



National Children's Commissioner

Megan Mitchell

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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Secretary,

Thank you for the opportunity to make a submission to the inquiry into the adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying.

The Australian Human Rights Commission (the Commission) refers specifically to terms of reference (d) and (e).¹

These comments are limited to the cyberbullying as experienced by children and young people. The Commission notes that where criminal sanctions are being considered, different standards should apply for addressing behaviour of children than for adults. This is due to the evolving level of maturity of young people, the more severe developmental impact of detention on children and young people, and the accepted over-arching principle that the focus should be on measures that are rehabilitative in focus and that create heightened understanding and acceptance of responsibility for actions.

Tackling violence, harassment and bullying – including cyberbullying – has been a key priority of the Commission over the past five years. It is an issue that profoundly affects the lives of thousands of people living in Australia, including children and young people.

Everyone has the right to be respected, safe and free from violence, harassment and bullying. The Convention on the Rights of the Child (CRC) ensures children and young people are able to lead a life free from violence and supports the fundamental human rights of being protected from cruel, degrading and inhuman treatment.²

As a party to the CRC, Australia has obligations to protect the rights of the developing child as they grow into adulthood.³ Children's right to access information (article 17), freedom of expression (article 13) and to be heard (article 12) need to be fostered alongside measures that protect them from violence, abuse and neglect (article 19) and respect their right to privacy (article 16).⁴

As the UN Special Representative of the Secretary-General on Violence against Children has emphasised, the ‘rapid development and expansion of [information communication technologies] ICTs have generated new opportunities for the realization of children’s rights as well as significant challenges for the protection of children’.⁵ These new arenas (including social networking platforms) have created spaces where cyberbullying and online harassment can take place, both by and against children and young people. It is the view of the Commission that the key to effective safety and protection of children and young people online is education – encompassing their schools and broader communities.

Consultations with children by the National Children’s Commissioner reveal that most children do not see a clear distinction between the online and physical world and report that bullying usually occurs in both physical and online settings.⁶ In this context, addressing bullying behaviour does not necessarily relate to the removal of harmful online material alone, nor to the application of legal sanctions and penalties, but rather, to a range of educative, conciliatory and protective measures.

In 2014, the National Children’s Commissioner conducted an investigation into suicide and self-harm among children. This investigation found that while bullying was a feature of some of the suicides of children, including from online sources, this was rarely the sole factor at play.

Submissions to the investigation pointed to the multiplicity of risk factors that predispose a child to suicide such as: mental health problems; substance abuse; child abuse; adverse family experience; and intentional self-harm, with or without suicidal intent. Information provided from the Kids Helpline for 2012/13 confirmed that in relation to calls about self-harm and suicide, while bullying was mentioned in a significant number of contacts, the top three co-concerns were mental health, emotional wellbeing and parent-child or peer relationships.

Research presented also suggested that there is a strong likelihood that risk factors experienced by children are multiple, interrelated and co-existing over critical developmental periods.⁷ Despite this, my investigation into suicide and self-harm found that there is limited available research about the risk factors that contribute to intentional self-harm among children and that, without this, targeting effective interventions is problematic.

The Commission has produced two research publications on cyberbullying that consider some significant issues relevant to this inquiry. These can be located at:

- Cyberbullying and the Bystander research report (2012)
<http://bullying.humanrights.gov.au/>
- Human rights and cyber-space (2013)
<http://www.humanrights.gov.au/publications/background-paper-human-rights-cyberspace>

The Commission also canvassed issues relating to cyberbullying in its submission to the inquiry into the establishment of the eSafety Commissioner – Enhancing On-line Safety for Children (2014)
<https://www.humanrights.gov.au/submissions/enhancing-online-safety-children>.

The Commission's Cyberbullying and the Bystander research report emphasised in particular that the key drivers of behavioural change amongst children and young people are peer support and educative approaches rather than legislative prescription.⁸ For instance, American research with young people (aged 14-24 years) in 2013 found that 71% of respondents had given little or no thought to the possibility that online or text message behaviour could get them into trouble at school. Similarly, 69% of respondents reported they had considered the possibility "only a little" or "never" that online or text message behaviour could get them "in trouble with the police".⁹ This type of research supports the view that public education and awareness raising programs are likely to be more effective influencers of children's behaviour than additional legal sanctions.

This type of approach has been similarly adopted by the eSafety Commissioner in response to calls for the criminalising of cyberbullying, and where such criminalising may affect children and young people and have a lasting impact on their lives.¹⁰

Public education is critical to both raising awareness of the law and to the application of effective safeguarding measures. Research conducted by the Australian Communications and Media Authority (ACMA) in 2014 found that children are most likely to seek help from their parents (than from others) if experiencing cyber-safety issues.¹¹ The Australian Communications and Media Authority recognises therefore that parents are a critical target group for public awareness and support for children as they navigate online spaces.¹²

Section 474.17 of the *Criminal Code Act 1995* (Cth) makes 'using a carriage service to menace, harass or cause offence' an offence if '(a) the person uses a carriage service; and (b) the person does so in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive'.¹³ This offence carries a penalty of up to three years imprisonment.

While this law criminalises cyberbullying, what is not known is to what extent the public are aware of the provisions of the Criminal Code.

Fundamentally, the Commission is of the view that education and community awareness are the most critical components required for enhancing online safety and preventing cyberbullying for children. This preventative approach should use research findings to educate and inform about the prevalence of particular risks, the specific contexts in which they arise, strategies to reduce the prevalence of cyberbullying including education of children as potential perpetrators and how to most effectively support children and young people if they are experiencing cyberbullying. This type of knowledge will assist families and communities in prevention, early detection and responsive intervention.

I would be happy to discuss these issues further with the Committee.

Yours sincerely,

Megan Mitchell

National Children's Commissioner

¹ Terms of Reference addressed are: d) other measures used to combat cyberbullying predominantly between school children and young people; and e) any other related matter.

² See *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 19; See Committee on the Rights of the Child, General Comment no. 13, Article 19: The right of the child to freedom from all forms of violence, UN Doc CRC/C/GC/13 (2011) para 12. At

http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.13_en_AUV.doc (viewed 3 February 2014); See International Covenant on Civil and Political Rights (ICCPR), 1966, art 7; See Universal Declaration of Human Rights (UNDHR), GA Resolution 217A (III), UN Doc A/810, 1948, art 5; See Convention on the Rights of Persons with Disabilities, 2006, art 16; See Committee on the Elimination of Discrimination Against Women, General Recommendation No. 19 – Violence Against Women (1992), paras 4, 17, 14; UDHR, 1948, art 7; ICCPR, 1966, arts 7, 26.

³ The role of the National Children's Commissioner has been fundamental in terms of implementing, promoting and educating about the Convention on the Rights of the Child.

⁴ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 12, 13, 16, 17, 19.

⁵ Marta Santos Pais, *Annual Report of the Special Representative of the Secretary-General on Violence against Children*, UN Human Rights Council, 35th sess, Agenda Item 3, UN Doc A/HRC/31/20 (5 January 2016) [99].

⁶ Australian Human Rights Commission, *Children's Rights Report* (2013).

⁷ Australian Human Rights Commission, *Children's Rights Report* (2014), 76.

⁸ Australian Human Rights Commission, *Cyberbullying and the Bystander: Research findings and Insights Report* (2013).

⁹ The Digital Abuse Study: A Survey from MTV & The Associated Press-NORC Center for Public Affairs Research (2013). A complete study report can be found at <http://www.apnorc.org>.

¹⁰ Julie Inman Grant, 'Criminalising child bullies isn't the answer', *The Advertiser* (online), 13 September 2017. At <http://www.adelaidenow.com.au/rendezview/criminalising-child-bullies-isnt-the-answer/news-story/42dbceadb67801747f8a457ee730a324> (viewed 4 October 2017).

¹¹ Australian Communications and Media Authority. *Connected parents in the cybersafety age*. June 2013. Snapshot February 2014.

¹² Australian Communications and Media Authority. *Connected parents in the cybersafety age*. June 2013. Snapshot February 2014.

¹³ *Criminal Code Act 1995* (Cth) s 474.17.