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SUBJECT: Western Australia Police Force's Submission For The Inquiry Into The Adequacy Of Existing Offences In The Commonwealth Criminal Code And Of State And Territory Criminal Laws To Capture Cyberbullying

KEY POINTS

- The WA Police Force finds existing laws adequate to address the majority of reported matters.
- The term Cyberbullying encompasses a wide range of behaviours, some of which should not be criminalised.
- Police should not be cast into censorship
- Lowering the bar for criminality too far could generate a substantial increase in reported crime, draw police into non-core roles such as arbitrator and censor, and increase demand on police resources.

INTRODUCTION

It is the experience of the WA Police Force that existing laws and powers are for the most part capable of dealing with technology enabled criminal behaviour. In this context it is important to note that the nature of technology is merely an enabler of offending rather than a type of offending, being effectively the means by which a crime is committed, rather than constituting the crime itself. An online fraud remains a fraud.

The term Cyberbullying is used to capture oppressive and threatening behaviour which is performed in an online environment. The term captures a wide range of events including personal arguments and differences of opinion, the sharing of intimate images now commonly referred to as "*revenge porn*", and extends to publishing content which results in a person taking their own life irrespective of the intent of the person who posted the material online.

Whilst reform is necessary, the process should distinguish between behaviours and outcomes which are criminal in nature and those which are merely crass, confronting and sordid. Lowering the bar for criminality too far could generate a substantial increase in reported crime, draw Police into non-core roles such as arbitrator and censor, and increase demand on police resources.

Technology has made it easy for people to say things they would not previously have said, to a much larger audience than was previously possible, with a much higher assurance of anonymity than was previously possible. Society requires time to adjust to these changes, some of which will be confronting and polarising.

BACKGROUND

The Senate Legal and Constitutional Affairs Committee invited the Commissioner of WA Police Force to make a submission on the ongoing inquiry into 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.

While WA Police Force do acknowledge that legislative review is required, the agency cautions that additional legislation should be approached with care to ensure over legislation does not occur and Police are not drawn into personal disputes. For example, while revenge porn does require legislative reform, the proposed process must take into account actual events to ensure the issue is addressed comprehensively.

The WA Police Force have consolidated the management of all Cybercrime matters, which includes, covert online operations and cybercrime investigation and the management of the Australian Online Reporting Network (ACORN) in a single business area, the experience of which is the foundation and source of this submission.

CURRENT SITUATION:

The WA Police Force makes the following comments regarding Cyberbullying:

1. ***Non-Consensual Sharing Of Intimate Images (Revenge Porn)***

Intimate images are often posted online for the purpose of causing another party distress, and in that context the activity could be considered cyberbullying.

The introduction of legislation to address non-consensual sharing of intimate images is a commitment of the WA State Government and WA Police Force are working with relevant State agencies to progress this matter.

The Western Australia Police Force has submitted significant material on this specific topic to the Department of Justice in Western Australia. Given that revenge porn is a subset of Cyberbullying the WA Police Force considers it relevant to overall question of Cyberbullying and recommends that due to the complexity of the topic this agency be consulted further in any proposed legislative drafting process.

2. ***A Single Act Which Is Likely Or Intended To Cause Repetitious Behaviour***

It is common for offenders to post a single set of information online which causes a quantity of undesirable behaviour. For example, following an acrimonious separation a person creates an online advertisement in the name of their victim which causes innocent people to ring, attend their home or perform some other activity which is distressing to the victim.

The victims in these matters suffer significant distress, particularly when the advert is sexual in nature, as is frequently the case.

This behaviour is not adequately covered by Western Australian law since the offence of stalking requires a repetitious behaviour by the offender, except where there is "...a breach of a restraining order or a bail condition (*Criminal Code (WA)* - section 338D(1) definition of ***pursue***)", which necessarily requires either of these forms of the intervention by a Court in *advance* of the

conduct. If behaviour of this nature is considered Cyberbullying, this issue of repetition should perhaps be modified, or some other specific offence provision be created.

3. Section 474 of the Commonwealth Criminal Code

It is the experience of the WA Police Force that section 474.17 of the *Criminal Code (Cth)* is appropriately and sufficiently constrained in its application by current interpretive legal precedent so as to exclude matters that ought not to attract criminal culpability. In determining whether material is offensive for the purposes of these offence provisions section 473.4 provides matters to be taken into account including:

- (1) the standards of morality, decency and propriety generally accepted by reasonable adults;
- (2) the literary, artistic or educational merit (if any) of the material; and
- (3) The general character of the material (including whether it is of a medical, legal or scientific character).

The leading authority on these words is the decision of the High Court in *Monis v R* (2013) 249 CLR 92. The Court there was considering a charge contrary to s 471.12 *Criminal Code* of using a postal service *to menace, harass or cause offence*. Although the charge in that case was framed in terms of “offensive” in the context of the use of a postal service, the consideration has equal application to the s. 474.17 offence.

In a split Decision, a joint judgment of 3 out of 6 Judges found that as the words “menacing” and “harassing” imply “*a serious potential effect on the addressee, one which causes apprehension, if not a fear, for that person’s safety*”, “...the grouping of the three words [with the word “offensive”] and their subjection to the same objective standard of assessment for the purposes of the offence”, effectively attaches the same standard to achieve consistency such that “...to be “offensive”, a communication must be likely to have a serious effect upon the emotional well-being of an addressee.”: *Monis v R* (2013) 249 CLR 92 at [310].

The judicial examination of the scope of the term ‘offensive’ in the *Monis* case, both on initial appeal to the NSW Supreme Court, and then in the High Court, was in the specific context of balancing the Constitutional validity of the provision against freedom of political speech. Absent this complex element, interpretation in a different context such as the present question of cyber offences may differ quite substantially.

The WA Police Force are nevertheless satisfied that proper interpretation of the terms within section 474.17 sufficiently constrain the scope to capture the type(s) of mischievous conduct in the present context, and that any move to widen the scope would significantly increase crime reports, exceed existing police resources and draw police into a range of non-core activities that ought not attract criminal culpability.

4. Adaptation Of Adults To The Online Environment

It is the experience of the WA Police Force that adults not only lack familiarity with the online social media environment, they are dismissive of it and seek to apply traditional rules which are now impractical and irrelevant. In short, there are some hard key truths which cannot be ignored

A good example of this is pornography, a confronting topic which breaches a number of social taboos. Whilst adults seek ways to avoid this topic, or discuss it in a sanitised and respectful manner, kids are getting a proportion of their sex education and information from the pornography they find online. This is changing the types of sexual activity risk taking young adults and juveniles perform, normalising activities which were previously considered fringe.

In the context of Cyberbullying, adults/parents need to understand that content cannot be reliably filtered or controlled and ceasing participation in social media is the only effective method to end

cyberbullying. Some parents are confronted by the notion of equitability and believe that denying their child social media access is punishing them as the victim. These perspectives are ethically correct but practically irrelevant.

It is also the observation of the WA Police Force that more recent education and information initiatives such as *ThinkYouKnow* and *iParent* are effective, that societal change is gradually starting to catch up with technological ability, and most parents are receptive to directly worded, unambiguous messages.

RECOMMENDATIONS:

The WA Police force recommend:

- A. That new "Cyber" specific offences are rarely required as the cyber component is simply the way the offence was committed.

If legislators wish to attach a higher penalty to a traditional offence which has been committed online, then the WA Police Force recommend this be achieved by extending the existing offence rather than creating a new offence, or by making the cyber component an aggravating feature triggering the higher penalty range. For example, add an additional penalty to the offence of Fraud for offences committed online rather than creating a new offence for Online Fraud. This approach assists legislators to clearly consider when the method of offending increases the severity of the offence to such an extent that a higher penalty is required.

- B. The precedents which guide the application of sections 474.17 of the *Criminal Code (Cth)* be maintained.
- C. The law, either at State or Commonwealth level be amended so to criminalise repetitive events that are caused by an offender through a single act..
- D. Focus be placed on education for both children and adults, with education for adults being direct and unambiguous.

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