



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

Submitted by the Alannah & Madeline Foundation

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**Alannah & Madeline
Foundation**

Keeping children safe from violence

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

The Alannah & Madeline Foundation's Response

Summary

Legal frameworks and criminal law are only one measure through which government can support our community to effectively reduce and manage the negative impact of cyberbullying on individuals, families and the community. This is especially the case regarding children and young people in relation to the Commonwealth Criminal Code and existing state and territory criminal laws.

The Alannah & Madeline Foundation (the Foundation) continues to advocate for laws that are capable of managing issues of serious or grievous bullying, but which are nuanced enough to take into account the context and reality of children and young people's lives.

The Foundation's commitment and ongoing support for adequate systems that help the community to understand, identify, address and reduce the impacts and incidence of cyberbullying include:

- **The National Centre Against Bullying**

In 2002, the Foundation recognised bullying as a major form of violence experienced by children, and set up the National Centre Against Bullying (NCAB). NCAB is a peak body working to advise and inform the Australian community on the issue of childhood bullying and the creation of safe schools and communities, including the issue of cybersafety. In 2013, NCAB, via the Foundation, convened a 'Bullying, Young People and the Law Symposium' which brought together more than 100 legal and law enforcement experts.

- **eSmart Schools and eSmart Libraries**

Established in 2010, this whole-of-school approach is the most effective way to equip a community with the skills, knowledge and behaviours to reduce rates of cyberbullying and improve responses to cyberbullying by children, young people and the community as a whole. Currently in over 2,300 schools nationwide, over 90% of participants agreed that eSmart assists schools to embed smart, safe, responsible behaviour across the curriculum.¹

- **Digital Licence**

The Digital Licence is an online education tool, which uses quizzes, videos and games to teach school age children about how to be capable, confident and safe users of the internet and digital technologies.

The adequacy of existing laws relies on ongoing programs and systems such as these. These programs ensure the community is educated and aware of the laws related to cyberbullying, but also have the skills and knowledge to effectively manage themselves and their behaviours in digital environments.

The Alannah & Madeline Foundation would therefore recommend to the inquiry:

1. The need for a national, uniform legal definition of what constitutes bullying. The Foundation (via NCAB) believes there is a need to properly define bullying – including cyberbullying as a specific type of bullying. Bullying has been defined by the Commonwealth in regards to the workplace

¹ 2015, eSmart Schools Independent Evaluation. Summary PDF: www.esmartschools.org.au/Documents/eSS_Evaluation.pdf

setting – we advise the Senate uses this to arrive at an accepted national definition with school-aged children in mind as well.

2. Granting the Commonwealth power to legislate on bullying as a crime (beyond its current jurisdictions of workplaces and some electronic contexts). However, this needs to avoid the unnecessary criminalisation of children and young people under 18 in relation to their use and experience of social media and other emerging technology platforms. The recent 'sexting' laws wrongly stigmatised some young people as peddlers in child pornography and gave them a criminal record as a result.
3. Increased formal support for early intervention, education and related programs for children and young people that improve their understanding of cyberbullying, their legal responsibilities and citizens (including digital citizens) and supports them to develop values and behaviours that lead to respectful behaviour both online and offline. eSmart is now in over 2,300 schools across Australia despite not being mandated at a Federal level. We advocate for eSmart to be an integral part of Australia's education system in relation to cyberbullying and cybersafety, and call for its national implementation and support. There is a growing gap in who gets access to world class cybersafety education, and we are concerned that while eSmart is increasingly the program of choice by schools in higher SES communities, all students would benefit from this program.

About the Alannah & Madeline Foundation

The Alannah & Madeline Foundation is a national charity established in memory of Alannah and Madeline Mikac, aged six and three who were tragically killed with their mother and 32 others at Port Arthur, Tasmania on 28th April 1996.

The Foundation believes that no child should feel unsafe and that confident, secure, resilient and inspired children are our hope for the future. The Foundation works across the spectrum of prevention and care, identifying issues that adversely affect the wellbeing of children and work to recover and protect them from bullying and violence through state-of-the-art, evidence-based programs and products.

The Foundation works mostly with children aged 16 and under in their homes, schools and in the community to care for those who have experienced or witnessed serious violence; reduce the incidence of bullying, cyberbullying and other cyber risks.

The work is undertaken collaboratively with the best minds to identify and reduce significant threats to children's safety through innovation and partnerships. The Foundation speaks out on the need for systemic change to build a supportive and safe society. To date, the Foundation has helped over 2.1 million children through its work. The Foundation's work is underpinned by a set of guiding principles:

- Child centred
- Innovation driven
- Evidence based
- Values led
- Ethical partners.

The Foundation commenced its work in the area of cybersafety almost ten years ago when it became increasingly apparent that the development of online networks created a new challenge. Since that time we have become a leader in the space developing innovative programs, and leading the way towards a society that understands and values eSafety.

Our approach to this inquiry

In this submission, the Foundation addresses three key areas that cover all aspects of the inquiry's investigation. The perspectives and advice are based upon:

- The Foundation's expertise and experience working with / for children and young people on whom these laws have the potential to impact upon in unintended ways.
- The Foundation's deep knowledge and success in developing and delivering community programs that support the safety and well-being of children and young people.

We will be addressing the inquiry in the following three areas that are reflected in the next three sections of this response.

1. Children, cyberbullying & the law (Questions A - C)

- a. We will address the issues relating to social media services and specifically the application of section 474.17 of the Commonwealth Criminal Code where it relates to children and young people.

2. Beyond the criminal code (Question D)

- a. We will discuss how the Foundation's work will be able to complement new / revised legal frameworks to combat cyberbullying in school communities. We will focus on the importance and value of this work especially as an early intervention and preventative measure, but also as a vital component in coordinating community education of new laws and the proper procedures that must be enacted at an institution level.

3. Holistic approach (Question E)

- a. We will offer insight into the interconnected nature of education, legal and community frameworks and programs, emphasising the value and significance of a holistic approach in combating cyberbullying in Australia. We see the provision of the Foundation's eSmart Framework to all schools in Australia as a front-line measure to address the emerging 'digital divide' between low and high SES schools, which increases the number of 'youth at risk' online.

Children, cyberbullying & the law

Addressing:

- a. the broadcasting of assaults and other crimes via social media platforms
- 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
- c. the adequacy of the policies, procedures and practices of social media platforms in preventing and addressing cyberbullying.

The challenge of defining cyberbullying

Over recent years, the legal frameworks seeking to address cyberbullying have continued to be interrogated and changed. However, the law still deals predominantly with singular incidents of bullying behaviour rather than addressing the wider range of bullying behaviours that are likely taking place within the social context of the participants. This is specifically the case with cyberbullying where the focus is on an *aspect* of bullying (and not the activity in its entirety) such as in the application of section 474.17.

What this means is, a person may engage in bullying behaviour both offline and online, over a sustained period of time and they may use different online services to do this. This is more likely to result in a tragic incident of significant self-harm or suicide by the victim – it is often the cumulative effective of what is described in section 474.17, more so than a single (or several) identifiable incidents of 'Using a carriage service to menace, harass or cause offence'.

We are in the early stages of creating a legal definition of cyberbullying in relation to criminal law. The rapidly changing nature of technology means that the form cyberbullying takes continues to morph as new ways and means of using technology emerge.

The law only becomes relevant when the bullying behaviour itself constitutes a crime. This means that any attempt to invoke the law is really an attempt to fit the bullying conduct into a legal framework that has been designed for something else.

A definition

Cyberbullying is a form of indirect or covert bullying conducted via digital technologies and is not easily observed or acknowledged by others. The perpetrator repeatedly communicates messages that are hostile or aggressive and intended to inflict harm on the recipient².

The risk of criminalising children

In the case of children, there are added complications in relying on the criminal law because of diminished responsibility between the ages of 10 - 14 and absolute immunity prior to that age.

This is significant because our understanding and experience of cyberbullying as a phenomenon is most pronounced amongst children, specifically teenagers. It is well documented that young people are some of the highest percentage users of social media in our society, and it is a significant part of their social world. It is also acknowledged that they are more likely to use the latest social media services that offer new forms of online engagement. This makes it more difficult for the law to maintain pace with technological developments and the types of social interactions that occur on these services.

² Spears, Keely, Bates and Katz: Research on youth exposure to, and management of, cyberbullying incidents in Australia: Part A: Literature review on the estimated prevalence of cyberbullying involving Australian minors, p 5.

Relatedly, the 'start-up' (innovation) culture of the technology industry prioritises 'testing in the marketplace' and responding to user feedback to improve their services – this takes precedence over 'user safety by design'. In their first year on the market, social media platforms can often have significant cyberbullying and harassment issues, due to their lack of monitoring and reporting processes. Young people are often the 'play-testers' in this environment, as their age group has a higher proportion of 'early adopters'. Any moves to improve and further regulate the 'policies, procedures and practices' of social media platforms would need to address these emerging services and the risks they pose to the young people that trial them in their earliest iterations.

A key point of contention in many cyberbullying incidents is whether an offender is *deliberately* and *repeatedly* engaging in hurtful behaviour. If they are not, it may simply be necessary to learn better online behaviour. If they are, it is important to take it seriously and address it effectively.

For children, the way they use and understand social media is challenging our own understanding and expectations around everything from privacy to intimate relationships. This is especially true for children under 18, as their experience of the world has elements of experimentation and exploration. While cyberbullying should not be tolerated, young people's use and experience of social media platforms may be interpreted by the law in different ways than the intent and purpose for which the platforms are being used. This has been discussed and acknowledged in issues around sexting and there are aspects of cyberbullying that have similar nuance that make laws like section 474.17 limited in their capacity to deal with the way children use and explore the technology.

As mentioned in the above section on 'The challenge of defining cyberbullying', we advocate that any new or altered law acknowledges the *range* of behaviours occurring in any given bullying situation. A valuable precedent in law is Victoria's 'Brodie's Law', which extended the offence of stalking in section 21A of the Crimes Act 1958 to cover behaviour that amounts to serious bullying (including cyberbullying). The offence carries a maximum penalty of 10 years imprisonment, and can theoretically apply to children 10 years and older.

However, the negative consequences of wrongly criminalising young people under 18 have already been experienced in this space regarding 'sexting', and we would not like to see this repeated. But perhaps a new Federal cyberbullying law, based on the current Commonwealth workplace bullying definition, could apply to both young people and adults while including different sentence parameters. That way, the same law would be recognised by all ages as defining acceptable and unacceptable behaviours across age spectrums, thus establishing a commonly understood standard of behaviour across Australian society.

Additionally, a useful example in law can be found in New Zealand's *Harmful Digital Communications Act 2015*, which aims to 'deter, prevent, and mitigate harm caused to individuals by digital communications' and 'provide victims of harmful digital communications with a quick and efficient means of redress'. However, this Act does not define cyberbullying.

The law as part of an educational framework. The law as deterrent.

The law itself is an educational tool. Laws are in place to act as a deterrent and impact upon behaviours – to teach people that there are acceptable and unacceptable ways to behave. This is further reason to have a nationalised standard legal definition of cyberbullying and to leverage the law to educate our community that such behaviour is unacceptable. However, for this approach to have impact, we need to be very clear and detailed on what cyberbullying is, how to identify it and ways to manage it and deal with it within the continuum of social expectations.

The law benefits from programs like the Foundation's successful eSmart program that operates in schools and public libraries across Australia because it helps to remind institutions and communities of their role in maintaining policies and standards that keep children safe and protected and that they are part of the continuum of the law.

Our legal frameworks are also impacted upon by regulations like Victoria's Child Safe Standards and by legal obligations like Duty of Care that educational and other institutions that have responsibility for the health and well-being of children must abide by.

Alongside the obligation schools have to exercise a duty of care towards children, they also have a responsibility and are guided by curriculum and to educate children about respectful and appropriate behaviours online. This includes informing children about the law and how it operates in relation to their role as citizens. In this way the law itself is educational, and educational institutions have a role in educating children about the law.

Collaboration with law enforcement officers

The Foundation has recently signed a Memorandum of Understanding with the Australian Federal Police, which we see as a vital step towards effectively addressing bullying and cyberbullying.

As we have learned from the experience of Brodie's Law, law enforcement officers require thorough training in all aspects of bullying behaviour, in addition to obtaining knowledge in the specifics of the law. They also require an understanding of the social settings in which bullying takes place – namely schools, workplaces and social media platforms.

The Foundation is well placed to offer additional training in bullying behaviours and the various settings in which it takes place. We have recognised that a whole-of-society approach to bullying and cyberbullying requires strong collaborations across sectors.

Any new or altered law must be supported by the resourcing of such training and collaboration.

Beyond the criminal code

Addressing:

- a. other measures used to combat cyberbullying predominantly between school children and young people.

The Alannah & Madeline Foundation has a history of supporting schools and other community and learning institutions to:

- combat cyberbullying
- strengthen community understanding and capacity to manage digital technology in ways that are safe and responsible in relation to children and young people
- reinforce the legal and community standards around technology and cyberbullying.

We have done this through:

- a. The National Centre Against Bullying
- b. eSmart Schools and eSmart Libraries
- c. The Digital Licence – especially our STARS Foundation partnership, working with Indigenous communities in the Northern Territory
- d. eSmart Workplaces.

Summaries of the first three initiatives aforementioned.

In partnership with McDonald's we have piloted Australia's first workplace cybersafety and bullying prevention program. Cyberbullying is a phenomenon that commonly crosses over into workplaces and McDonald's are the first workplace in the country to achieve eSmart Status. We see this as a vital development of the eSmart program, as it supports teenagers and young people who for the first time are having to balance their personal and professional lives.

We have identified key gaps that need to be addressed in improving the way we combat cyberbullying in our community. These include:

Economic cost of bullying

In partnership with PwC, the Foundation has begun a project to establish the economic impact on our community of bullying and cyberbullying. It will specifically estimate costs of bullying in schools in Australia, and will include:

- calculation of the number of bullying incidents across Australia by type of bullying and student characteristics
- cost metrics and associated assumptions
- an economic model to calculate the impact of the cost metrics and estimate the total cost of bullying in Australia on a per annum basis.

Start early to change behaviour and culture

The Foundation, within its strategic planning, has identified the need to support young children and parents. We are embarking on a research project and developing new partnerships and projects to help us meet this identified gap.

Holistic approach

Addressing:

- a. any other related matter.

It needs to be understood that the need for children and young people to be safe from violence will always require multi-faceted and complex approaches which requires the whole-of-community and includes legal, structural, technological and cultural solutions working together.

At the Foundation this is represented in the way we work and can be seen in the development of programs like eSmart which supports whole communities to address cyberbullying and to foster pro-social behaviours in our children and young people, so that they grow up to be citizens who respect and value the laws in place to address cyberbullying and any other aspect of digital citizenship.

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THANK YOU.



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