Law Council
OF AUSTRALIA

Office of the President

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Senator Louise Pratt
Chair
Legal and Constitutional Affairs References Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

Dear Senator Pratt

Response to questions on notice: the adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying

On 9 February 2018, the Law Council appeared before the Senate Legal and Constitutional Affairs References Committee (**the Committee**) in relation to its inquiry into the adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying.

In the course of providing evidence, Law Council representatives were asked to take on notice two questions. The first question related to whether section 474.17 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**) should be clarified to capture the situation which arose in *Monis v R; Droudis v R (2013) 249 CLR 92* (***Monis***). The second related to whether legislative amendment is required to place additional legal obligations on social media service providers in relation to cyberbullying.

This supplementary submission provides further input to the Committee on the Law Council's view in relation to the above questions.

Meaning of offensive and harassing

The Hansard transcript of this exchange reads as follows:

> *Senator PATRICK: You talked about the offence relating to the use of a carriage service in a manner that's menacing, harassing and so forth. You suggested the High Court had found that the degree must be serious. Did I hear that correctly?*
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> *Mr Moses: Yes. The test in relation to these matters is basically one where there has to be a seriousness element to it. That was in the Monis case. The authorities make it clear that, for the use of a carriage service to be criminally offensive, the degree of offensiveness must be serious.*

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Senator PATRICK: Did the court have a view of the temporal nature of that—for example, perhaps you could have individual uses that were not serious but persistent such as someone getting regular harassment or menacing over a period of time?

Mr Moses: My recollection in respect of that issue is it didn't arise in relation to the Monis case, which you may recall involved letters being sent to the families of service men and women. But to answer your question as a lawyer: in my view that could certainly fit within that type of test. I would have thought that, if you have consistent and persistent messaging being sent to an individual, that may slide it into more than just hurt feelings on the part of a reasonable person and rather feeling that they are the subject of harassment in relation to matters engaging in some form of, I suppose, feeling that they've been targeted. Now, that's just my view, and you may form the view that that is something that may need to be looked at as to whether or not that may need to be clarified, but it's an interesting question you've raised. We will certainly look at it for you if you would like us to and draft a supplementary submission that may assist you in terms of the analysis of the High Court case in Monis and deal squarely with your question as to whether or not that would be caught by section 474.17. Would that assist you?

Senator PATRICK: Yes, that would be very useful. In some sense, in a scenario where you're suggesting the law doesn't require substantive change, perhaps clarification of the provision to capture that and maybe a suggestion as to how that provision might change would be useful.

The Law Council does not propose at this time that there should be legislative amendment to section 474.17 of the Criminal Code to provide clarification regarding the level of seriousness required for the offence to be made out. The number of charges and successful prosecutions under this provision, as outlined in the Attorney-General's Department's submission to the Committee, suggests that the offence provision appears to be operating reasonably effectively.

In *Monis* the appellant was charged with 12 counts of using a postal service in a way that reasonable persons would regard as being, in all the circumstances, offensive under section 471.12 of the Criminal Code (using a postal service or similar service to menace, harass or cause offence). The appellant allegedly sent communications to relatives of Australian soldiers and officials killed in Afghanistan and Indonesia. The communications criticised the deployment of Australian troops in Afghanistan in terms critical of deceased.

The questions before the High Court were: whether section 471.12 in its application to "offensive" uses of postal service effectively burdens implied freedom of political communication; and whether section 471.12 in its application to "offensive" uses of postal service is reasonably appropriate and adapted to a legitimate end in a manner compatible with the system of representative and responsible government.

The High Court was evenly divided and hence the New South Wales Court of Criminal Appeal decision that the section was valid was affirmed. Crennan, Kiefel and Bell JJ held that the section did not impermissibly intrude on the implied freedom of political communication.

Their Honours also held that the words "menacing" and "harassing" imply serious potential effect upon an addressee, one which cause an apprehension, if not a fear, for that person's

safety. For consistency, to be "offensive" a communication must be likely to have a serious effect upon the emotional well-being of an addressee.[1]

The construction of the word "offensive" for section 474.17 of the Criminal Code (using a carriage service to menace, harass or cause offence) is the same as that considered in *Monis*.[2] That is, to be offensive the communication must be likely to have a serious effect upon the emotional wellbeing of an addressee.

In relation to the term "harassing", the Queensland Court of Appeal in *R v Ogawa* [2009] QCA 307 held that continual making of unwanted telephone calls would fall into the category of harassing.

Given that the judiciary has interpreted the terms in section 474.17 in the above manner and the offence provisions appear to be operating reasonably effectively, the Law Council does not see a particular need to amend the provision in accordance with judicial authority.

Legal obligations on social media services to prevent cyberbullying

The Hansard transcript of this exchange reads as follows:

> *Mr Moses: I think your question, Senator, is directed to whether there's specific legislation that, in effect, places obligations on these types of entities or platforms to prevent certain conduct in relation to cyberbullying. Is that your question?*
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> *Senator PATRICK: Yes, that's correct. I'm wondering if maybe, as part of your supplementary, you could look at whether or not something that places a positive obligation may be useful, although I note that Facebook doesn't pay a lot of tax even though the law says it should.*
>
> *Mr Moses: I won't comment on that.*
>
> *Senator PATRICK: Sure.*
>
> *Mr Moses: In relation to our submission, we will do two things. We will look at what the current law is in relation to obligations on these types of entities. Secondly, if it would be useful, we will make some suggestions as to any legislative amendments that could be drafted to place obligations on these entities. So we'll look at that as well.*
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> *Senator PATRICK: That would be appreciated.*

The Law Council notes that the *Telecommunications Act 1997* (Cth) (**the Telecommunications Act**) will generally not be applicable to social networking sites, as they are not carriage service providers. Section 313 of the Telecommunications Act states that a carrier or carriage service provider must, in connection with their operations or the supply of carriage services, do the carrier's best or the provider's best to prevent telecommunications networks and facilities from being used in, or in relation to, the commission of offences against the laws of the Commonwealth or of the States and Territories.[3] A carriage service intermediary must also do their best to prevent telecommunications networks and facilities from being used in, or in relation to, the

[1] *Monis v R; Droudis v R* (2013) 249 CLR 92, [310].
[2] *Brown v Director of Public Prosecutions* [2016] NSWCA 333, [5].
[3] *Telecommunications Act 1997* (Cth) s 313(1).

commission of offences against the laws of the Commonwealth or of the States or Territories.[4]

The Telecommunications Act also places an obligation on carrier, carriage service providers and carriage service intermediaries to give law enforcement authorities help as is reasonably necessary for the purposes of enforcing criminal laws and laws imposing pecuniary penalties, assisting the enforcement of the criminal laws in force in another country, protecting the public revenue, and safeguarding national security.[5] The section also provides an exemption from liability for carrier or carriages services that act in good faith under sections 313(3) or (4).[6]

Social media sites including Twitter, Facebook and Instagram have their own private, direct messaging applications, that are similar to texting or SMS messaging. Some of these messaging applications that social media services own or are affiliated with may be regulated carriage service providers and hence caught by the Telecommunications Act obligations.

As outlined in the Law Council's initial submission to the Committee, the *Enhancing Online Safety Act 2005* (Cth) (**Enhancing Online Safety Act**) creates a civil penalty regime for social media services. The Law Council is supportive of the current tiered regime under the Enhancing Online Safety Act, however, submitted that it could be improved with the following recommendations:

(a) the distinction between tier 1 and tier 2 social media services in the Enhancing Online Safety Act should be maintained. However, the 12 month period in which a non-compliant tier 1 service is downgraded to a tier 2 service may be too long and may lead to serious consequences occurring from cyberbullying. The Law Council recommends that the eSafety Commissioner be given a discretion to remove a service's 'tier 1' status, after a shorter period of time, if the provider has clearly failed to remove material that has potentially serious consequences; and

(b) the tier 2 enforcement scheme should be expanded to permit the Commissioner to enforce requests for removal of content from small service providers.[7]

The civil penalty available under the Enhancing Online Safety Act has not yet been used. The eSafety Commissioner submitted to the Committee that when the Office has approached a social media service to remove cyberbullying content, the service has complied with this request on every occasion. The Commissioner has therefore never issued a formal written notice. They submitted that 'the Office's experience with social media services to date has been largely positive – with the terms of use adequate to capture cyberbullying'.[8]

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[4] Ibid ss 313(2).
[5] Ibid ss 313(3)-(4).
[6] Ibid ss 313(5)-(6).
[7] Law Council of Australia, submission to the Senate Legal and Constitutional Affairs References Committee, *The adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying* 20 October 2017 https://www.lawcouncil.asn.au/resources/submissions/the-adequacy-of-existing-offences-in-the-commonwealth-criminal-code-and-of-state-and-territory-criminal-laws-to-capture-cyberbullying
[8] Office of the eSafety Commissioner, Submission No. 13 to the Senate Legal and Constitutional Affairs References Committee *Submission to the Parliamentary inquiry into the adequacy of existing offences in the*

Accordingly, the Law Council does not consider that there has been a demonstrated need at this time to impose a positive obligation by way of a criminal penalty on social media services to remove cyberbullying content from their platform.

Thank you for the opportunity to provide a supplementary submission on these matters.

Please contact Dr Natasha Molt, Deputy Director of Policy, Policy Division
or in the first instance, if you require further information or clarification.

Yours sincerely

Morry Bailes
President

Commonwealth Criminal Code and of state and territory laws to capture cyberbullying, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Cyberbullying/Submissions, 7.