
New South Wales
Council for
Civil Liberties

**New South Wales Council for Civil Liberties Inc**

149 St Johns Road
Glebe NSW 2037
Australia
Ph 61 2 9660 7582
Fax 61 2 9566 4162

**Correspondence to:**

PO Box 201
Glebe NSW 2037
Australia

DX 1111 Sydney
Email office@nswccl.org.au
www.nswccl.org.au

Friday, 25 November 2005

The Manager
Content, Credit Management & Infrastructure
Australian Communications & Media Authority
PO Box 13112 Law Courts
Melbourne VIC 8010

**by email**: mobilecontent@acma.gov.au

Dear Sir/Madam,

**Re: Draft Safety Measures Notice**

The New South Wales Council for Civil Liberties ('CCL') thanks the ACMA for the opportunity to comment on the draft Safety Measures Notice ('the draft') pursuant to section 4.1 of the *Telecommunications Service Provider (Mobile Premium Services) Determination 2005 (No.1)*.

CCL is concerned that the draft recommends excessive restrictions on the freedom of expression of both children and adults. CCL is also concerned that the draft violates the right to privacy of both children and adults.

As noted in part two of the draft:

> Mobile chat rooms are an increasingly useful medium for communication and social networking and are especially used for these purposes by young people.

As such, it is important that any restrictions on, or interference with, a person's ability to communicate using such chat rooms are strictly limited to those measures necessary to achieve a legitimate goal.

While it is important to ensure children are protected from sexual predators, CCL believes that the 'risk management' approach endorsed by the draft leads to a disproportionate outcome. CCL believes that the education and awareness measures proposed in Part 4.1.1 of the draft will ultimately be more effective in protecting children from paedophiles than the more intrusive and restrictive 'measures to address specific risks' proposed in Part 4.2 of the draft.

**general principle**

Freedom of expression is a fundamental human right. It is enshrined in article 19(2) of the *International Covenant on Civil and Political Rights* ('ICCPR'):

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

This right inheres to both adults and children. Article 13 of the *Convention on the Rights of the Child* ('CROC') guarantees children freedom of expression in the same terms as the ICCPR. The ICCPR and CROC also guarantee freedom from arbitrary interference with privacy and correspondence.[1]

These freedoms are, of course, not absolute. For example, both the ICCPR and CROC permit laws that restrict speech, where necessary, to protect *inter alia* public order and morals. CROC also obliges governments to protect children from all forms of sexual exploitation and sexual abuse.[2] The operation and application of laws that restrict fundamental freedoms must, however, be 'necessary and proportionate to the goal in question and not arbitrary'.[3]

As a matter of principle, therefore, restrictions on the freedom of expression and interference with the right to privacy on mobile chat rooms should be limited to those measures that are necessary and proportionate to the protection of children from exploitation. CCL believes that the draft represent a disproportionate response to the perceived threat, and fails to strike the right balance between protecting children and upholding fundamental rights.

**protecting children from sexual exploitation**

According to a study of child sexual assault prosecutions in New South Wales, most child victims know their attackers: 46% are assaulted by family members and a further 44% by adults known to the family.[4] Only 5% of convicted offenders were strangers to the child. These statistics suggest that the actual danger to children from strangers in mobile chat rooms is significantly less than the danger in the family home or in the company of family friends.

It is a federal criminal offence to use a telecommunications service, such as mobile chat rooms, to procure a child under 16 for sexual activity or to groom a child under the age of 16 for sexual activity.[5] This is consistent with the internet-related recommendations

---

[1] ICCPR article 17; CROC article 16.
[2] CROC article 34.
[3] *Gauthier v Canada* (2003), UN Human Rights Committee, UN Doc. CCPR/C/78/D/941/2000 (12 August 2003), [13.6].
[4] P Gallagher, J Hickey and D Ash, *Child Sexual Assault: An Analysis of Matters Determined in the District Court of NSW During 1994* (1997) quoted in Brown, Farrier, Egger & McNamara, *Criminal Laws* (2001, 3rd edition) 938.
[5] *Criminal Code 1995* (Cth) ss 474.26 (procuring) & 474.27 (grooming).

of the Wood Royal Commission investigation into paedophilia in NSW.[6] The federal criminal offences attract substantial maximum sentences ranging from twelve to fifteen years imprisonment. This suggests that the criminal justice system is already well-equipped to deal with paedophiles who use mobile chat rooms to exploit children.

**arbitrary restrictions on exchanging information**

CCL believes that the emphasis throughout the draft on preventing users from exchanging contact details and personal information is misconceived. This approach ignores the fact that exchanging such information is, for both adults and children, a natural and normal consequence of social interaction. Mobile chat rooms are just another medium through which human beings communicate and it is outrageous to suggest that every exchange of a person's contact details is illegitimate and should be stopped. The policy of restricting everyone in a chat room from communicating their contact details to others because paedophiles might use the same method to procure children is disproportionate in the extreme.

The draft would prohibit a message like "The execution of Van Nguyen is outrageous. Call the PM's office on 98765432 to protest" or "call me on 0412345678 when you get to the political rally". Arguably, the filtering of such messages also violates the constitutional right of every Australian to freedom of political communication.[7]

The proposed blocking of numbers with more than three digits is also arbitrary. For example, it would be impermissible to write a message like "the Battle of Hastings was fought in 1066". How does this serve the end of protecting children from sexual exploitation?

**education: the best defence**

CCL believes that education is the best defence against sexual exploitation of children, and supports in principle education programs as recommended in Part 4.1.1 of the draft. These programs should encourage children to report suspicious activity to a responsible adult. They should also alert children to the dangers of arranged meetings with strangers, if not accompanied by a responsible adult. Children and parents should be educated to recognise and report criminal activity to the appropriate authorities. This also ensures that a child sexual predator is identified and dealt with according to law, rather than simply diverted into another medium of exploiting children.

At the same time, it is important that education programs do not exaggerate the dangers involved. As already mentioned above, the risk of abuse from a stranger is low when compared to the risk from a family member of close family friend. The vast majority of mobile chat room users are legitimate and there is no reason to discourage totally the exchange of photos, contact details or personal information provided sensible precautions are taken.

CCL is willing to assist the ACMA in preparing appropriate educational resources along these lines.

---

[6] The Hon Justice JRT Wood, *Royal Commission into the NSW Police Service Final Report: Volume V – The Paedophile Inquiry* (1997) [16.27].

[7] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

**moderation and monitoring: disproportionate responses**

In Part 5, the draft Notice outlines proposals to moderate and/or monitor mobile chat rooms. This involves people reading *all* messages posted in the chat rooms. This includes messages created by adults and messages posted in private chat rooms. CCL is concerned that this constitutes an arbitrary interference with the right of adults and children to express themselves to each other.

Moderation and monitoring also represents a gross violation of the right to privacy, particularly in one-to-one chat rooms. No carriage or content service provider has the right to interfere in the communication and/or correspondence of the users of its services. Only law enforcement officers with court-ordered telecommunications and listening device warrants should be permitted to do this.

The blocking of sexually explicit material in one-to-one chat rooms between adults is also arbitrary. It restricts consenting adults to the level of expression suitable for the viewing of children. For example, in the United States it is a constitutionally-recognised principle that "speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it".[8] To hold otherwise would impermissibly "reduce the adult population…to reading only what is fit for children".[9] The draft seeks to prohibit the criminal conduct of paedophiles, but the restrictions it imposes go well beyond that objective by restricting the speech of law-abiding adults *and* children.

**electronic filtering**

Part 5 of the draft also canvasses the electronic filtering of every message in a mobile chat room. While this form of surveillance is less invasive because it is automated, it is more restrictive because it is impossible to read messages in context and innocent messages will inevitably be filtered.

Furthermore, electronic filtering, no matter how sophisticated, will not be adequate to distinguish between legitimate speech and paedophiles at work in chat rooms.

Electronic filtering would cast the net far too widely. For example, it is proposed that numbers more than two digits long should be filtered out. This will disproportionately prohibit vast amounts of legitimate communication. Such a policy would *prohibit* a message such as "JS Bach was born 320 years ago".

**limiting profile information**

An example of where a measure is proportionate to the response is in the restriction of the contact details of minors in publicly available profiles. Adults, of course, should be able to choose whether their telephone numbers or street addresses are publicly available. However, it is legitimate, given that profiles can be searched and downloaded, that a child's contact details are never publicly available.

---

[8] *Ashcroft v Free Speech Coalition* (2002) 535 U.S. 234, 252 (Kennedy J; joined by Stevens, Souter, Ginsburg & Breyer JJ).

[9] *Butler v Michigan* (1957) 352 U.S. 380, 383; quoted in *Ashcroft v Free Speech Coalition* (2002) 535 U.S. 234, 252.

However, it would be disproportionate to restrict details of age and free-form text posted by children. This is information that children could legitimately wish to search in order to find other children of a similar age with similar interests. Prohibiting children from using such a search functionality is excessive and limits a child's ability to use the technology to its full potential.

**conclusion**

The education of children and adults to the potential dangers of communicating in mobile chat rooms is the most effective way of balancing the legitimate concern to protect children from sexual predators and the rights of every person to freedom of expression and privacy.

The specific measures proposed in the draft Safety Measures Notice (particularly moderation, monitoring and electronic filtering) disproportionately restrict legitimate speech in mobile chat rooms. Restricting messages like "Australia was federated in 1901" is not a proportional response to the directive to 'minimise the potential for illegal contact between children and adults through the use of the chat room service'.[10]

If the ACMA would like CCL to expand on any of the points raised in this submission, please feel free to contact the authors through the CCL office.

Yours sincerely,

Michael Walton and Anish Bhasin
Committee Members
NSW Council for Civil Liberties

[10] Australian Communications Authority, *Telecommunications Service Provider (Mobile Premium Services) Determination 2005 (No.1)* Part 4.3(1)(a)(i)(B).