

Submission to the Department of Communications Discussion Paper 'Enhancing Online Safety for Children'

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Executive summary

The government's proposed Children's e-Safety Commissioner represents a serious threat to freedom of speech and digital liberty. The proposed regime would create extraordinary new powers, which would be conferred on a government-appointed digital censor. The power to order certain material to be pulled down from large social media sites also gives discretionary power to a government bureaucrat.

The proposal misdiagnoses the problem of bullying on and offline. Bullying can be a significant and very harmful social problem – whether on or offline. Cyberbullying is not a special case demanding of specific laws. It should be dealt with using the same legal framework as bullying that takes place offline.

The existence of a Children's e-Safety Commissioner will not prevent or protect young people against cyberbullying. There are many forms of harmful online activity that will not be caught by the government's proposed regime. The regime may also drive cyberbullying to sites that are less easily monitored by parents and guardians. Smaller social media sites are less likely to have rigorously enforced community standards yet the government's proposal is aimed only at large social media sites.

The proposal also ignores existing remedies. There are a variety of current laws that exist to catch the same conduct that the government seeks to proscribe. Legal remedies for stalking, harassment, intimidation and a range of other unacceptable behaviours are already available to victims of bullying.

The Children's e-Safety Commissioner may provide a false sense of security among parents that cyberbullying has been dealt with. Some parents may not feel that their own efforts are still necessary when faced with the existence of the government's cyberbullying program. Parents may fail to employ monitoring and security software believing it to be redundant. However, there will be cases of cyberbullying that are not caught by the government's scheme but that would have been caught by parental vigilance.

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Introduction

The Institute of Public Affairs is opposed to the government's proposed Children's e-Safety Commissioner and the introduction of a new cyberbullying offense.

In September 2013, the Coalition in opposition released the 'Coalition's Policy to Enhance Online Safety for Children'. In January 2014, the Department of Communications released a discussion paper outlining in detail what it proposed to do, and called for submissions in response. This submission addresses itself to that discussion paper.

The discussion paper consists of three proposals.

- A Children's e-Safety Commissioner, with responsibility to oversee the government's anti-cyberbullying policies.
- A statutory requirement for large and participating social media networking sites to remove harmful material from their sites, upon the request of users or as directed by the Commissioner.
- Reform of Commonwealth legislation to create a new cyberbullying offence or strengthen existing provisions of the Commonwealth Criminal Code which prohibit the use of a carriage service to harass or be menacing or offensive.

The strongest option for a new cyberbullying offense would give the Commissioner the power to issue infringement notices to take down material, cease conduct, or any other action the Commissioner thinks necessary.

Bullying is a serious problem, but it is a serious social problem. It is not a technological or legal problem. Remedies for bullying that target the medium in which bullying occurs or the legal framework will be ineffective. The only effective way to tackle bullying is through parents, guardians and schools.

If these proposals are pursued, parliament should not imagine that it has done anything to protect young people from being the victims of bullying.

In some circumstances – by encouraging bullying conduct onto sites harder to monitor, or discouraging young people from informing parents about their victimisation – it will be ineffective.

New legal remedies for cyberbullying offenses are excessive, in part duplicate existing law, and represent an unacceptable threat to freedom of speech.

About this submission

This submission seeks to contextualise the cyberbullying problem as an educational and social challenge, rather than a technological or legal one.

First, the submission strives to get conceptual clarity on cyberbullying. The discussion paper expends little energy trying to understand the problem it wants to solve. This submission argues that cyberbullying is not a unique and discrete form of conduct but merely traditional bullying with a

different medium. A proper understanding of cyberbullying as a form of traditional bullying affects what policy should be used to tackle this problem.

There is a great deal of research into bullying – the forms it takes, the harms it causes, and the most effective remedies. The discussion paper confuses the issues, misdiagnoses the problems, and as a consequence offers a policy proposal which would be ineffective at tackling the harm of cyberbullying.

Second, the submission surveys the substantial existing law available to remedy serious instances of cyberbullying. It is necessary to be clear about what sort of conduct the government is seeking to prohibit. The discussion paper cites, but seems to dismiss, the existence of Section 474.17 of the Commonwealth Criminal Code which provides exactly the restitution and protection against online harassment that the government is seeking. Furthermore, the submission argues that there are a large number of existing civil and criminal remedies which cover all forms of conduct that the discussion paper describes as cyberbullying.

Third, the submission argues that the power to take down content from social media sites is an excessive and unnecessary limitation on freedom of speech. A take-down power along the lines proposed would be disproportionate, would limit speech rather than confronting the underlying act of bullying, and would be unpredictable and unnecessarily coercive. This is particularly important given the importance of social networking for young people as a means for individual and social development.

Fourth, the submission briefly explores some of the existing institutional and technological tools by which young people can both empower themselves to prevent or mitigate bullying, and the existing programs offered by social networks to take-down serious abuse. An attempt to regulate large social networks could push social interactions towards smaller sites that neither have elaborate policies to deal with bullying, or are less easily monitored by parents and guardians.

Finally, this submission deals with some further objections to the government's proposal. A consolidation of anti-cyberbullying functions would reduce necessary experimentation in education programs. The Children's e-Safety Commissioner is bound to suffer mission creep as it is seen by governments and the public as a one-stop-shop for social media censorship. Finally, many of the Commissioner's proposed functions are already being provided by the private and university sector.

This submission addresses itself directly to the issue of cyberbullying among students and children. Unfortunately, popular discussion of cyberbullying often conflates a large number of different issues that require different analytical frames and require different policy responses. For instance, racial vilification on social media sites is a different issue to cyberbullying, which is addressed not towards groups but specific individuals. Likewise the Twitter 'trolls' debate, which saw a number of celebrities call for action on anonymous trolls who were criticising them, is also a starkly different issue, despite superficial similarities.

When the government considers the cyberbullying proposals, it needs to remain clear about what exactly it is trying to do, and what conduct it is trying to prevent.

The government's proposal confuses and misdiagnoses the 'cyberbullying' problem

From a social or policy standpoint, cyberbullying does not differ in any meaningful way from 'traditional' bullying. Cyberbullying is a neologism that confuses more than it clarifies. Parliament needs to understand that there is, in fact, no such thing as 'cyberbullying'. It does not describe a discrete and specific form of conduct. There is just bullying, on and offline.

A policy that tries to tackle cyberbullying as a discrete activity will both misdiagnose the essential problem with bullying and be consequently ineffective.

What do we mean by bullying? The Norwegian bullying prevention expert Dan Olweus provides a standard three part definition: it is a) intentionally aggressive behaviour, b) involves an imbalance of power between bully and victim, and c) is usually repeated over time.¹ Clearly such activity can occur in the online and offline space.

The discussion paper defines 'cyberbullying' 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". However, an understanding of the standard three part definition of bullying should show that the discussion paper's emphasis on the medium by which bullying occurs is misplaced.

Cyberbullying is bullying using information communications technologies. This includes the use of large social media sites like Facebook and Twitter, blogs and message boards, but also includes any other electronic communication, like text messages and emails. Bullying can also be done over landlines or mobile phones, as the Australian Mobile Telecommunications Association has pointed out.² Given the ubiquity of mobile phones, bullying by text or multimedia message is likely to be more significant a problem than bullying by social media.³ Only the government's most extreme proposal (to create a civil enforcement regime for cyberbullying) would tackle non-social media cyberbullying, and this proposal has many concerning and dangerous features that lead us to reject that extreme option.

It has been well documented that students who experience bullying online also experience bullying offline. Raskauskas and Stoltz find a close correlation between victims of cyberbullying and traditional bullying. As they write, "The overlap between traditional and electronic bullying is important because it means that some students are facing bullying both at school and outside

¹ See <http://www.violencepreventionworks.org/public/bullying.page>.

² https://www.police.nsw.gov.au/__data/assets/pdf_file/0018/107028/bullying_with_mobile_phones.pdf.

³ Aashish Srivastava, Roger Gamble, and Janice Boey, "Cyberbullying in Australia: Clarifying the Problem, Considering the Solutions," *International Journal of Children's Rights* 21(2013).

school.”⁴ Another study found that “hardly any students are exclusively cybervictims ... most of the cybervictims [are] at the same time traditional victims.”⁵

Determining the prevalence of bullying and cyberbullying is problematic for two reasons. The first is that researchers have not determined a consistent definition of what such activity would constitute. The second is the fluid nature of social cues prevalent among youth. Teenagers distinguish between (for instance) ‘bullying’, ‘teasing’, ‘drama’, and ‘pranks’. The distinctions between these activities – which reflect young peoples’ sense of the seriousness of the harm they are causing or being subject to – are not obvious to outsiders, and can vary according to age and social group.⁶

The paper relied upon by the Department of Communications cites a number of studies which find the experience of being cyberbullied is between 4.9% and 30% in a given Australian student population.⁷ This is a substantial difference. Apart from definitional problems, further complexities are introduced by the fact that the bullying surveys are self-reported.

Despite the difficulties of measurement, there is evidence to suggest that cyberbullying is less prevalent than traditional bullying. A 2008 paper in the *Journal of Child Psychology and Psychiatry* found that “cyberbullying is substantially less frequent” than traditional bullying.⁸

Any harm caused by bullying is serious. Bullying can cause severe distress and emotional harm. Reducing bullying and the harm caused by bullying is an important and worthy goal.

However, there does not seem to be any clear evidence that harm from bullying has significantly increased as a result of the growth of social media. Death by suicide is the discussion paper’s primary illustration of the extreme harm that can be caused by cyberbullying. The risk of triggering suicide is proposed to be one of the factors by which the e-Safety Commissioner would test harmful material.

Suicide is a real and tragic consequence of bullying.⁹ The discussion paper cites several highly publicised incidents of suicide which (it suggests) were related to cyberbullying. However, these cited examples illustrate the co-occurrence of cyberbullying and traditional bullying, suggesting that a strategy to tackle only cyberbullying would not affect the underlying problem. The question before the government is not whether bullying can have tragic consequences, it is a) does the rise of digital communication change the significance of bullying in a policy-relevant way and b) can the government prevent the harm caused by cyberbullying?

⁴ Juliana Raskauskas and Ann D. Stoltz, "Involvement in Traditional and Electronic Bullying among Adolescents," *Developmental Psychology* 43, no. 3 (2007).

⁵ Petra Gradinger, Dagmar Strohmeier, and Christiane Spiel, "Traditional Bullying and Cyberbullying: Identification of Risk Groups for Adjustment Problems," *Zeitschrift fur Psychologie / Journal of Psychology* 217, no. 4 (2009). See also Peter K. Smith et al., "Cyberbullying: Its Nature and Impact in Secondary School Pupils," *Journal of Child Psychology and Psychiatry* 49, no. 4 (2008); danah boyd, *It's Complicated : The Social Lives of Networked Teens*, text.

⁶ *It's Complicated : The Social Lives of Networked Teens*.

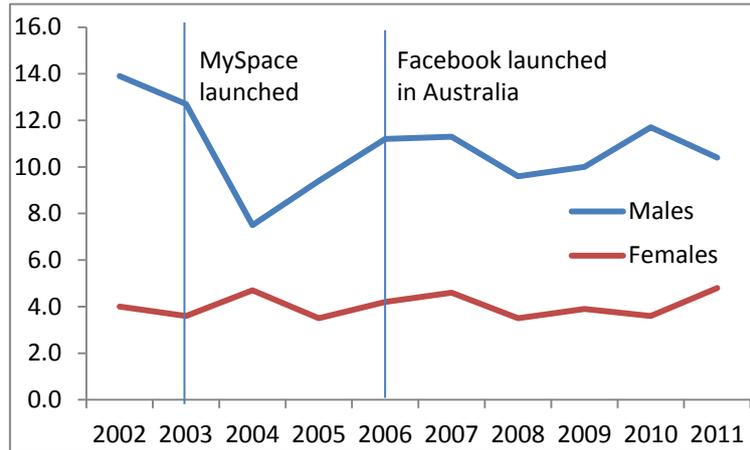
⁷ Srivastava, Gamble, and Boey, "Cyberbullying in Australia: Clarifying the Problem, Considering the Solutions".

⁸ Smith et al., "Cyberbullying: Its Nature and Impact in Secondary School Pupils".

⁹ Young Shin Kim and Bennett Leventhal, "Bullying and Suicide. A Review," *International Journal of Adolescent Medicine and Health* 20, no. 2 (2008).

We shall address the latter question further in the submission. As to the former, if cyberbullying does 'super-charge' traditional bullying – that is, make it more pervasive and harmful – then we would expect to see an increase in death by suicide among young people since the advent of social media. MySpace was launched in 2003, and Facebook was opened to public access in Australia in 2006. The graph on death rates below does not show any clear increase in death by suicide that we could attribute to the launch of these social networks.

Have social networks increased the harm from bullying?
Age-specific death rate (per 100,000) by suicide in Australia, ages 15-19



Source: ABS 3303.0 Causes of Death, Australia, 2011, IPA

The harm caused by bullying is real, and parliament's desire to reduce bullying and the harm it causes is irreproachable.

But the research evidence shows that the single most significant barrier to tackling bullying is the fact that most young people being bullied remain silent – that is, they do not tell teachers or parents. A large Western Australian study found that 38 per cent of children bullied did not speak to anybody else about their victimisation.¹⁰ This is of great concern because adult intervention is the most effective mechanism for reducing both bullying and the harm from bullying. The government's proposed cyberbullying policies intervene only after the most important and necessary step has been made: telling adults about victimisation.

It is true that there is reason to believe that students are less likely to tell adults if they are being cyber-bullied than if they were being traditionally bullied.¹¹ However when considering this, it is important to recall the co-occurrence of both forms of bullying. Furthermore, one major reason that students do not notify adults is that they fear having their electronic equipment confiscated by parents, or being forced to remove themselves from social media. Once again, this suggests that educating parents and students about the harm and unacceptability of bullying is essential.

One final factor which could make cyberbullying worse than traditional bullying is the potential for online bullying to be a combination of public and anonymous. However, the government's proposal

¹⁰ Joint Select Committee on Cyber-Safety, "High-Wire Act Cyber-Safety and the Young, Interim Report," (Parliament of Australia, 2011).

¹¹ Smith et al., "Cyberbullying: Its Nature and Impact in Secondary School Pupils."

will do little to mitigate the anonymity problem. Two of the major social network sites - Facebook and Google Plus – have a ‘real name’ policy, placing a limit on anonymous accounts. For those sites that do not have real name policies – like Twitter – even the strongest take-down power available to the e-Safety Commissioner would not be able to prevent the creation of new, anonymous accounts.

Anonymity is a necessary and vital part of online discourse, and any constraint on anonymity would be a drastic restriction on freedom of speech. Furthermore, the dangers of anonymity can be overstated. Anonymity does not correlate with more hostile expression online.¹² While it is important to recognise that anonymity affects perceptions of the harm of cyberbullying among young people, any policy to reduce anonymity would be deeply misguided, and damage the benefits individuals – including young people – get from online interaction.

¹² Kimberly Short, " Hiding Behind the Small Screen: Investigating Levels of Anonymity When Managing Online Hostile Commentary," (School of Communication: American University, 2012).

Australian law already provides many remedies for conduct described as cyberbullying

The internet is not a lawless wilderness. Activity which occurs online is subject to, and constrained by, territorial law. Expression online is subject to the very same limitations as offline speech. In recent years Australian courts have applied defamation and racial vilification laws on social media and blog posts, to name just two of the most prominent cases.¹³

To the extent that the internet poses challenges for existing law, those challenges concern determining in which jurisdiction a given act occurred, not whether it occurred in a jurisdiction at all.¹⁴ Cross-jurisdictional issues are unlikely to be a significant factor in bullying prevention, as bullying occurs within school- and peer-group.

As a consequence, and with the argument presented above in mind, we should not be looking for remedies for bullying that are specific to the internet. If the existing remedies for bullying are insufficient then they are insufficient on and offline.

The popular definition of bullying captures a very large range of individual behaviour. As we have seen above, some of what is described popularly as ‘bullying’ is better described by participants as ‘drama’, ‘pranks’, or ‘teasing’. A broad and unclear definition of bullying incorporated in Australian law risks criminalising or penalising conduct which is a natural part of the social and emotional development of young people. Interpersonal conflict is part of growing up. Such nuances are often missed in the debate by parents and popular media alike. Young people draw meaning and significance from social interactions differently to adults who observe from the outside. What may look like harassment on Facebook to an adult observer may be seen by young participants as something else entirely.¹⁵ Trying to develop bureaucratic and legal mechanisms that impose order on this complex social world could be counterproductive and have unpredictable developmental consequences.

At the other extreme, much of what is described as bullying in the popular press constitutes serious criminal conduct. For example, stalking with intent to intimidate or cause fear of physical or mental harm, physical or sexual assault, threats to kill or harm, criminal defamation, blackmail, and victimisation, are often collapsed into the word ‘bullying’. In these cases, there are substantial civil and criminal remedies at the state or Commonwealth level available to victims. In some circumstances the law provides for significant jail terms. The fact that some criminal conduct occurs on the internet makes no difference to the criminality of that conduct.

So while the government needs to be careful that it does not duplicate existing law, there is a greater risk: that it may unintentionally trivialise serious criminal conduct by describing such conduct as the lesser wrongdoing of bullying. It is for this reason that many social media sites’ anti-bullying

¹³ See *Eatock v Bolt* [2011] FCA 1103 and <http://au.news.yahoo.com/nsw/a/21816220/student-ordered-to-pay-over-defamation/>.

¹⁴ For an extended exploration of these issues, see Adam D. Thierer and Clyde Wayne Crews, *Who Rules the Net? : Internet Governance and Jurisdiction* (Washington, D.C.: Cato Institute, 2003).

¹⁵ This argument is made powerfully in boyd, *It's Complicated : The Social Lives of Networked Teens*.

recommendations emphasise the need for victims to contact police when necessary: an online death threat is not an example of bullying, but an unlawful threat to kill under state and federal law.

Online speech does differ from offline speech in one important way: there is already significant legislation prohibiting offensive or harassing expression over the internet with no equivalently broad legislation governing speech offline. Section 474.17 of the Commonwealth Criminal Code states it is an offence to use a carriage service to menace, harass or cause offence:

A person is guilty of an offence if:

- (a) the person uses a carriage service; and
- (b) the person does so in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.

Penalty: Imprisonment for 3 years.

Most, if not all, cases of cyberbullying are either more accurately described as ‘drama’, or are already criminal activity as described above, and therefore captured by s 474.17.

The discussion paper appears to implicitly accept the strength of s 474.17. However, it suggests that “the language of these provisions is difficult to understand ... most people would not know what ‘using a carriage service’ means.” Later the discussion paper suggests the “most people” who would not understand the language are specifically minors.

This is a shaky foundation to rest significant legislative change on. That legislation is written for the benefit of the legal community is not unique to cyberbullying. It is highly unlikely that any minors will be digging around in the Commonwealth Criminal Code for solutions to bullying. But we could say the same thing about the legislation that governs criminal activity that minors may be victims of: the strength of our laws against theft or assault is not measured by the accessibility of the legal language.

Simply put, if the essential policy problem is that not enough people understand legislation as written, then the obvious policy solution is to educate people about that existing legislation, not add new offences to the statute books.

The discussion paper raises a few further objections to the use of s 474.17, but these are even more dubious. It suggests that the existing provision is too broad, and that the maximum penalty is too large. This is hard to understand – the broad provision captures any conduct likely to be described as cyberbullying, and the courts are under no obligation to impose the maximum penalty.

The existence of s 474.17 ought to be the final word on the government’s cyberbullying proposals. It is true that Institute of Public Affairs researchers have previously criticised s 474.17 and similar

provisions for being excessively expansive.¹⁶ But the significance of this provision for the government's proposed changes is that legislation already exists, is recognised by the discussion paper to exist, is recognised to have been used successfully by prosecutors against bullying-type conduct, and is broad and powerful enough to cover a large amount of conduct. The criticisms of s 474.17 in the context of the cyberbullying debate are insubstantial and weak.

There are a number of civil and criminal remedies that cover conduct which can be described as cyberbullying and fall within the purview of conduct the government wants to target. Butler, Kift and Campbell provide a comprehensive overview of existing Australian law that covers cyberbullying activity. Their key point is that "[i]t is not difficult to reconceptualise cyber bullying in terms of criminal, tortious or vilifying behaviour."¹⁷ A few are worth noting. In some circumstances bullying may constitute criminal defamation. In many more circumstances, civil defamation would capture a very large amount of cyberbullying. As they write,

Where the cyber bullying consists of uploading words or images onto internet web sites, chat rooms, bulletin boards, blogs or wikis which humiliate, embarrass or otherwise cause distress to the target, the target may have an action for defamation.

Such activity would capture almost all cyberbullying. Other actions may be available as intentional infliction of mental harm, invasion of privacy, and perpetrator liability.

Australian law has developed over centuries in order to tackle a massive range of conduct, and is easily adaptable to the online sphere by the judiciary. In addition, there has been substantial development in the prevention of crimes like stalking in the past decade. There is no need for parliament to create new offenses that are covered by existing law.

There is a common misconception held by law enforcement and many in the public when it comes to the enforcement of existing law on digital communication: that the jurisdictional complexities of the medium obscure simple enforcement challenges. Regardless of whether a website is hosted in Australia or another country with starkly different laws to Australia, individuals who commit criminal acts in Australia are liable to Australian law. Section 474.17 of the Commonwealth Criminal Code applies to Australian internet users regardless of where the website they use is being hosted. There appears to be a widespread misconception however, even among law enforcement, that this is not the case, and that the international nature of communications networks mean that our domestic law is powerless.¹⁸ Education would seem to be necessary to inform all involved of the conceptual significance of the digital sphere, and the applicability of terrestrial law to the internet.

It is to be expected that legal action is only taken in the most extreme cases. Bullying, as we have seen, is extremely common among young people. The last thing society wants is to be charging large numbers of students with criminal conduct.

¹⁶ James Paterson to *FreedomWatch*, 2012, <http://freedomwatch.ipa.org.au/jail-for-being-immature-and-dumb/>; Chris Berg to *ibid.*, 2013, <http://freedomwatch.ipa.org.au/freedom-of-speech-and-the-man-monis-case/>.

¹⁷ Desmond A. Butler, Sally M. Kift, and Marilyn A. Campbell, "Cyber Bullying in Schools and the Law : Is There an Effective Means of Addressing the Power Imbalance?," *eLaw Journal* 16, no. 1 (2010).

¹⁸ For an illustration of this misconception, see Geordie Guy, "Submission to the Joint Select Committee on Cyber-Safety Inquiry," (House of Representatives: Parliament of Australia, 2011).

However, the sheer comprehensiveness of existing legal remedies for bullying and cyberbullying ought to be part of any education program as a disincentive to such conduct. Furthermore, its existence provides a tool by which parents, schools, and ultimately law enforcement, can convince bullies from ceasing their conduct. Even in the most extreme cases, a police caution will be sufficient to prevent future bullying conduct.

Finally, the political system and media needs to understand that these remedies exist. What does it tell children who are being victimised by bullies – or the bullies themselves – when parliament repeatedly claims that there are no remedies for cyberbullying?

The proposal is a serious threat to freedom of speech online

Freedom of speech is a fundamental liberty. It is the manifestation of our individual moral autonomy and underpins our democratic system of government.¹⁹ Any limitation on freedom of speech needs to be tightly confined, in response to an urgent and pressing problem, and needs to target action, not expression. On these grounds the Children's e-Safety Commissioner fails. It is overly broad, will not address the bullying problem, and restrains expression rather than the underlying conduct.

The freedom of speech problems involved in the government's proposal are particularly disappointing because in opposition, the Coalition promised to pursue a freedom agenda to elevate 'traditional rights' such as freedom of speech and association to the top of the government's human rights goals.²⁰ The establishment of a Children's e-Safety Commissioner would be directly opposed to that agenda – the development of a new censorship power that can be applied to the most dynamic and popular forms of online communication.

The government proposes to make the test of what constitutes a cyberbullying incident to be "material targeted at and likely to cause harm to an Australian child." The Commissioner would take into account context and content, the age and characteristics of the child in question, and "the risk of triggering suicide of life-threatening mental health issues for the child." If the material passes these tests, the Commissioner will order that the material be taken down, and, if the extreme proposal to introduce a civil penalty regime is introduced, may issue an infringement notice to forbid such conduct occurring again.

As discussed above, bullying is harmful not because it constitutes individual offensive expressions but because it constitutes a sustained behaviour over time between to individuals with unequal real or perceived power with the intention to cause emotional harm. Many of the civil and criminal remedies available described above target such conduct.

Instead, the government proposes to censor expression according to the discretion of the Commissioner.

Rather than focusing on the elimination of the harmful conduct – that is, sustained harassment – the proposal simply censors individual acts of expression. The proposal is at the same time a blunt instrument – censorship is an extreme power for the government to wield – and unlikely to make a material difference to bullying. Faced against a genuine act of bullying sustained over time a specific take-down power such as the one outlined in the discussion paper would be entirely ineffective.

In the next section the submission outlines the existing policies and protocols whereby social media sites allow users to block other users, or report abuse for take-down or banning. These policies have been developed independently of government, in response to user demand, and are increasingly effective. What happens when the Commissioner decides some content constitutes cyberbullying

¹⁹ For an extended argument on the right to freedom of speech, see Chris Berg, *In Defence of Freedom of Speech: From Ancient Greece to Andrew Bolt*, Monographs on Western Civilisation (Institute of Public Affairs; Mannkal Economic Education Foundation, 2012).

²⁰ Chris Merritt, "George Brandis to Reclaim Rights Agenda," *The Australian*, 30 August 2013.

but social media networks disagree? It is easy to see how a cooperative scheme can easily become coercive.

The distinction of what constitutes harmful material is highly ambiguous, not just from the perspective of policy analysts studying the government's proposals, but from the perspective of the young people themselves. The Commissioner will be instructed to take certain factors into account, but the young people participating in online activity will be unable to predict what speech might fall foul of these decisions. The power to censor always involves highly subjective and therefore arbitrary decisions. What is viewed as bullying by adults is not necessarily seen that way by young people. The opacity of young peoples' social interactions adds to these ambiguities.

The proposal also has significant rule of law issues. For example, the discussion paper seems to imply that the onus of proof will be reversed should an individual seek to appeal the Commissioner's decision:

In cases of material which is potentially harmful or distressing to a child, the scheme should favour the interests of the child, rather than the person seeking to publish the material.

Freedom of speech on social media is particularly important for young people

The rise of social media networking sites in the last few decades has brought risks, but this is the case for any new environment in which individuals are free to communicate and socialise. The benefits of digital media for personal and social expression are dramatic. Technology has had a major liberating effect on personal expression for those who may not have had a voice in the traditional media.

This is as true – if not more true – for young people, who are now capable of engaging with (for instance) politicians, celebrities, authors, journalists, and musicians directly on social media. Less dramatically but no less significantly, young people have been able to use social networks to deepen and extend their interpersonal networks, build and create relationships, and form communities that previous generations could not have imagined. From an education standpoint, the major feature of social networks is not that they encourage technological skill development but that they encourage social development. Social networks are a powerful medium for self-expression and identity development.²¹

A recognition of these obvious yet underappreciated benefits of digital engagement should emphasise the very real risks of imposing statutory limits, controls, or censorship powers on the spaces young people use for personal development.

Punishing young people for cyberbullying offenses could have significant developmental consequences as well. Social interactions in young people are highly fluid and opaque. A bully in one social context can be a victim in another, and vice-versa. A very large number of students are bully-

²¹ danah boyd, "Why Youth (Heart) Social Network Sites: The Role of Networked Publics in Teenage Social Life " in *Macarthur Foundation Series on Digital Learning – Youth, Identity, and Digital Media Volume* ed. David Buckingham (Cambridge, MA: MIT Press, 2007).

victims.²² There are a large number of psychological and social factors for why that is the case. But for our purposes, institutionalising penalties – and encouraging their greater use – brings the risk of creating further harm.

²² Melissa K. Holt, David Finkelhor, and Glenda Kaufman Kantor, "Hidden Forms of Victimization in Elementary Students Involved in Bullying," *School Psychology Review* 36, no. 3 (2007).

There are already many technological and institutional tools to mitigate cyberbullying

All major social media sites offer mechanisms and tools to deal with online harassment and bullying.

Facebook's 'Family Safety Centre' includes information on bullying and a graduated series of responses that include removing users from abusive tags, unfriending and blocking other Facebook users, and for abusive content, which specifically includes bullying, reporting it to Facebook, after which Facebook will take it down. The Facebook Community Standards include a prohibition on bullying and harassment that reads:

Facebook does not tolerate bullying or harassment. We allow users to speak freely on matters and people of public interest, but take action on all reports of abusive behavior directed at private individuals. Repeatedly targeting other users with unwanted friend requests or messages is a form of harassment.

Twitter has a graduated system to deal with harassment. Users can unfollow accounts, block them to prevent them from sending tweets or reading a user's tweets. Private account settings also prevent unapproved users from reading tweets. Finally, Twitter has a service to report users who engage in targeted abuse or harassment. Users who have violated the Twitter terms of service – which includes a prohibition on targeted abuse – have their accounts deactivated.

Google Plus also has a safety centre with anti-bullying information for parents and teenagers. Users can block other users, remove others from their posts, and report others for violating Google Plus' Community Standards, which include restrictions on hate speech, impersonation and private information.

As we have seen, cyberbullying is not restricted to social media sites; indeed, cyberbullying may be more common off social media than on it. Self-reported instances of cyberbullying emphasise bullying by text message and prank calls. As a consequence, technology firms have developed tools to deal with such conduct. In 2013 Apple's iOS7 software for iPhone and iPad introduced a function where nominated phone numbers could be blocked from calling or messaging a user. Most phones running the Android operating system also offer a blocking function, and third party software is also available.

While these technological and institutional mechanisms are often dismissed in popular discussions about bullying, they are significant. Blocking, by itself, tackles much of the harm imposed by cyberbullying, and certainly more efficiently and effectively than a government imposed scheme. The empowerment of users to take control of their own experience – with the support of parents, guardians and, where appropriate, schools – is a necessary way to tackle unwanted interactions.

Furthermore, each of Facebook, Twitter, and Google Plus offer extensive resources on bullying. Parents need to work with children to understand the services available to them.

Finally, a number of major social network organisations, including Facebook, Google, Microsoft and Yahoo!7 have signed up to the Commonwealth Government's Cooperative Arrangement for

Complaints Handling on Social Networking Sites, which aims to improve avenues for complaint handling and the reporting of abusive content.

It is important to note that technological and institutional solutions to cyberbullying are being further developed over time. The government needs to ensure that technology firms and social media sites are free to experiment and develop new services and protections. Locking in a regulatory regime could stifle the development of such services. This is a serious concern considering the fluid and porous nature of online communication. New services are always developing and young people tend to be early adopters. Technological innovation and fashion are too fast paced for legislators or regulators to effectively keep up.

An official government scheme could also have the unintended consequence of providing a false sense of confidence that the cyberbullying problem has been dealt with. This is a form of regulatory complacency which encourages actors to reduce private risk management in response to regulatory expansion. Given the certainty that the government's policies will not be effective at reducing bullying, the regulatory complacency that the establishment of a Children's e-Safety commissioner could spark would be serious.

Pushing young people into less controlled and less transparent sites

The government intends to declare certain large social media sites as "participating" with the Children's e-Safety Commissioner. There is a significant risk that bringing these major sites under government control will simply drive bullying activity underground, as young people leave major sites like Facebook and Twitter for sites that they believe are less legally risky.

However, smaller, non-participating sites also tend to be less well established, are more forgiving of anonymity, and are more opaque from the perspective of parents and guardians.

Displacing bullying from the most popular - and therefore easiest for parents to monitor - sites like Facebook to sites which are newer, are harder to monitor, have less Australian presence and have less developed inbuilt privacy and e-safety systems will do little to reduce bullying victimisation.

Further comments

Anti-bullying program consolidation would be counterproductive

The Children's e-Safety Commissioner is proposed to consolidate existing anti-bullying programs into "a single organisation which takes the lead in relation to online safety for children, allowing for greater efficiency and addressing duplication and overlap" (p.6). Appendix A of the discussion paper details a large number of programs and resources administered by seven separate administrative agencies from the Department of Communications to the Australian Human Rights Commission.

First: it is important when assessing resources dedicated to anti-bullying that private sector initiatives are considered as well. All major social media sites have anti-bullying programs and resources. Furthermore, there are a large number of private sector anti-bullying initiatives available for schools and parents to use.

Second: program consolidation would not necessarily further the government's goals. Duplication and overlap offer advantages. There is no single, universally accepted and universally successful anti-bullying program. Given the fluid and personal nature of the bullying problem, it is unlikely one will ever be developed. Agencies and levels of government need the flexibility to experiment with new and competing education programs. Program consolidation would be counterproductive.

Children's e-Safety Commissioner is guaranteed to mission creep

The discussion paper grants a large number of powers and responsibilities to the proposed Children's e-Safety Commissioner. These are extensive as they are. However, it is the historical experience of previous bodies that they exceed or stretch their mandate, are provided with extra powers and responsibilities by future parliaments, and grow in stature and prominence. The Institute of Public Affairs has traced how other bodies have grown from modest beginnings to become bureaucratic behemoths.²³

There is no reason to believe that the Children's e-Safety Commissioner will operate within the boundaries set by this parliament, nor any guarantee that its functions will not be extended in the future. Considering the substantial threat to freedom of speech represented by its proposed functions, the government should be worried that it is not creating a body that will become even more dangerous in the future. The only way to guarantee the Commissioner will not threaten free speech in years to come is to decline to establish it in this parliament.

The popular moral panic over 'trolls' illustrates how expansive a program that allows the government to censor social media could potentially become. Will government – this government or the next – be able to resist demands that trolls who are criticising celebrities, or politicians, be silenced? Once the government has taken responsibility for cleaning up social networks from bullies it is hard to see where the limits are.

²³ See Chris Berg, "The Biggest Vested Interest of All: How Government Lobbies to Restrict Individual Rights and Freedom" in *Occasional Paper* (2013).

The private and university sector is providing many functions of the Children's e-Safety Commissioner

It is the stated philosophical position of the Coalition government that "government should do for people what they can't do for themselves – and no more."²⁴ However, much of what the Commissioner is proposed to do replicates existing private and university activity. There is a large amount of research already being conducted on bullying and cyberbullying – it is not clear how a dedicated research fund will add to this research in a politically significant way. Schools across Australia have already been working on and investing in custom made or private sector anti-bullying programs that can be tailored to their needs. Reliable, research-informed advice on bullying prevention and mitigation is already widely available online. The Children's e-Safety Commissioner would not add materially to what is already available.

²⁴ Tony Abbott, "This Year's G20: Getting the Fundamentals Right" (World Economic Forum, Davos, Switzerland, 23 January 2014).

Conclusion: what to do about cyberbullying

Bullying is a very serious issue. It can cause real harm. The desire of the government to prevent bullying and mitigate the harm caused by bullying is admirable and worthy. However, the proposed Children's e-Safety Commissioner will do little to prevent bullying, and may in some circumstances extenuate the harm it causes.

So what can we do about cyberbullying? Ultimately cyberbullying is a variant of traditional bullying, and bullying is a social phenomenon. A consistent finding in the literature is that many children do not tell teachers or parents about being bullied. The most important intervention we can make on behalf of bullied children is to encourage them to speak to adults about how they are being victimised. Certainly being open about their experiences helps adults prevent some of the most tragic consequences of bullying – that is, self-harm or suicide. Adults are also capable of intervening to stop the bullying, or helping victims cope and understand that the experience of being bullied is a temporary one.

The education necessary for this is two way: parents, guardians and teachers need to be able to identify the signs of bullying in a child; and children to identify the differences between bullying and playful teasing.

As we have argued, the hardest and most important step in bullying prevention is the first one: encouraging children to talk to somebody about their experiences. Legal remedies are far down the risk-management priority scale.

New technology does present important challenges for parents and schools to educate themselves. Of course, digital literacy is not only – or even primarily – important for the prevention of cyberbullying: indeed, concerns about other cybersafety issues like privacy protection ought to be a key part of a modern education system and part of family discussions. As Berin Szoka & Adam Thierer write,

Regrettably, we often fail to teach our children how to swim in the “new media” waters. Indeed, to extend the metaphor, it is as if we are generally adopting an approach that is more akin to just throwing kids in the deep end and waiting to see what happens. Educational initiatives are essential to rectifying this situation.²⁵

While the Commonwealth and State governments can play some part in educating children about safety online, ultimately the most effective anti-bullying intervention will be from the ground up. The most effective way to protect children from dangers online is to educate them, supervise them, and encourage them to share their experiences and worries with the adults in their life.

²⁵ Adam D. Thierer and Berin Szoka, "Cyberbullying Legislation: Why Education Is Preferable to Regulation," in *Progress on Point* (The Progress and Freedom Foundation, 2009).

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