

Tasmanian Government Submission

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

October 2017

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Introduction

The Tasmanian Government welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs References Committee's inquiry on the adequacy of existing offences in the Commonwealth *Criminal Code* and of state and territory criminal laws to capture cyberbullying.

Cyberbullying covers a broad range of conduct, relationships, motivations and means of distribution. Cyberbullying can be used to coerce, control, abuse, blackmail, humiliate, intimidate or harass another person.

Cyberbullying differs somewhat from what is considered to be 'traditional' bullying in that it may involve a single but widely disseminated or indefinitely accessible communication rather than a sustained course of conduct. For example, where an online post is accessible indefinitely or the sharing of a post goes 'viral' on social media outlets reaching a large number of people.

Recent data on bullying amongst young people reports that around 20% of Australian minors experience cyberbullying each year.¹ The use of modern technology has contributed to the prevalence of cyberbullying and the ease with which a person can access and distribute offensive material. The harm caused by bullying can be very victim-specific and the consequences vary widely depending on the victim.

Cyberbullying is a complicated issue and consideration of the legal frameworks utilised to deal with cyberbullying is welcomed.

The Tasmanian Government acknowledges the significant amount of work being undertaken to address cyberbullying by the Office of the eSafety Commissioner and the ability to issue a notice for the removal of the cyberbullying material. The prevalence of, and harm caused by, cyberbullying requires compassionate and effective response mechanisms to support those who are bullied.

Although out of scope for the purposes of the matters identified for consideration by the Legal and Constitutional Affairs Committee's inquiry, the Tasmanian Government notes that it is important to bear in mind other approaches such as civil and non-legal interventions as well as criminal responses to address bullying.

General comments

Cyberbullying is a form of bullying that has arisen from the widespread use of electronic devices and social media platforms. Some forms of cyberbullying justify a criminal justice response owing to the very serious harm that bullying can cause a victim.

¹ Donna Cross, 'Australian Covert Bullying Prevalence Study' (Report, Child Health Promotion Research Centre, Edith Cowan University, May 2009)

*The adequacy of existing offences in the Commonwealth Criminal Code and of state and territory
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There are currently legal frameworks that address the problem of cyberbullying. Most notably, the Commonwealth offence of ‘using a carriage service to menace, harass or cause offence’ (section 474.17 *Commonwealth Criminal Code*) captures some serious forms of cyberbullying.

In order to establish the Commonwealth offence of using a carriage service to menace, harass or cause offence it must be shown that:

- The offender intentionally used a carriage service; and
- The offender was at least reckless in using the service in a way that a reasonable person would regard as menacing, harassing or offensive.

In 2014 the then Tasmanian Attorney-General, the Hon Dr Vanessa Goodwin MLC, requested that the Board of the Tasmania Law Reform Institute consider as a project the examination of the capacity of Tasmanian laws to address the issue of bullying and cyberbullying, legislative approaches of other jurisdictions aimed at addressing the problem of bullying and cyberbullying, and options for any necessary reform.

The TLRI observed that cyberbullying may be viewed as a distinct category of bullying which, while displaying the same properties as bullying more generally, includes the additional feature that an electronic communication device is the medium for the bullying conduct.

In its 2015 Issues Paper the TLRI noted that there is some uncertainty as to whether cyberbullying should be dealt with as a distinct practice, or as another manifestation of bullying more generally. The Issues paper provided the following arguments for treating cyberbullying as a discrete behaviour:

- Some level of ‘toxic disinhibition’ — where cyberbullies say, publish or post things online that they would not be prepared to say to their target in person — may occur;
- Cyberbullying can be anonymous, meaning it can be difficult for the victim or third party to identify the bully and stop the bullying. This anonymity may also affect the fear and threat of ongoing behaviour felt by the victim, due to uncertainty as to who the perpetrator is and fear of future bullying;
- As cyberbullying does not occur ‘in person’, it is not constrained by time or location. Cyberbullying may also reach a greater audience than other forms of bullying, increasing the humiliation felt by the victim; and
- Some forms of cyberbullying can remain accessible indefinitely, whereas at least the actual occurrence of individual instances of other forms of bullying is temporary.

In contrast, arguments for treating cyberbullying in the same way as other forms of bullying identified by the TLRI included the following:

- Often the seriousness of the harm caused by bullying is exacerbated by its repeated, sustained or escalating nature and the fear of future bullying. By dealing with cyberbullying alone, the broader pattern of bullying may not be addressed and future bullying outside of the ‘cyber sphere’ — and fear of future bullying — may not be prevented; and

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

- There is evidence suggesting that people who bully ‘offline’ also bully online or by some other form of communication technology, and that victims of ‘offline’ bullying are often also subject to bullying online or by some other form of communication technology. The connection between ‘in person’ bullying and cyberbullying may suggest that technology is a tool of convenience to complement — or simply a different medium for — more general bullying behaviour.

Specific comments on Issues for consideration

A: The broadcasting of assaults and other crimes via social media platforms

The Tasmanian Government notes that although this is not a circumstance with which any particular issues have currently been identified, the potential benefits of a range of enforcement mechanisms and offences need to be available to provide a variety of responses to support law enforcement responses.

State police agencies are not well equipped to achieve the take down of offending videos or images that are shared on social media or published on websites or other online services. The provision of complementary support from the Commonwealth for State police agencies to do this would be welcome.

B: The application of section 474.17 of the Commonwealth Criminal Code ‘Using a carriage service to menace, harass or cause offence’, and the adequacy of the penalty, particularly where the victim of cyberbullying has self-harmed or taken their own life

Tasmania Police rarely use the Commonwealth *Criminal Code* offence of ‘Using a carriage service to menace, harass or cause offence’ under section 474.17.

Investigatory regimes and police powers are significantly different under State and Commonwealth legislation. This includes search warrants, collection of forensic evidence, interview procedures, arrest powers and investigative detention. The majority of state police have no experience with Commonwealth procedures. The Tasmanian Government notes that it is preferable that offending conduct be covered by State-based offences where possible if there is an expectation that the offences will be enforced by state police.

Penalties should be flexible depending on the intent and nature of the conduct of the cyberbully. Consideration should be given to the deterrent effect generally from existing penalties and the impact of penalties imposed on persistent offenders who continue to cause harm.

C: The adequacy of the policies, procedures and practices of social media platforms in preventing and addressing cyberbullying

The policies, procedures and practices of social media platforms in preventing and addressing cyberbullying need to be responsive to victims. The Tasmanian Government notes that the response mechanisms adopted by social media platforms to prevent and address cyberbullying is an evolving and ongoing process.

Tasmania Police find that many complainants are not very technologically literate and often come straight to the police, rather than to the social media platform,. Consequently, an issue here is the ability of persons aggrieved by online behaviour to utilise the procedures put in place by social media platforms to address cyberbullying.

D: Other measures used to combat cyberbullying predominantly between school and children and young people

Tasmanian schools and school staff are amongst those at the frontline dealing with cyberbullying by young people.

Some of the Tasmanian Department of Education's educational frameworks and initiatives in relation to this are:

- The *Tasmanian Education Act 2016* (effective 10 July 2017) requires all Tasmanian State Schools to develop a comprehensive behaviour management policy outlining the process to be followed in response to unacceptable student behaviour. The Act requires development of a Secretary's instructions to provide schools with greater guidance on content and development of school-based policies (s128). The intent is a strong emphasis on restorative justice approaches to school-based behaviour management wherever safe and appropriate.
- Preventative and educational responses – the 2016-17 Tasmanian budget allocated \$3 million over four years to combat bullying (including cyberbullying) in schools and further strengthen the Respectful Schools and Workplaces Framework, under which Respectful Relationships education is provided in all Tasmanian school. Tailored resources for teachers and school staff include the *Respectful Use of Digital Technologies*, which supports teachers and other school staff to educate students about how to respectfully communicate on digital platforms, responding particularly to issues of sexting and circulation of inappropriate images.
- The *Respectful Schools Respectful Behaviour* resource includes practical advice for principals and teachers to address and resolve bullying, cyber safety, harassment and discrimination and violence and aggressive behaviour.
- *Protocol for dealing with inappropriate images of students on electronic devices at school* – a clear protocol for staff who become aware of inappropriate images of students on electronic devices at school. The protocol outlines a series of reporting, support and

Tasmanian Government Submission
The adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying

follow-up requirements, including the mandatory requirement for principals to contact Tasmania Police for advice on any incident of which the school becomes aware.

The Department of Education partners with the Office of the eSafety Commissioner to provide Virtual Classrooms for classes across the state in relation to online safety and cyberbullying.

Non-government schools are required as a condition of registration to have policies in place relating to student welfare, including bullying and harassment. The Non-government Schools Registration Board monitors compliance with this requirement.

E: Any other related matter.

While there are no specific cyberbullying laws in Tasmania, it may be the case that some cyberbullying behaviours are covered by existing legislation, depending on where the behaviour occurs, the attributes of the victim and the type of cyberbullying behaviour.

Cyberbullying may engage the Tasmanian *Criminal Code* offence of ‘stalking’.

Tasmania’s legislation is technology neutral.

Stalking

The offence of stalking at section 192(1)(f) to (i) of the *Criminal Code* (Tas) (Attachment 1) provides conduct elements that may apply to cyberbullying behaviours.

- Paragraph (f) may cover cyber harassment, where the ‘bully’ contacts the target with offensive material.
- Paragraph (i) also governs contact with the victim. There is no requirement that the form of contact is offensive or might reasonably be expected to cause apprehension or fear, and may apply to examples of cyberbullying such as contacting a victim through a false profile.
- Paragraph (g) may cover cyber harassment, as well as the publication of offensive material relating to the target.
- Paragraph (h) may cover cyberbullying that threatens the victim. If ‘apprehension’ is given a wide interpretation, this paragraph may be able to cover cyberbullying that creates apprehension or fear relating to damage to reputation or humiliation. Where the cyberbullying creates apprehension or fear of being physically bullied, this paragraph may allow the interaction between bullying behaviours to be considered.
- Paragraph (j) does not expressly relate to cyber bullying but it is drawn sufficiently broadly to potentially cover instances of cyberbullying that do not fall within the more specific paragraphs.

Other than paragraph (i), the sections that may apply to cyberbullying either require proof that the behaviour could reasonably be expected to cause the other person to be apprehensive or fearful or that the material is offensive. Where the cyberbullying alleged is, for example, a blog with posts about the victim or a 'hate page' about the victim or false profile of the victim (except where used only as a means to contact the victim), one of these additional elements must be established.

Civil law responses

Current adversarial legal processes can make targets of bullying behaviour feel twice bullied – first by the bullying behaviour and second by the process designed to address the bullying.

Not all cyberbullying conduct should attract criminal liability owing to the severe consequences of the criminal law and less serious examples of cyberbullying may be better dealt with in another way.

Anti-Discrimination Act 1998

Section 17(1) of the *Anti-Discrimination Act 1998* (Tas) prohibits conduct which offends, humiliates, insults or ridicules another person on the basis of attributes set down in s 16, in circumstances in which a reasonable person would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed. The s 16 protected attributes are race, age, sexual orientation, lawful sexual activity, gender, gender identity, intersex, marital status, relationship status, pregnancy, breastfeeding, parental status, family responsibilities and disability.

In the former Anti-Discrimination Commissioner's response to the TLRI Issues Paper, she noted that discrimination law offers broad protection against behaviours that constitute bullying, including cyberbullying, but also that it is not exclusive or comprehensive. A victim of cyberbullying may complain to the Anti-Discrimination Commissioner and if it is accepted, informal processes may be used to resolve the cyberbullying dispute.

Restraint Orders

Restraint orders may be a useful way to address some serious bullying by facilitating early intervention and preventing very severe harm from eventuating. Part XA of the *Justices Act 1959* (Tas) deals with restraint orders. Section 106B(1)(d) of the *Justices Act* provides that 'a restraint order may be imposed where a person has stalked the person for whose benefit the application is made or caused the person for whose benefit the application is made to feel apprehensive or fearful through the stalking of a third person'. The definition of stalking aligns closely with the offence of 'stalking' in s 192 of the *Criminal Code Act 1924* (Tas) and provides a civil law response.

Attachment I

Criminal Code

192. Stalking

(1) A person who, with intent to cause another person physical or mental harm or to be apprehensive or fearful, pursues a course of conduct made up of one or more of the following actions:

- (a) following the other person or a third person;
- (b) keeping the other person or a third person under surveillance;
- (c) loitering outside the residence or workplace of the other person or a third person;
- (d) loitering outside a place that the other person or a third person frequents;
- (e) entering or interfering with the property of the other person or a third person;
- (f) sending offensive material to the other person or a third person or leaving offensive material where it is likely to be found by, given to or brought to the attention of the other person or a third person;
- (g) publishing or transmitting offensive material by electronic or any other means in such a way that the offensive material is likely to be found by, or brought to the attention of, the other person or a third person;
- (h) using the internet or any other form of electronic communication in a way that could reasonably be expected to cause the other person to be apprehensive or fearful;
- (i) contacting the other person or a third person by postal, telephonic, electronic or any other means of communication;
- (j) acting in another way that could reasonably be expected to cause the other person to be apprehensive or fearful –

is guilty of a crime.

Charge: Stalking.

(2) For the purposes of subsection (1) –

- (a) a person pursues a course of conduct if the conduct is sustained or the conduct occurs on more than one occasion; and
- (b) if the conduct occurs on more than one occasion, it is immaterial whether the actions that make up the conduct on one of those occasions are the same as, or different from, the actions that make up the conduct on another of those occasions.

(3) A person who pursues a course of conduct of a kind referred to in subsection (1) and so causes another person physical or mental harm or to be apprehensive or fearful is taken to have the requisite intent under that subsection if at the relevant time the person knew, or ought to have known, that pursuing the course of conduct would, or would be likely to, cause the other person physical or mental harm or to be apprehensive or fearful.

(4) Subsection (3) does not apply to a person who, in good faith, pursues a course of conduct of a kind referred to in subsection (1) in the course of performing official duties to –

Tasmanian Government Submission

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

- (a) enforce the criminal law; or
- (b) administer an Act; or
- (c) enforce a law imposing a pecuniary penalty; or
- (d) execute a warrant; or
- (e) protect the public revenue.



Department of Justice

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