noted that it wasn't immediately clear why frequent adjustments to the nature of the basic test for cyber-bullying are likely to be necessary.²² As the test for what constitutes 'cyber-bullying material targeted at an Australian child' is of central importance to the operation of the bill and the balancing of competing rights, the Scrutiny of Bills Committee requested the Minister for Communication's advice as to why it was not considered more appropriate that any adjustments to the test be brought directly before the Parliament through proposals to amend the primary Act. The Scrutiny of Bills Committee noted that pending the Minister's reply the provisions may be considered to delegate legislative powers inappropriately.²³

19 Online Safety bill, cl. 31.

20 The Hon Paul Fletcher MP, Parliamentary Secretary to the Minister for Communications, *House of Representatives Hansard*, 3 December 2014, pp 14038–14039.

21 Online Safety bill, cl. 42.

22 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 1 of 2015*, 11 February 2015, p. 8.

23 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 1 of 2015*, 11 February 2015, p. 9.

1.29 The Scrutiny of Bills Committee also questioned whether the powers conferred on the Commissioner in clause 16 are appropriately defined.²⁴ It also asked for advice from the Minister whether consideration has been given to including further legislative guidance in clause 19 on the criteria by which the Commissioner decides to exercise his or her power to investigate a complaint.²⁵ Finally, the Scrutiny of Bills Committee was concerned that clause 64 of the Online Safety bill gives the Commissioner the power to delegate some of his or her functions to a body corporate. This power of delegation enables non-statutory entities staffed by people employed outside the Australian Public Service to exercise the Commissioner's powers (including coercive information gathering powers). The Scrutiny of Bills Committee therefore sought the Minister's advice on whether this is an insufficiently defined administrative power.²⁶

1.30 The committee notes the report of the Scrutiny of Bills Committee and the matters raised in relation to the Online Safety bill.

24 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 1 of 2015*, 11 February 2015, p. 9.

25 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 1 of 2015*, 11 February 2015, p. 10.

26 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 1 of 2015*, 11 February 2015, p. 11.

