Commissioner for Children & Young People

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10th February 2020

Online Safety Legislative Reform

As South Australia's Commissioner for Children and Young People, my mandate under the *Children and Young People (Oversight and Advocacy Bodies) Act 2016* is to advocate for the rights, interests and wellbeing of all children and young people in South Australia. My work is underpinned by the rights contained in the United Nations Convention on the Rights of the Child (CRC).

Since I commenced this position in 2017, I have spoken with thousands of children and young people about what is important to them. One of the key messages they tell me is that the online world is a significant part of their daily lives. It is another setting in which they live their lives, another place they visit in the same way they go to school, to their friend's homes, or to their local sports field.

Children and young people also tell me that they want to have the tools to access, understand and engage with the digital space and to feel empowered online. My *Hopes and Dreams* report highlighted that a lack of reliable, affordable and accessible internet is a key issue for children and young people, particularly in regional communities. This presents a significant barrier to education, training, job-seeking and social connection.

On the basis of these conversations, I included the "engagement and empowerment of young digital citizens" as a key focus area in my current strategic agenda: "All children and young people should be able to engage with the digital world, access its benefits equally, be digitally included and have their rights protected". At the core of my *Front and Centre Strategic Agenda* is moving beyond the rhetoric and truly placing the needs, interests and wellbeing of children and young people in our

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collective thoughts and actions. This involves including them in shaping and contributing to the decisions and services that impact their lives.

Balancing risk with opportunity and agency: A proactive, rights-based approach

The "Three Ps" that underpin the CRC are **provision, protection and participation.** When it comes to debates about the online space, there is a tendency to place a disproportionate emphasis on "protection", which results in a risk-based approach to online safety.

There are indeed very real and potentially serious risks associated with children's use of technology. However, a focus almost exclusively on risks and safety can undermine a child's right to participation, to freedom of expression, and to access information and the benefits of digital media. In 2018, the National Children's Commissioner wrote that a focus almost exclusively on safety reflects a "reactive, welfare-based" approach rather than a "proactive, rights-based" one:

> *The former perpetuates the concept of a child or young person as a passive recipient... the latter recognises the child or young person as a contributing citizen with human rights under civil or administrative law and international human rights instruments.*[i]

A growing body of research suggests that risk does not equate with harm.[ii] Rather, some level of exposure to risk enables children to develop digital literacy that is necessary to both minimise the potentially negative impacts of their online engagements and unlock more of the benefits for their social connection, education, health, civic engagement, as both individuals and members of communities.

This is backed up by what children and young people themselves are telling me. They want the tools to navigate online spaces and to feel empowered in doing so. Children also want to be able to trust technology companies, service providers and the websites that they visit to not try to take advantage of them and their right to privacy.

We therefore need a balanced approach that can protect children and young people from harm while simultaneously empowering them to access and understand information online safely. In seeking to protect children and young people online, the focus should be on developing children's digital literacy,

awareness, resilience, and capacity to manage risks as well as breaking down communication barriers between adults and young people.

Agency is just as crucial as safety online. Children and young people should be empowered to think critically and develop their own views, language and strategies, not only as consumers and users, but also as "makers" in the digital space. Without agency, children and young people cannot benefit from the opportunities nor develop resilience when facing risks. Balancing children's provision, protection and participation is complex. However, **the perspectives and valuable expertise of children and young people should not be overlooked in meeting this challenge.**

The Online Safety Legislative Reform discussion paper is framed in terms of what concerns parents and carers. These concerns are valid and certainly need to be taken into account. However, the voices of children and young people are largely missing. This is significant because **the challenges identified by children and young people are not always the same as those that dominate adult discourses or inform public policy and regulations.**

For example, one key message that has emerged during my consultations with children and young people is that they do not use the term "cyber". It appears to be an adult construct. Many children and young people also expressed feeling like the adults in their lives do not understand or appreciate the importance of their online relationships. Furthermore, while children value their privacy online, they see risks to their privacy coming from both outside their sphere (from governments and businesses) as well as from within their own sphere (overprotective or oversharing parents). These examples highlight the urgent need to understand digital media through children's eyes and enact child-centred definitions of rights, risks and opportunities online.

Addressing online bullying: Solutions recommended by children and young people themselves

Although the media treats bullying and "cyberbullying" as separate issues, children and young people themselves do not make such a distinction. During my consultations with children and young people about bullying, one group spoke of how they believed the term "cyber" – and "cyberbullying" in particular – evolved from a different, "adult" understanding of young people's world:

> *Older people's perception of the internet is that it's a different world ... However for the younger it's become part of our world and it is just bullying.*

Where the children and young people I consulted spoke of bullying as likely to occur through technology, in more than 90% of instances they described it as also happening in person.[iii] Andrew Przybylski of the Oxford Internet Institute reiterated the point that "bullying is bullying" and online is just another place where it happens when he told the BBC: "If you're a parent or you're running a school or designing an intervention, [online and offline bullying] are two sides of the same coin".[iv]

Technological solutions alone are insufficient. Given that evidence suggests that bullying online is commonly an extension of face-to-face bullying, the recommended solutions reported in my *Bullying Project* report are applicable to online bullying too.

Reframing online safety as respect

During my consultations about bullying, children and young people expressed a belief that being kind – including being kind to the bully – is a more effective strategy than exclusion or punishment. They also reported that having positive and safe relationships with friends is an important part of bullying prevention.

Children and young people understand the complexity of social relationships, recognising that the roles of "bully", "bullied" and "bystander" are interchangeable and dynamic, and that many people who bully are often vulnerable themselves. Children and young people overwhelmingly expressed a desire to be taught how to have difficult relationships and support each other.

Children and young people tell me that what concerns them online is not so much the technology-related issues but rather the human and relationship issues about who and what to trust online. Reframing bullying – online and offline – as a health and wellbeing issue about healthy relationships and respect should therefore be a key part of a solution. We need to create connected communities, online and offline. Breaking down communication barriers between children and adults, and building a greater understanding of the issues of online safety is crucial in this regard.

The importance of education and support for children and young people and their families and friends

The eSafety Commissioner's 2017 *State of Play* report highlighted that a significant majority (71 per cent) of young people who had negative online experiences sought help in an informal capacity through family and friends. If this is the case, friends and families need to be informed and themselves supported in order to have conversations with, and provide the best possible support to children and young people.

A 2016 poll of young people conducted by the New South Wales Advocate for Children and Young People (ACYP NSW) found that the most popular strategy used by parents to manage their child's internet use was friending their child on social media. This was reported to be more common than discussing online safety concerns and talking to their child about their use of the internet. However, this raises questions about a child's right to privacy (Article 16 of the CRC) and ultimately reinforces the importance of a rights-based approach to online safety.

This highlights the need for education that starts early and is not limited to schools. Active shared family screen time should be encouraged for children, parents, carers and families as a way of raising awareness about healthy internet use and emphasising positive and empowering online interactions.

What happens when children and young people feel empowered online?

Case study: Commissioner's Digital Challenge

I have recently launched the latest in my series of free digital challenges, which are all about providing children and young people with the skills they need to become empowered and engaged digital citizens. In the 2020 *Space to Dream* digital challenge, children and young people learn how to use the 5-step design thinking process in order to invent a toy or gadget for a person their age who is travelling to Mars.

The Challenge seeks to reach and engage children who are not at school or who attend schools that are not engaging in digital learning. Children and young people can complete the challenge inside or outside of school, through public libraries, Scouts, Girl Guides, Children's University Adelaide, or at home with their families. It is

offered in the broader community to highlight the importance of community involvement in education, engagement and participation.

The following quotes from children who took part in the 2019 challenge demonstrate how children and young people feel when they are supported and empowered to develop digital skills:

> *We completed a coding program which was very beneficial to us in adapting to the world around us ... We can't wait for the future!*
>
> - Student from Westport Primary School

> *I think if others tried it, their coding brain would get stronger and be able to cope with other challenges in other subjects.*
>
> - Student from Marion Primary School

Space to Dream follows my 2019 *Learn to Speak Robot* Challenge, which focused on digital thinking (coding and computational thinking). An estimated 19,026 children took part in the 2019 challenge across 217 schools, 31 libraries, various community groups, and at home with families. Future challenges will be designed to expand across core areas of the digital learning journey with a systems thinking, digital literacy and digital citizenship component.

Further recommendations in response to the Online Safety Legislative Reform Discussion Paper

There are no simple solutions to the complex issues associated with online safety. The wide range of issues requires a diversity of responses, behavioral, cultural and educational. Technological and legislative solutions alone are insufficient. Children and young people want to be involved and take responsibility for helping to make the internet a better and safer place. They have valuable expertise to contribute to what should be an ongoing conversation geared towards shaping an appropriate response. An effective framework should therefore involve collaboration between children and young people themselves, governments, organisations, schools, families and the private sector.

No penalty framework for children: Penalising children and young people is ineffective

Although the Discussion Paper states that it does not propose to extend the penalty framework of the cyber abuse scheme for adults to the cyberbullying scheme for children (page 33), I am concerned that Question 14 in the Discussion Paper opened up this point as a matter of debate: "Should the penalties differ under a cyber-abuse scheme for adults and the cyberbullying scheme for children?"

I strongly advise that children should **not** be subject to the same penalty framework as adults. It is illogical to hold children to the same standard of responsibility as adults. There is strong evidence now that shows children and young people are still developing the capacity to understand consequences, which has implications for how they understand the gravity of their actions. Until children and young people can develop an adult understanding of "right" or "wrong", legal or illegal, we must ensure that we are facilitating their growth and development in society in an inclusive way rather than inhibiting it through punitive penalty frameworks.

Although the children and young people I consulted as part of my bullying project believed that there should be consequences for bullying, they also believed that punitive and criminalising responses have little preventative impact for children and young people. Situational, child-specific responses that have a restorative focus are more effective than punitive and criminalising responses. This is in line with international research about the relationship between anti-bullying legislation and rates of bullying, which emphasises that legislation is only one part of a solution, and the effectiveness of laws is dependent on other strategies in place.[v]

Children and young people's rights should be embedded in the digital environment, by design and by default

For the potential of digital technology to be realised, it needs to be proactively directed (rather than retroactively adapted) towards the promotion of children and young people's rights. As the 5Rights Foundation makes clear:

> *In an interconnected world, if children and young people's rights are not upheld in one environment, they are denuded in all environments.*[vi]

The 5Rights Foundation distinguishes between four different types of risk:

- "Content" risks (e.g. exposure to harmful or age-inappropriate material);
- "Contact" risks (e.g. exposure to unsolicited contact from adults);
- "Conduct" risks (e.g. online bullying);

- "Contract" risks (e.g. data harvesting, commercial pressure).

The proposals presented in the Discussion Paper address some of the content and conduct risks. However, contact and contract risks require equal attention. This is particularly important in light of the results of a poll I conducted with 13-17 year olds. The second most important issue after "bullying" was "creepy adults".

The onus should be on companies

Self-regulation by social media and technology companies has failed. The effectiveness of opt-in tools and filtered services is limited insofar as they place the onus on the public rather than the companies. The government needs to consider a legally enforceable duty of care to make companies and service providers take more responsibility for the safety of their users, particularly children and young people. In the UK, the 2019 *Online Harms White Paper* proposed new online safety laws that introduced an independent regulator to prioritise the principle of "safety by design" and place the onus on companies to meet the legal duty of care.

The Australian government should require social media and technology companies to adopt minimum safeguarding standards for children and young people so that the sites, games and apps they use are free from harm. These standards should include default high-privacy settings and mandatory transparent and effective reporting and complaints handling. Mandating transparency is an important step in strengthening accountability and public trust in the system. Trust is a key issue identified by children and young people, and an important basis of safety and privacy.

Language should be child-friendly

I mentioned earlier that many children and young people have told me that they do not use the term "cyber". Rather, they see it as an adult construct. This example highlights the importance of adopting child-friendly, accessible language. The government should consider mandating terms and conditions that are written in child-friendly language to ensure that people and companies know their rights and responsibilities. The use of child-friendly language leads to better outcomes in terms of access, inclusion and engagement for young people, which ultimately has the potential to improve outcomes related to trust and safety. Child-friendly language should also be used in all educational programs and materials in light of the

evidence that those who treat children and young people as passive have proven to be less effective.

Facilitating children and young people's participation to achieve better engagement, impact and sustainability

A rights-based approach means also involving children and young people in the design and delivery of new frameworks, policies and educational programs and materials. Facilitating children and young people's participation through co-designed, peer-led programs and formal feedback mechanisms is likely to achieve better impact, engagement and sustainability.

On the role and functions of the eSafety Commisioner: the online content scheme and take-down powers

The main focus of the eSafety Commissioner has been to provide recourse for those who have tried to have material removed by social media providers. The current framework does not allow the eSafety Commissioner to use take-down powers for content hosted overseas. I support the proposed change to extend the take-down powers in the revised online content scheme to content hosted overseas. I also support the proposal to reduce the take-down period from 48 hours to 24 hours.

The eSafety Commissioner was initially established in 2015 with functions related primarily to online safety for children. The expansion of the eSafety Commissioner's role to protect "all Australians" in 2017 has been widely supported for enabling serious issues involving adults online to be addressed. However, now that children and young people are grouped together with adults, there is a risk that children and young people may receive less attention, and that more emphasis will be placed on the regulatory functions of the eSafety Commissioner (which have the potential to be more criminalising and punitive, particularly for children and young people) at the expense of the Commissioner's educational and empowerment functions. As the secretary of the UK's Children's Charities Coalition on Internet Safety (CHIS) John Carr puts it:

> *When terrorism, hacking and fraud are such major national security concerns, child protection seemingly slips down the list of priorities.*[vii]

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A new *Online Safety Act* should therefore ensure that the focus remains on prevention and education rather than on dealing with the consequences.

There should be measures in place, to ensure that appropriate action is taken when children and young people do file formal reports, to ensure that the promise that something will be done (and support will be available) when children and young people report an incident is a real promise rather than a false one.

The eSafety Commissioner's 2017 *State of Play* report noted that only 24 per cent of young people who had negative online experiences sought help in a formal way. This highlights the need to reframe help-seeking as a strength rather than a weakness, and as something that is goal-oriented and meaningful, done for one's wellbeing rather than just in response to a problem. Reframing help-seeking as a strength would help break down some of the barriers that young people face when reporting and accessing support, including feelings of shame and embarrassment, fear of retaliation and a fear of not being believed. This would ultimately foster trust in the government and system.

I hope these recommendations are helpful. If you have any questions, please do not hesitate to contact me.

Yours sincerely,

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[i] National Children's Commissioner, "Call for Submissions for an Independent Report to the UN Committee on the Rights of the Child About Australia's Implementation of the CRC, OPSC AND OPAC", 28 May 2018, p. 3.
[ii] Young and Well Cooperative Research Centre, "Children's Rights in the Digital Age: A download from children around the world" Digital Rights Around the World", September 2014, p. 13; Sonia Livingstone (2013), "Online Risk, Harm and Vulnerability: Reflections on the Evidence Base for Child Internet Safety Policy" *ZER: Journal of Communication Studies* 18, pp. 13-28; Green et al. (2011), "Risks and Safety for Australian Children on the Internet: Full Findings from the AU Kids Online Survey of 9-16 Year Olds and Their Parents," Melbourne: ARC Centre for Creative Industries and Innovation.
[iii] CCYP SA, "The Bullying Project", 2018, p. 25.
[iv] UNICEF, "The State of the World's Children 2017: Children in a Digital World", p. 80.
[v] See Appendix One of Commissioner for Children and Young People SA, "The Bullying Project: What South Australian children and young people have told us about bullying", 2018. On the effectiveness of anti-bullying laws in the United States, see A. Waldman (2018), "Are Anti-Bullying Laws Effective?" *Cornell Law Review Online* 103, pp. 135-154.
[vi] 5Rights Foundation, "Children and Young People's Rights," https://5rightsfoundation.com/our-work/childrens-rights/, Accessed 4 February 2020.
[vii] Cited in eChildhood's Commentary on the NTIA's International Internet Policy Priorities for 2018 and beyond", 17 July 2018.