

A submission by AUARA to the Senate Legal and Constitutional
Affairs References Committee

Inquiry into the adequacy of existing offences in the Commonwealth
Criminal Code and of state and territory criminal laws to capture
cyberbullying

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**the australian
universities' anti-bullying
research alliance
(AUARA)**

About AUARA

This submission is by the members of AUARA, the *Australian Universities Anti-bullying Research Alliance*.

- We are internationally recognised educators, psychologists, academics, lawyers and researchers in the fields of social aggression, bullying and cyberbullying, mental health and wellbeing and children's peer relationships.
- We have a combined 80 years research experience leading, contributing to and drawing from the national and international evidence-bases related to the psychology of aggression and bullying, to translate that research into successful educational prevention and intervention strategies.

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We believe that the existing offences in the Commonwealth Criminal Code and of state and territory criminal laws that capture cyberbullying are adequate to deal with serious cyberbullying offences. We do not believe that it is necessary to enact specific laws that proscribe cyberbullying.

While the law has many purposes, the community may see a law criminalising cyberbullying as primarily a means of managing such incidents through punishment and retribution. However, considering the ages of young people who bully and cyberbully this is a potential problem. In Australia only children aged 14 years and older are deemed to have the requisite capacity to be legally responsible. By contrast, children below the age of 10 are not deemed capable of criminal intent while children between the ages of 10 and 14 may be criminally responsible if the prosecution can prove beyond reasonable doubt that the child knew he or she ought not to have committed the offence, as distinct from an act of mere “naughtiness or childish mischief.”¹ When it is borne in mind that 10% of children and young people report they bully others frequently,² many children and young people could potentially be criminalised by any new legislation. For example, children and young people may already be subject to sexting laws, which have been designed primarily for adult sex offenders. There is a highly persuasive argument to be made that prosecuting young people engaging in sexting in accordance with existing child pornography laws is entirely inappropriate, given the very serious purpose for which child pornography laws exist and the consequences of conviction under this legislation.³ Further, as Cornell and Limber⁴ observed in relation to the American experience, that in “recent years, there has been a shift toward increasing criminalization of bullying”. They continued:

There are multiple concerns with the criminalization of bullying. First, the concept of bullying may be too broad and subjective for reasonable application in the criminal justice system, especially because it encompasses behaviors engaged in by a large proportion of the population. A second concern is that the criminalization of school misbehaviour [sic] leads to higher rates of school disengagement, academic failure and dropout, and ultimately, involvement in the juvenile justice system.⁵

It may be thought that having a specific law against bullying and the fear of punishment may also serve as a deterrent effect. However, it would be naïve to think that simply having a law will curtail the behaviour. After all, there are longstanding and well publicised laws against speeding, but this has not stopped many drivers from speeding. Similarly criminal sanctions

¹ *C v DPP* [1996] 1 AC 1 and see *Criminal Code Act 1995* (Cth) s 7(1),(2); *Crimes Act 1914* (Cth) ss 4M, 4N; *Criminal Code Act 2002* (ACT) ss 25-26; *Children (Criminal Proceedings) Act 1987* (NSW) s 5; *Criminal Code* (NT) ss 38(1),(2); *Criminal Code 1899* (QLD) s 29(1),(2); *Criminal Code Act 1924* (Tas) s 18(1),(2); *Children and Young Persons Act 1989* (VIC) s 127; *Criminal Code Act Compilation Act 1913* (WA) s 29. See further Butler, D., Kift, S., Campbell, M.A., Slee, P., & Spears, B. (2011). School policy responses to cyberbullying: An Australian legal perspective. *International Journal of Law and Education*, 16(2), 7-28.

² Lawrence, D., Johnson S, Hafekost J, Boterhoven De Haan K, Sawyer M, Ainley J, Zubrick SR (2015). The mental health of children and adolescents. *Report on the second Australian Child and Adolescent Survey of Mental Health and Wellbeing*. Department of Health, Canberra.

³ Langos, C. (2012). Cyberbullying: The challenge to define. *Cyberpsychology, Behavior, and Social Networking*, 15, 285-289.

⁴ Cornell, D.G., & Limber, S. P. (2016). Do U.S. laws go far enough to prevent bullying at school? *Continuing education Corner*, 47, 64-68.

⁵ *Ibid* 64.

against drug use and underage sex do not deter young people from engaging in such conduct.⁶ There is also evidence from America that shows that criminalisation of school bullying has not resulted in a decrease in the behaviour.⁷ Young people typically have a reduced capacity to appreciate the risk of injury that may result from their actions and may have a tendency to act impulsively.⁸ The potential deterrence effect of specific laws in the context of bullying and cyberbullying may therefore be overstated.

It is interesting to note that the general public in Australia has *not* called for laws to be changed to prevent or punish students who bully face-to-face, despite its perennial existence in the schoolyard. Instead it is only since bullying has been able to be facilitated by technological means that broad debates about the law and bullying have surfaced in the public consciousness.⁹

There could be several reasons for this. The first may be that adults have not grown up with technology and often feel they do not understand the online and mobile environments which young people inhabit. They have had no experience of cyberbullying themselves and so may feel a lack of control when confronted with this phenomena.¹⁰

Secondly, there is the constant media attention that cyberbullying attracts and especially the links that the media draws between bullying, cyberbullying and suicide. The coining of the word “bullicide” illustrates this suggested link. However, suicidal intent is a complex, multi-faceted pathway and the relationship between bullying and suicide is not clear, with most who are bullied or cyberbullied not taking this course of action.¹¹ However, it is well established that bullying and cyberbullying are associated with mental health problems and other negative social, academic and physical outcomes in young Australians.¹²

Thirdly, cyberbullying has the capacity to reach the target anywhere, anytime. Not even the target’s home now offers a safe haven against such behaviour.¹³

⁶ Campbell, M.A., & Zavrnsnik, A. (2013). Should cyberbullying be criminalized? In P. Smith & G. Steffgen (Eds.), *Cyberbullying through the new media: Findings from an international network* London: Psychology Press 65-82.

⁷ Coyne, I., & Campbell, M. A. (2017). Preventing bullying in school and work contexts. *Oxford Research Encyclopedia of Criminology and Criminal Justice*.

⁸ Slee, P.T., Campbell, M., & Spears, B. (2012). *Child, Adolescent & Family Development*. Cambridge University press, Melbourne

⁹ Spears, B.A., Slee, P.T., and Huntley, J. (2015). *Cyberbullying, Sexting and the Law*. A report for the Minister for Education and Child Development.

¹⁰ Campbell, M.A., & Zavrnsnik, A. (2013). Should cyberbullying be criminalized? In P.K. Smith & G. Steffgen (Eds.), *Cyberbullying through the new media: Findings from an international network* London: Psychology Press. 65-82.

¹¹ Hinduja, S., & Patchin, J.W. (2010). Bullying, cyberbullying, and suicidal ideation. *Archives of Suicide Research, 14*, 206-221.

¹² Spears, BA, Taddeo, CM, Daly, AL, Stretton, A & Karklins, LT (2015) Cyberbullying, help-seeking and mental health in young Australians: Implications for public health. *International Journal of Public Health, 60*(2) 219-226.

¹³ Butler, D., Kift, S. & Campbell, M. (2010) “Cyber Bullying in Schools and the Law: Is there an Effective Means of Addressing the Power Imbalance?” *eLaw Journal: Murdoch University Electronic Journal of Law* Vol 16 Issue 1, 84-114.

One forum that carefully examined ways of reducing bullying by legal solutions was the *Bullying, Young People and the Law* symposium, held in Melbourne, Australia, 2013. The symposium was attended by pre-eminent legal, law enforcement and educational experts from Australia and New Zealand.

Its recommendations were to introduce an appropriate legal framework to address bullying and cyberbullying in Australia, to establish a national digital communication tribunal and to continue to provide education about bullying prevention and management. Public consultation was also called for by the Federal Department of Communication in 2014 to explore options under Commonwealth legislation to deal with cyberbullying, eventually leading to the decision by the government to *not* criminalise young people for bullying or cyberbullying.¹⁴ Instead, the *Enhancing Online Safety for Children Act 2015* was enacted which established the Office of the Children's e-Safety Commissioner to support young people and their families through education, the provision of resources, a comprehensive complaints system, and a two-tiered scheme for the removal of cyberbullying material from participating social media services. Alongside these, the Commissioner has the power to issue notices to individuals to take down offensive material, refrain from posting and apologise to the targeted young person.

An additional study specifically garnered the views of Australian education employees' perceptions of cyberbullying and the law.¹⁵ All the interviewees held senior authoritative positions in either education or the law or both, and were responsible for either creating or enacting policy in relation to bullying and cyberbullying in educational settings. Overall, participants were divided in their support for the introduction of a specific law for cyberbullying. Participants identified many sanctions which they thought would be appropriate for children and adolescents who persist in cyberbullying; such as mediation, victim impact statements, family conferences, bonds, cautions and taking a juvenile justice team approach.

We recognise that there may be some behaviours that are so extreme that they warrant criminal sanction. In our submission the existing array of Commonwealth laws concerning misuse of the telecommunications system¹⁶ and State/Territory dealing with matters such as stalking,¹⁷

¹⁴ Katz, I., Keeley, M., Spears, B., Taddeo, C., Swirski, T. & Bates, S. (2014) *Research on youth exposure to, and management of, cyberbullying incidents in Australia (SPRC Report 16/2014)*. Sydney: Social Policy Research Centre, UNSW Australia June 2014 <https://www.communications.gov.au/publications/research-youth-exposure-and-management-cyber-bullying-incident-australia-synthesis-report-june-2014>

¹⁵ Young, H., Campbell, M., Spears, B., Butler, D., Cross, D., and Slee, P., (2016) Cyberbullying and the role of the law in Australian schools: Views of senior officials *Australian Journal of Education* 60(1) 86-101.

¹⁶ *Criminal Code 1995* (Cth) s 474.17 (using a carriage service to menace, harass or cause offence); see also *Criminal Code 1995* (Cth) ss 474.15 (using a carriage service to make a threat), 474.16 (using a carriage service for a hoax threat).

¹⁷ See *Crimes Act 1900* (ACT) s 35; *Crimes Act 1900* (NSW) s 545B; *Criminal Code 1983* (NT) s 189; *Criminal Code 1899* (Qld) s 359A; *Criminal Law Consolidation Act 1935* (SA) s 19AA; *Criminal Code Act 1924* (Tas) ss 192, 192A; *Crimes Act 1958* (Vic) s 21A and *Criminal Code 1913* (WA) ss 338D, 338E; *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 8, 13.

assault,¹⁸ and criminal defamation¹⁹ are sufficient to address those cases.²⁰ However, cyberbullying like all other forms of bullying, is a complex relationship problem which is deeply embedded in our society and which requires equally complex social and behavioural responses and interventions. Some young people have social and emotional health problems, while others are characterised by impulsive and over-reactive and emotionally unstable behavioural patterns. This highlights that bullying and cyberbullying is a health-related concern and that young people who perpetrate need help to support changing their behaviours, not punishment.²¹ It has been demonstrated that a multi-faceted, tiered, community-based approach is needed to educate everyone, that bullying of any kind is unacceptable.²² In our view a specific criminal law proscribing cyberbullying is not necessary, when there are already in place more appropriate measures to address this behaviour. Such a law would likely not deter young people and could possibly do more harm than good. This behaviour should instead be dealt with as a public health problem with educational solutions.²³

¹⁸ See *Criminal Code Act 2002* (ACT) ss 26, 26A; *Crimes Act 1900* (NSW) s 61; *Criminal Code 1983* (NT) ss 187(b), 188; *Criminal Code 1899* (Qld) ss 245, 335; *Criminal Law Consolidation Act 1935* (SA) s 20; *Criminal Code Act 1924* (Tas) ss 182(1), 184; *Crimes Act 1958* (Vic) s 31; *Criminal Code 1913* (WA) ss 222, 313.

¹⁹ See *Criminal Code Act 2002* (ACT) s 439; *Crimes Act 1900* (NSW) s 529; *Criminal Code 1983* (NT) s 204; *Criminal Code 1899* (Qld) s 365; *Criminal Law Consolidation Act 1935* (SA) s 257; *Criminal Code Act 1924* (Tas) s 196; *Criminal Code 1913* (WA) s 345. In Victoria the common law concerning criminal defamation subsists but is supplemented by a statutory offence of “criminal libel”: see *King v R* (1876) 2 VLR 17; *Wrongs Act 1958* (Vic), s 10(1).

²⁰ See generally, eg, Kift, S., Campbell, M. and Butler, D. (2010) “Cyberbullying in social networking sites and blogs: legal issues for young people and schools” *Journal of Law, Information & Science* 20(2) 61-99.

²¹ Burns, S., Cross, D., Alfonso, H., & Maycock, B. (2008). Predictors of bullying among 10-11 year old school students in Australia. *Advances in School Mental Health Promotion*, 1(2), 49-60.

²² Ttöfi, M. M., & Farrington, D. P. (2011). Effectiveness of school-based programs to reduce bullying: A systematic and analytic review. *Journal of Experimental Criminology*, 7, 27-56.

²³ Such as the *National Safe Schools Framework*, the overarching safety and wellbeing policy framework for all schools in Australia (<https://studentwellbeinghub.edu.au/parents/national-safe-schools-framework#/>), and resource development, such as the *Resilient and Inclusive Classrooms* professional Learning Module on the Student Wellbeing Hub, which includes many practical ideas for teachers concerning dealing with bullying (<https://www.studentwellbeinghub.edu.au/educators/professional-learning/resilient-and-inclusive-classrooms#/>).