



Australian Government
Attorney-General's Department

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Submission of the Attorney-General's Department

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**

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Scope of submission

1. The Attorney-General's Department welcomes the opportunity to provide the Senate Legal and Constitutional Affairs References Committee with this submission as part of the Committee's inquiry into the adequacy of existing offences in the *Criminal Code Act 1995* (Criminal Code) and state and territory criminal laws to capture cyberbullying.

2. On 7 September 2017, the Senate referred the following matters to the Legal and Constitutional Affairs References Committee for inquiry and report:

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

- 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;
- d. other measures used to combat cyberbullying predominantly between school children and young people; and
- e. any other related matter.

3. This submission focuses on paragraphs (a), (b) and (d) of the inquiry's Terms of Reference, outlining the current criminal offences applicable to cyberbullying under Commonwealth legislation and other Commonwealth programs, including education and victim support, that address cyberbullying.

4. In preparing its submission, the department consulted with the Commonwealth Director of Public Prosecutions.

What is cyberbullying?

5. Cyberbullying is a modern manifestation of 'traditional' bullying behaviour. 'Bullying' can be defined as intentionally demeaning treatment of others, which offends or belittles them or causes or risks physical or psychological harm.¹
6. Cyberbullying exists where this 'bullying' conduct occurs through online or other telecommunications services (for example, through a social media website or by text messages on a mobile phone). It follows that cyberbullying is the use of technology to undertake deliberate behaviour with the intent to offend, belittle or cause harm. It can include 'trolling', abusive language, intimidation, threats and humiliation.
7. Once the bullying behaviour reaches online platforms, it is often permanently available and can spread quickly and is outside the control of the victim or perpetrator. The impacts of cyberbullying can be far-reaching, and may compound feelings of fear, humiliation, social isolation and other negative effects on victims.

¹ Trischa Mann and Audrey Blunden, *Oxford Australian Law Dictionary* (Oxford University Press – Australian and New Zealand, 1st ed, 2010), 82.

Cyberbullying and the *Criminal Code*

8. The Criminal Code does not define 'cyberbullying'. However, Division 474 of Part 10.6 of the Criminal Code contains a number of offences which criminalise the use of telecommunications services to engage in inappropriate behaviour.
9. Broadly framed provisions of general application in the *Criminal Code* are preferred to avoid technical distinctions, loopholes, additional prosecution difficulty and appearance of incoherence associated with having numerous, yet slightly different provisions of similar effect across Commonwealth law.²
10. Section 474.17 of the *Criminal Code* has been successfully used to prosecute a range of cyberbullying-related activity. The department considers that this offence adequately criminalises cyberbullying-related conduct at a Commonwealth level, in the context of the broader criminal law framework of state and territory offences. The scope and application of section 474.17 is detailed below.

Section 474.17

11. Section 474.17 criminalises the use of a carriage service, including the Internet or a phone, in a way that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.
12. The 'reasonable person' frames the offence by reference to what a reasonable person would regard as menacing, harassing or offensive, not what the accused intended. It follows that the prosecution would not have to prove that the accused *intended* to menace, harass or cause offence.
13. Consistent with the principles set out in Chapter 2 of the *Criminal Code*, the individual concerned must have intended to use the carriage service and have been reckless as to whether they were using a carriage service in a way that the 'reasonable person' would regard, in all the circumstances, as menacing, harassing or offensive.
14. There are also Commonwealth offences for using the internet in the commission of a serious offence that may apply to cyberbullying conduct. For example, section 474.14 of the *Criminal Code* criminalises the use of a telecommunications network with the intention of committing a serious offence against a foreign law, or against a law of the Commonwealth, state or territory.³
15. In relation to the cyberbullying of children, section 474.25C of the *Criminal Code* (Carly's Law) captures online conduct that prepares or plans to harm a child, including mental harm that can arise from cyberbullying.

² Chapter 2.1.2 of the *Guide to framing Commonwealth offences, Infringement Notices and Enforcement Powers* <<https://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf>>.

³ Section 473.1 provides that a serious offence means an offence against a law of the Commonwealth, a State or a Territory that is punishable by imprisonment (a) for life; or (b) for a period of 5 or more years; a serious offence against a foreign law means an offence against a law of a foreign country constituted by conduct that, if it had occurred in Australia, would have constituted a serious offence against a law of the Commonwealth, a State or a Territory.

Menace, harass, cause offence

16. Section 474.17 does not further define what constitutes menacing, harassing or offensive conduct. This enables community standards and common sense to be imported into a decision on whether the conduct is in fact menacing, harassing or offensive.
17. However, section 474.17 was constructed to ensure the use of a carriage service by a person can be menacing, harassing or offensive to the reasonable person because of the *way* the carriage service has been used or the *content* of the communication, or both.
18. The *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No. 2) 2004* introduced section 474.17 into the *Criminal Code*. The Explanatory Memorandum for the Bill states that the offence covers scenarios such as the use of a carriage service to make a person apprehensive as to their safety or well-being or the safety of their property, to encourage or incite violence, or to vilify persons on the basis of their race or religion.⁴
19. The use of a carriage service may be 'harassing' through the quantity and frequency of communications being sent.⁵ 'The method of use' refers to the actual way the carriage service is used, rather than what is communicated during that use. The continual making of unwanted telephone calls to a particular person would likely fall into this category.
20. The use of a carriage service may be 'menacing' where an individual causes another person to be in fear. The sending of threatening and abusive messages and images via social media would likely fall into this category.⁶
21. The use of a carriage service may 'cause offence' where the content of those communications are considered offensive subject to the 'reasonable persons' test. Sending unwanted offensive and sexually explicit communications would likely fall in this category.⁷
22. Section 473.4 of the *Criminal Code* provides matters to be taken into account where determining whether material or the particular use of a carriage service is offensive. These are standards of morality, decency and propriety generally accepted by reasonable adults, the literary, artistic or educational merit (if any) of the material, and the general character of the material, including whether it is of a medical, legal or scientific character.

State and territory offences

23. The federal system of government established by the Australian Constitution means that powers are distributed between the Commonwealth and the states and territories. The Commonwealth Parliament is limited to making laws on prescribed subjects.⁸ However, with only a few exceptions, a state parliament

⁴ <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=ld:legislation%2Fbillhome%2Fr2131>.

⁵ See, for example, *R v Ogawa* [2009] QCA 307.

⁶ See, for example, *Agostino v Cleaves* [2010] ACTSC 19.

⁷ See, for example, *Aboud v R* [2017] NSWCCA 140.

⁸ See sections 51 and 52 of the Australian Constitution.

can make laws on any subject of relevance to that state. For this reason, criminal law is largely the responsibility of states and territories.

24. However, where the Commonwealth has legislative power with respect to a subject matter, it can create criminal offences in respect of the subject matter. For example, the 'external affairs' power in subsection 51(xxix) allows the Commonwealth Parliament to make criminal legislation for the purposes of ensuring Australia's compliance with an international treaty.
25. State and territory offences cover serious instances of cyberbullying such as harassment, stalking and anti-social behaviour.
26. For example, the *Crimes Act 1958* (Vic) makes it an offence for a person to act in a way that could reasonably be expected to cause physical or mental harm to the victim, including self-harm.⁹ Mental harm is defined to include psychological harm and suicidal thoughts. The maximum term of imprisonment for this offence is five years' imprisonment.

Application of section 474.17

27. Whilst noting that section 474.17 is an offence of broad application covering a range of conduct, the Commonwealth Director of Public Prosecutions (CDPP) advises that there have been 927 charges against 458 defendants found proven under section 474.17 of the *Criminal Code* since its introduction in 2004.¹⁰
28. The CDPP noted that state and territory agencies would likely prosecute a significant number of matters under section 474.17.

Prosecutions

29. There have been several successful prosecutions relying on section 474.17 for what could be considered cyberbullying behaviour:
 - *R v Hampson* [2011] QCA 13: The perpetrator posted a series of offensive comments and pictures to the Facebook tribute pages of Elliott Fletcher and Trinity Bates (Elliott Fletcher, age 12 years, died after being stabbed at School in Shorncliffe. Trinity Bates, aged 8 years, was taken from her bedroom in her home in Bundaberg and later found deceased in a nearby storm water drain). The perpetrator was charged with two offences against section 474.17, and two state-based child abuse material offences. For each offence against section 474.17, the perpetrator was sentenced to 3 years' imprisonment. This was substituted on appeal to two years' imprisonment for each offence with immediate release on payment of a \$1,000 good behaviour bond.
 - *Agostino v Cleaves* [2010] ACTSC 19: The perpetrator befriended the victim on Facebook, then sent a series of threatening and abusive messages through the platform. The perpetrator posted

⁹ Subparagraph 21A(2)(g)(i) of the *Crimes Act 1958* (Vic) refers.

¹⁰ This information was extracted from the Commonwealth Director of Public Prosecutions database on 18 October 2017.

photos of himself with a gun and engaged in online conversations about shooting the victim. The perpetrator was charged with one offence against section 474.17, and was sentenced to six months' imprisonment.

- *Aboud v R* [2017] NSWCCA 140: In the context of online grooming a person under the age of 16, the offender was also found guilty of an offence contrary to section 474.17 for posting inappropriate commentary and posts of a manipulative and threatening nature on the Facebook accounts of teenage girls. The offender was sentenced to 7 years' imprisonment with a non-parole period of 5 years and 3 months for all offences.
- *Grott v The Commissioner of Police* [2015] QDC 142: The perpetrator and complainant met on social media and formed a friendship. The perpetrator then began sending the complainant taunting messages, abusive messages, and threats that he would kill himself. He then posted pictures of the complainant to an Instagram account with abusing and degrading commentary, and screenshots of text message conversations between the two with offensive commentary. The perpetrator was charged with two offences against section 474.17, as well as two state-based stalking and identity theft offences. For each of the offences against section 474.17, the perpetrator was sentenced to three years' imprisonment.

Approach where the victim has self-harmed or taken their own life

30. Division 2 of Part IB of the *Crimes Act 1914* (Cth) provides general sentencing principles for people convicted of a federal offence. These principles apply for sentencing of individual found guilty of an offence contrary to section 474.17.
31. For example, a court must take into account a victim impact statement. Victim impact statements can be made by any person who suffered harm as a result of the offence, including family members.¹¹ 'Harm' is defined to include physical, psychological and emotional suffering, economic and other loss, and damage.
32. Further, the Commonwealth Director of Public Prosecution's [Prosecution Policy of the Commonwealth](#) (Prosecution Policy), provides factors to consider in determining whether the public interest requires a prosecution. Those factors include the actual or potential harm occasioned to an individual, and the prevalence of the alleged offence and the need for deterrence, both personal and general.¹²
33. In summary, offending which results in self-harm or where an individual takes their own life can be considered when determining whether to prosecute an alleged offender, and where the judiciary is determining an appropriate sentence.

¹¹ Section 16A of the [Crimes Act 1914](#) (Cth).

¹² See paragraphs 2.10(k) and (p) of the Prosecution Policy.

Prosecutorial discretion

34. Any decision to prosecute a matter in the courts is subject to prosecutorial discretion. With regard to the prosecution of juveniles, the CDPP requires assessment in accordance with internal procedures, including the [Prosecution Policy](#).
35. The Prosecution Policy provides that the prosecution of a juvenile should always be regarded as a severe step. This requires consideration of whether the public interest warrants prosecution, for example, the seriousness of the alleged offence and whether a prosecution would be likely to have an unduly harsh effect on the juvenile or be inappropriate, having regard to the juvenile's vulnerability and his or her family circumstances.

Penalty

36. An offence contrary to section 474.17 carries a maximum term of imprisonment of 3 years or, if appropriate, by a maximum fine of \$37,800.¹³
37. The maximum penalty for section 474.17 was determined with the intention of providing an effective deterrent to the commission of the offence, and to reflect the seriousness of the offence within the *Criminal Code*.
38. Section 474.17 covers more serious conduct – namely menacing or harassing – and the maximum penalty is set with the most serious possible conduct, including repeat offences, in mind. However, the inclusion of 'cause offence' in section 474.17 means the provision can apply to very low level offending, in particular conduct regarded as merely offensive (such as offensive language).
39. Section 471.12 provides a mirrored offence for section 474.17, albeit where an individual uses a postal or similar service rather than a carriage service. The maximum penalty for that offence is 2 years imprisonment, consistent with the suggested penalty for the draft Model Criminal Code 'threat to cause harm' offence (*Non Fatal Offences Against the Person Report*).

¹³ Subsection 4B(2) of the *Crimes Act 1914* and Chapter 3.1.3 of the *Guide to framing Commonwealth offences, Infringement Notices and Enforcement Powers*

<<https://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf>>.

Broadcasting of assaults and other crimes via social media platforms

40. A benefit of increased online connectivity is that people are able to engage and communicate with larger and more diverse audiences, while sharing and accessing information with less tangible barriers.
41. However, this evolution in communications has also given rise to computer-based crimes such as hacking, the proliferation of sharing and accessing extremist propaganda online and the commission of crime by means of new technologies (for example, the broadcasting of assaults and live-streamed child abuse).

Live-streamed child abuse

42. The *Criminal Code*¹⁴ ensures that engaging a sexual activity with a child online is criminalised in a comparable way to activity engaged in in 'real life'. The offence criminalises the broadcasting of child abuse activity via online social media platforms, for example, through a live-stream video.
43. The *Criminal Code* also provides circumstances of aggravation for these offences.¹⁵ Currently, the grounds of aggravation are where, at the time the offender commits the offence, the child has a mental impairment or if the child is in a position of trust or authority in relation to the child, or the child is otherwise under the care, supervision or authority of the offender.
44. On 13 September 2017, the Government introduced the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017 (Bill). That Bill proposes to add explanatory notes in section 474.25A to clarify the application of the offence to offending involving the live-stream video or other auditory means. The Bill also introduces new 'aggravating factors' to section 474.25B: where the child is subjected to cruel, inhuman or degrading treatment or the child dies as a result of physical harm suffered in connection with the sexual activity in subsections 474.25A(1) or (2).
45. The Bill was referred to the Senate Legal and Constitutional Affairs Committee (Committee) for inquiry. On 16 October 2017 the Committee handed down its report, recommending passage of the bill without change to these amendments.

Broadcasting of assaults

Section 474.14

46. Section 474.14 of the *Criminal Code* criminalises the use of a telecommunications network with the intention of committing a serious offence against a foreign law, or against a law of the Commonwealth, state or territory.¹⁶ A person who commits an offence under this section is punishable by a penalty not exceeding the penalty applicable to the relevant serious offence.

¹⁴ Section 474.25A.

¹⁵ Section 474.25B.

¹⁶ Section 473.1 provides that a serious offence means an offence against a law of the Commonwealth, a State or a Territory that is punishable by imprisonment (a) for life; or (b) for a period of 5 or more years; a serious offence against a foreign law means an offence against a law of a foreign country constituted by conduct that, if it had occurred in Australia, would have constituted a serious offence against a law of the Commonwealth, a State or a Territory.

47. This provision covers a broad range of preparatory activities that make use of telecommunications, undertaken with the intention to commit, or facilitate, the commission of a serious offence.
48. Accordingly, this offence has scope to apply to the broadcasting of assaults, where the conduct meets the seriousness threshold.

Measures used to combat cyberbullying between school children and young people

49. Addressing cyberbullying is a joint effort between the government, law enforcement and digital industry. Education, victim support and civil avenues are just as important as criminal laws to combat online anti-social behaviour.

ThinkUKnow

50. The AFP's ThinkUKnow program, launched in 2009, provides cyber-safety education to school students, parents and teachers covering online grooming, sexting, cyberbullying and general online safety. ThinkUKnow provides presentations to Australian parents, carers, teachers and students on the technologies young people use, the challenges they may face, and importantly, how they can be overcome. In the past financial year (2016 – 2017), ThinkUKnow provided cyber safety education to more than 22,000 parents, cares and teachers, and more than 123,000 students.
51. Further information on this program is available at www.ThinkUKnow.org.au.

Office of the eSafety Commissioner

52. In 2015, the government established the Officer of the Children's eSafety Commissioner to protect Australian children from cyberbullying. In November 2016, the government re-named the Office of the eSafety Commissioner to reflect the Office's expanding responsibility for online safety issues also affecting adults.
53. The eSafety Commissioner plays a key role in:
- facilitating the removal of serious cyberbullying material
 - promoting online safety for children more broadly
 - administering the online content scheme for the removal of illegal content; and
 - coordinating activities relating to online safety for children on behalf of the Commonwealth.
54. Further information on the Office of the eSafety Commissioner is available at www.eSafety.gov.au.