

Submission by the Mental Health Commissions of Australia to The Senate Inquiry into the adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying – October 2017

This submission has been made by the Mental Health Commissions of Australia. It should be noted that the Mental Health Commissions have not sought legal counsel on the adequacy of existing laws to address cyberbullying, nor have we fully explored the broadcasting of assaults and other crimes via social media or the adequacy of current measures, policies, procedures and practices of social media platforms to address cyberbullying. The below submission is based on the Mental Health Commission's expertise in mental health, particularly with respect to the adequacy of penalties where a victim of cyberbullying has self-harmed or attempted suicide.

In Summary

- Children and young people who are bullied have an increased risk of developing a mental health condition including depression and anxiety, and an increased use of drugs and alcohol. This can further lead to self-harm, suicide ideation, and suicide attempts.¹
- There is no specific cyberbullying legislation enacted in Australia, however there are a range of provisions, relating to criminal, civil and work health and safety offences, which can be applied in instances of cyberbullying. These include provisions relating to stalking and intimidation intended to cause physical or mental harm.²
- Many states and territories are introducing bullying (some of which can apply to cyberbullying) bills to address gaps that exist in the legislation, and ensure that the law is transparent and perpetrators are held to account, particularly when bullying and cyberbullying leads to the physical and mental harm of victims.
- Most social media services have rules prohibiting cyberbullying and offer a complaints tool where you can ask for cyberbullying material to be removed. While most websites and telephones companies have Terms and Conditions to control what users can do, often these rules specifically include cyberbullying.

¹ Scott JG, Moore SE, Sly PD, Norman RE. (2014) Bullying in children and adolescents: A modifiable risk factor for mental illness. *Australian & New Zealand Journal of Psychiatry* 48(3): 209-212.

² *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13

- Whilst legal reform is currently underway to ensure that bullying and cyberbullying is adequately addressed, much of this reform is concentrated on punitive measures which do not address the underlying causes and problems that bullying presents. The Mental Health Commissions of Australia recommend that reform needs to be preventative and educational so as to provide awareness of the implications of cyberbullying.
- Research has shown that as cyberbullying is often linked to relationships within the school environment, school-based interventions have been effective in its reduction and prevention.³
- NSW provides for a good example of anti-bullying strategies that allow schools to draw on a range of responses that include support for victims of cyberbullying, alongside education and other non-punitive responses where possible.
- The Australian Government's Office for eSafety Commissioner works towards helping young people having safe, positive experiences online and encouraging behavioural change by acting responsibly online. It also has a complaints resolution function in relation to cyberbullying.

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

The Commonwealth Criminal Code

Section 474.17 of the *Criminal Code Act 1995* (Cth) establishes an offence in relation to cyberbullying, and imposes a penalty of imprisonment for three years. Using this section to charge perpetrators of cyberbullying is possible but is very much open to judicial discretion. Consideration may be given regarding provisions that recognise the degree of harm that has resulted, including both physical and mental harm with, possible consideration to an escalating penalty.

Many of the bills that are being introduced and passed at the state level for bullying impose a higher maximum penalty than what is available to cyberbullying offences brought under the Commonwealth Criminal Code. In severe cases of cyberbullying, it is likely that a victim would take action under their state's relevant bullying laws as

³ Pearce N, Cross D, Monks H, et al. (2011) Current evidence of best practice in whole-school bullying intervention and its potential to inform cyberbullying interventions. *Australian Journal of Guidance and Counselling* 21: 1-21.

opposed to s 474.17 of the Commonwealth Criminal Code. These bills are outlined below.

South Australia

Statutes Amendment (Bullying) Bill 2017

Following the recent suicide of 13-year-old student Libby Bell in South Australia following bullying online and in other environments, the *Statutes Amendment (Bullying) Bill 2017* was introduced by Hon Dennis Hood MLC to the South Australia Legislative Council on 27 September 2017⁴. This bill is for an Act to amend the *Criminal Law Consolidation Act 1935* and the *Intervention Orders (Prevention of Abuse) Act 2009*, and is known as “Libby’s Law”. Under the bill, the maximum penalty for bullying (including cyberbullying) which causes serious harm to the victim is imprisonment for 10 years, where serious harm means harm that endangers a person’s life, results in serious impairment of mental or physical function, or results in serious disfigurement. The maximum penalty for bullying that does not cause serious harm is imprisonment for five years. In the former case, it is not necessary to prove that the defendant intended to cause serious harm to the victim. Where the victim self-harmed, it is not necessary to prove that the defendant knew, or ought to have known, that the victim may self-harm.

Response to the proposed legislation has been mixed and warrants consideration. The bill is designed to hold people, including youth, accountable for harm caused by bullying, and to provide schools and departments with legislation to support measures to address bullying including cyberbullying. However, it takes a punitive rather than preventative approach, and does not recognise the reasons why children commit bullying activities or the issues involved. It does not address the problem that has led to bullying occurring.

Victoria

Crimes Amendment (Bullying) Bill 2011 (Vic)

Following the suicide of 19-year-old Brodie Panlock who suffered from serious, relentless bullying at her workplace, the Victorian government introduced the *Crimes Amendment (Bullying) Bill 2011 (Vic)* Bill in 2011 known as “Brodie’s Law”. The Bill extended the definition of stalking in section 21A of the *Crimes Act 1958 (Vic)* to specifically include behaviour that could lead a person to self-harm. This includes serious bullying and is punishable by up to 10 years imprisonment.

⁴*Statutes Amendment (Bullying) Bill 2017*, avail <https://www.legislation.sa.gov.au/listBills.aspx?key=S>

Western Australia

With regard to State laws relating to cyberbullying offences, Western Australia's Criminal Code is likely to apply. The Criminal Code (WA) sits within the portfolio of the Attorney General and is administered by the Department of Justice, who would be best qualified to provide any further comment in this regard.

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

Where children are concerned the Mental Health Commissions of Australia recommend changes take into account how it may impact on the ability of the education sector and schools to respond appropriately. In this regard, it is necessary to take into account the substantial work done nationally and at state level to formulate effective approaches.

There are national resources that support parents and children, including website information on dealing with cyberbullying, and information on where to find help and counselling services are promoted on the Queensland Government website, for example; in particular:

- The National Safe Schools Framework —providing Australian schools with a set of guiding principles to assist school communities to develop positive and practical student safety and wellbeing policies. The National Safe Schools Framework is based on the overarching vision: *All Australian schools are safe, supportive and respectful teaching and learning communities that promote student wellbeing.*
- The Office of the eSafety Commissioner —providing online safety education for Australian children and young people, a complaints service for young Australians who experience serious cyberbullying, and supports to address illegal online content through the Online Content Scheme.
- The Bullying. No Way! website (www.bullyingnoway.gov.au) — providing information and resources to support teachers and schools in creating and maintaining safe and supportive school environments.

NSW

In NSW, the amendment of the *Crimes Act 1900* (NSW) by the *Crimes Amendment (School Protection) Act 2002* (NSW) created a criminal provision for bullying which makes it an offence to assault, stalk, harass or intimidate any school student or

member of staff of a school while the student or member of staff is attending a school.⁵ Although a good protection for those children and young people on school grounds (including entering and leaving school premises), the provision does not protect from bullying that occurs outside of school premises and school hours. While this can technically be applied to cyberbullying, the necessary act must take place at a school. It therefore has limited application.

In May 2017, NSW introduced ‘revenge porn’ offences making it an offence to share intimate images of a person without their consent⁶. However, the problem of cyberbullying is not fundamentally a legal problem, but a social one. Especially in the case of school children and young people, bullying will best be countered by social arrangements that involve parents, teachers and the affected children. While noting that cyberbullying can have catastrophic outcomes, it needs to be seen along a continuum of behaviours, with criminal penalties for only the most serious of cases. Research by the University of NSW (UNSW) revealed a number of complexities around legal responses and penalties for young people who cyberbully. UNSW found that people’s preferred response would minimise harm for the victim and also avoid needlessly criminalising or stigmatising the cyberbully⁷. Support, rehabilitation and restoration were considered to be more effective than punitive measures in building the long term wellbeing of those involved.

In the case of cyberbullying between school children and young people, the NSW Parliamentary Research Service noted in 2016 that “police generally do not pursue criminal action for cyberbullying in schools or between youth⁸”, acting only on the more serious cases and using non-punitive approaches in the first instance. The Mental Health Commissions of Australia are generally supportive of such an approach.

The NSW Department of Education has adopted anti-bullying strategies that allow schools to draw on a range of responses that include support for victims of cyberbullying, alongside education and other non-punitive responses where possible. In serious cases disciplinary measures are available. These responses are in

⁵ *Crimes Act 1900* (NSW) s 60E

⁶ *Crimes Act 1900* (NSW) s 91Q

⁷ Spears, B., Taddeo, C., Swirski, T., Keeley, M., Katz, I., Colling, P., Daly, T. & Bates, S. (2014) *Research on Youth Exposure To and Management of Cyberbullying Incidents in Australia: Part C – An evidence-based assessment of deterrents to youth cyberbullying*, Social Policy Research Centre Report 11/2014, avail

https://www.sprc.unsw.edu.au/media/SPRCFile/Youth_exposure_to_and_management_of_cyberbullying_in_Australia_Part_C.pdf, p 21

⁸ Angus, C. (2016), *Cyberbullying of Children*, NSW Parliamentary Research Service, e-brief 2/2016, March 2016, avail <https://www.parliament.nsw.gov.au/researchpapers/Documents/cyberbullying-of-children/Cyberbullying%20of%20Children.pdf>, p 11

line with best practice responses to bullying, including wider school community involvement to reduce bullying.⁹

The NSW Department of Education's key anti bullying policy for NSW public schools, *Bullying: Preventing and Responding to Student Bullying in Schools*, specifically includes cyberbullying as well as bullying that occurs off school premises and outside of school hours where there is a clear and close relationship between the school and the conduct of the student.

The policy takes a multi-pronged approach aimed at protection, prevention, early intervention and response strategies and includes the whole school community in the development and delivery of anti-bullying plans.

Anti-bullying initiatives need to be accompanied by wider efforts to build the resilience of all children and young people¹⁰ and in this respect, the NSW Mental Health Commission notes the Department of Education's *Wellbeing Framework for Schools*. This takes a strengths based approach to enhancing student wellbeing and includes a comprehensive package of \$167.2 million of new support for public schools for five years from 2015. The investment includes funding to employ 236 additional school counsellors and 100 specialised behaviour settings for students who need more intensive support across NSW public schools.

Other related matters

Consideration needs to be given to the unintended consequences of laws against cyberbullying for people with significant mental health issues. There is the potential for a person experiencing certain types of mental illness to engage in behaviours that might be considered online harassment or cyberbullying as a result of their illness. Laws regarding cyberbullying should offer sufficient safeguards to ensure people engaging in cyberbullying as a direct result of their mental illness receive an appropriate response.

The Western Australian Mental Health Commission (WAMHC) recognises that there is a connection between cyberbullying, bullying and mental illness. As such, the WAMHC commissions a number of youth mental health services that can be accessed by those experiencing a mental illness, which may have been result of (or influenced/exacerbated by) bullying and/or cyberbullying. In addition, the WAMHC

⁹ Ibid, p 19

¹⁰ NSW Commission for Children and Young People (2014) *Bullying and Cyberbullying*, avail http://cdn2.hubspot.net/hubfs/522228/publications/health_safety_and_wellbeing/bullying_and_cyb_erbullying_Aug2014.pdf?t=1507455582997, p 4

offers prevention services that build resilience amongst young people which is particularly important given that in some instances bullying may lead to a mental illness.

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Australian Government
National Mental Health Commission



Mental Health Commission
of New South Wales



Queensland
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