

8 February 2018

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

Dear Committee Secretary,

UNSW LAW SOCIETY SUBMISSION REGARDING THE INQUIRY INTO THE  
ADEQUACY OF EXISTING OFFENCES IN THE COMMONWEALTH CRIMINAL  
CODE AND OF STATE AND TERRITORY CRIMINAL LAWS TO CAPTURE  
CYBERBULLYING

The University of New South Wales Law Society welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying.

The UNSW Law Society is the representative body for all students in the UNSW Faculty of Law. Nationally, we are one of the most respected student-run law organisations, attracting sponsorship from prominent national and international firms. Our primary objective is to develop UNSW Law students academically, professionally and personally.

Our enclosed submission reflects the opinions of the students of the UNSW Law Society. This submission addresses all the terms of references of the inquiry.

We thank you for considering our submission. Please do not hesitate to contact us should you require any further assistance.

Yours sincerely,



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# DECONSTRUCTING THE ADEQUACY OF EXISTING STATE AND COMMONWEALTH CRIMINAL LAWS IN CAPTURING THE OFFENCE OF CYBERBULLYING

## I OVERVIEW

On 3 January 2018, Amy ‘Dolly’ Everett took her own life at the hands of cyber-bullies. She was just 14 years old. In the days leading up to her death, Dolly left a message. She drew a picture of a girl, in a bridge pose, with the words ‘stand up, speak even if your voice shakes’.<sup>1</sup> Unfortunately, Dolly’s experience is not an isolated one. Conservative estimates suggest that cyberbullying affects 20 per cent of children aged between eight and 17 years old, or 460 000–560 000 children, in a 12 month period.<sup>2</sup> Compared to the 222 cyberbullying offences charged under s 474.17 of the *Criminal Code Act 1995* (Cth) between 1 July 2016 and 30 June 2017,<sup>3</sup> which includes offences against both children and adults, it is clear that much more needs to be done in this area.

Through analysing the inadequacy of current criminal laws, this submission exposes the way in which the malleable scope of s 474.17 distorts the fundamental correlation between criminal responsibility and moral culpability.<sup>4</sup> This inadequacy exists on three distinct levels: (1) lack of precaution taken by Social Media Platforms in managing the age-group of users, (2) non-prescriptive community standards pervading Facebook’s response strategy to cyberbullying and (3) semantic ambiguity pervading the wording of s 474.17.

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<sup>1</sup> Caroline Overington, ‘Dolly Everett: She Was Only 14’ *The Australian* (Sydney), 13 January 2018 <<http://www.theaustralian.com.au/news/inquirer/dolly-everett-she-was-only-14/news-story/2ef4b694f0ac79ecfebcb8e54d379df>>.

<sup>2</sup> Barbara Spears et al, ‘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’ (Research Paper No 9, Social Research Policy Centre, June 2014) <[https://www.communications.gov.au/sites/g/files/net301/f/Cyberbullying\\_Research\\_Report\\_-\\_Part\\_A.pdf](https://www.communications.gov.au/sites/g/files/net301/f/Cyberbullying_Research_Report_-_Part_A.pdf)>.

<sup>3</sup> *Statistics by Crimes Act/Criminal Code* (22 September 2017) CDPP Australia’s Federal Prosecution Service <<https://www.cdpp.gov.au/statistics/additional-tables>>.

<sup>4</sup> H L A Hart, *Positivism and the Separation of Law and Morals* (1958) 71(4) *Harvard Law Review* 593.

## II INADEQUACY OF CURRENT PROTECTIVE MEASURES TAKEN BY SOCIAL MEDIA PLATFORMS IN MANAGING CYBERBULLYING.

### *A Ineffectual Management of User Age-Groups*

Social media sites are presently adopting basic safety mechanisms to enable victims of cyberbullying to report harassing material and access support teams. However, there is often inadequate accessible data as to how reports are dealt with and the number of successful online removals.<sup>5</sup> For instance, Facebook has a user dashboard that enables individuals to know when a complaint is being assessed although it does not give open information about the nature of the reporting process and associated data. Twitter implements both automated and human-based technologies to procure action against cyber-bullies depending on the severity of the activity, ranging from the deletion of tweets to the suspension of accounts on a permanent basis. However, it displays no public data on the efficacy of its reporting policies, procedures, and practices. This lack of transparency augments the ‘covert-operation’ of cyberbullying, in that its corrupting and pervasive nature remains undetected and removed from the target lens of institutions aiming to instigate significant law reform.

Notably, social media sites are ineffective in managing the age group of users that access its platforms. Instagram requires users to be aged thirteen or over, yet there are no multi-tiered mechanisms of cross-verification – such as providing digital copies of student/individual identification (school cards) alongside second-party identity confirmation. While social media sites have mechanisms to investigate and respond to offensive material, there are no public statistics which accurately delineate the effectiveness of this approach.<sup>6</sup> Similarly, Facebook mentions on its rules that individuals under the age of thirteen cannot sign up although the European Union Kids Online and the London School of Economics contend that fifty per cent of eleven to twelve-year-old individuals are users of the platform.<sup>7</sup> The main users of Snapchat are within the age groups of 11 to 16 and 64 per cent of them have propounded that Snapchat is ‘risky’ according to NSPCC’s Net Aware guide.<sup>8</sup> The ease to which young people from outside a prescribed age bracket can access social media inhibits the capacity for the platform owners to control and monitor the dissemination of material which in turn may contribute to the proliferation of cyberbullying. In particular, the fact that a significant portion of Facebook users are under-age exacerbates the incidence of cyberbullying as young individuals are more vulnerable to psychological anguish. This vulnerability stems from the fact that youth are less aware of mental-health support lines such as YoungMinds, retain under-developed support

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<sup>5</sup> Marc Ambasca-Jones, ‘What are Four of the Top Social Media Networks doing to Protect Children?’, *The Guardian* (online), 9 February 2016 <<https://www.theguardian.com/sustainable-business/2016/feb/09/social-media-networks-child-protection-policies-facebook-twitter-instagram-snapchat>>.

<sup>6</sup> Ibid.

<sup>7</sup> Dipo Daramola, *Young Children as Internet Users and Parents Perspectives* (Masters Thesis, University of Oulu, 2015) 19.

<sup>8</sup> NSPCC Net Aware, *Snapchat* (24 January 2018) National Society for the Prevention of Cruelty to Children <<https://www.net-aware.org.uk/networks/snapchat/>>.

networks (in lieu of their age-maturity) and are more susceptible to the miasma of stigma encompassing issues with respect to psychological health.

Nevertheless, the counter-argument that Facebook and Twitter retain effective mental-health support facilities in the form of partnerships with external-stakeholders (i.e. Cycle Against Suicide) may be posited. However, this counter-argument neglects the fact that the overarching community guide-lines which govern the daily operation of the aforementioned social media platforms fail to mention the protective measures in place to control and subdue under-age access user groups. Alternatively, soft-policy mechanisms (i.e. non-enforceable but normative/educative-based) which provide support to under-age users in instances of cyberbullying, such as sex-ting, are not enunciated within community-guidelines attached to online platforms such as Facebook. Facebook currently uses ‘around the clock’ support teams to report posts and provides a family safety centre for teenagers and parents to block and unfriend abusive people in a safe manner. Likewise, Twitter created a safety centre in 2015 to provide education to parents and educators on how to ensure that young people remain safe online in partnership with Cycle Against Suicide.<sup>9</sup> Instagram has community guidelines and information for parents covering pertinent issues such as ‘who can view my teen’s photos’.<sup>10</sup> These procedures, policies and practices may be well-intentioned although there is no public data upon which one can verify their effectiveness.<sup>11</sup>

### ***B Facebook as a Microcosmic Case-Study Illustrating the Need for Prescriptive Measures Against Cyberbullying***

Cyberbullying is not an issue that can be effectively mitigated through legal redress. Rather accountability mechanisms that are a function of permeating greater educative influence should be given more primacy by societal institutions. In part, this emphasis on developing educative policy is justified through the analysis above which highlights the inadequacy of community guidelines implemented by online media platforms. Consequently, the proliferation of under-age user groups, more vulnerable to assaults on mental health, remains an unaddressed issue that has generated little moral conscientiousness amongst the Australian population. Social media platforms have made efforts to protect the privacy of its users through the introduction of privacy settings. Unfortunately, it appears that social media platforms have been ineffective in their role as ‘gatekeeper’ to address bullying. This is evident in analysing the most popular social media company, Facebook, and its commitment to addressing cyberbullying.

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<sup>9</sup> Ambasna-Jones, above n 5.

<sup>10</sup> Common Sense Media, *What Should Parents Know about Instagram?* (24 January 2018) Common Sense Media <<https://www.common sense media.org/facebook-instagram-and-social/what-should-parents-know-about-instagram>>.

<sup>11</sup> United Nations Children’s Fund, *Children’s Rights and the Internet: From Guidelines to Practice – Articles from the Guardian Sustainable Business Child Rights Hub* (10 May 2016) United Nations Children’s Fund (UNICEF) and the Guardian <[https://www.unicef.org/csr/files/Childrens\\_Rights\\_and\\_the\\_Internet\\_Guidelines\\_to\\_Practice\\_Guardian\\_Sustainable\\_Business\\_English.pdf](https://www.unicef.org/csr/files/Childrens_Rights_and_the_Internet_Guidelines_to_Practice_Guardian_Sustainable_Business_English.pdf)>.

Facebook was chosen as a case study due to its ranking as the third most popular website, and most popular social media platform at the time of writing this analysis.<sup>12</sup> Furthermore, it is arguably the closest version society has to a ‘universal communication platform’.<sup>13</sup> The website has often struggled with censoring content that could harass users, thereby increasing tension between the competing interests of enhancing freedom of speech and preserving the integrity of a purportedly safe space that promotes social cohesion. In this context, ‘cyber bullying’ has been defined as aggressive or harmful behaviour towards individuals or groups through electronic technologies. Since Facebook has separated ‘hate speech’ from ‘cyberbullying’ in their Community Standards, these concepts will also be separated in the analysis below.<sup>14</sup>

In 2015, Facebook redesigned their Community Standards, containing several categories of goals such as ‘keeping you safe’ and ‘reporting abuse’, a format that remains today (as of January 2018).<sup>15</sup> Within this section contains examples of infractions such as ‘photos or videos of physical bullying posted to shame the victims’.<sup>16</sup> However, the Community Standards are vague,<sup>17</sup> lacking specificity in terms of the correlative measures of relief available to victims of cyberbullying and selecting between various grades of severity in terms of available reactive measures. In particular, selecting between penal measures and a passive measure such as a deleting a post that is tantamount to cyberbullying. Whilst it is understandable that Facebook cannot fully uphold both the value of promoting speech and protecting users, it does require more transparency in terms of its policies, especially as users do not understand the process between flagging content and the decision regarding whether it should be removed.<sup>18</sup>

In addition, Facebook has recognised that childhood bullying is a detrimental issue with social media usage and has launched a ‘Bullying Prevention Hub’.<sup>19</sup> This recognition raises another key concern with Facebook’s response to cyberbullying, there is an understandable focus on protecting the victim from further harm but does not do enough to create a dialogue between the victim and perpetrator. Within the ‘Bullying Prevention Hub’ there is information on ‘if you’ve been called a bully’, encouraging apologies and understanding the behaviour that lead to being called a bully.<sup>20</sup> Although having information for different parties involved with cyberbullying is beneficial, the process does not engage with the perpetrator to explain why their actions were wrong. Upon a post being flagged or deleted, Facebook will send the user a message that the post has not met Community Standards, but does not explain why. However,

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<sup>12</sup> Alexa Internet Inc, *The Top 500 Sites on the Web* (2018) Alexa <<https://www.alexa.com/topsites>>.

<sup>13</sup> Vindu Goel, ‘Facebook Clarifies Rules on What It Bans and Why?’, *New York Times* (New York), 16 March 2015.

<sup>14</sup> J Patchin, S Hinduja ‘Bullies Move Beyond the Schoolyard: A Preliminary Look at Cyberbullying’ (2006) 4 *Youth Violence and Juvenile Justice* 2, 148–69.

<sup>15</sup> Facebook, Facebook *Community Standards* (2018) Facebook <<https://www.facebook.com/communitystandards>>.

<sup>16</sup> *Ibid.*

<sup>17</sup> Brett G Johnson, ‘Facebook’s Free Speech Balancing Act: Corporate Social Responsibility and Norms of Online Discourse’ (2016) 5 *Journal of Media Law & Ethics* 3, 19.

<sup>18</sup> *Ibid.*

<sup>19</sup> Facebook, *Facebook Bullying Prevention Hub* (2008) Facebook <<https://www.facebook.com/safety/bullying>>.

<sup>20</sup> *Ibid.*

it may be unfeasible to create a system that gives reasons for why Facebook has acted for every violation. This violation of community values is compounded by the possibility of assigning the role as ‘peacemaker’ to schools in preventing cyberbullying.<sup>21</sup> With that being said, creating system that involves all necessary parties to create a dialogue is a goal for Facebook’s future.

### ***C Amending Existing Criminal Laws on Cyberbullying***

Previously, criminal acts and images of violence were exposed to the public only through censored news reports. However, with the rise of social media and the ability to distribute and re-distribute user generated content offenders can now easily share the entire crime commission process to large interactive audiences through recordings or instantaneously through live streams.<sup>22</sup> The question arises as to whether the existing laws at a Commonwealth and state/territory level are adequate in addressing this relatively new form of media and its impact on criminal behaviour, victims and third party viewers.

Although the broadcasting of crimes on social media is not specifically addressed, most states have provisions that encompass the issue or aspects of the issue. For example, in New South Wales it is an offence to record and distribute intimate images without consent.<sup>23</sup> Although these provisions would render the streaming of a sexual assault on Facebook illegal, they would be ineffectual against the broadcasting of crimes such as assault, wherein no intimate images of the victim were revealed.

By comparison, South Australian legislation more effectively encapsulates the issue of cyberbullying by broadcasting criminal acts. The *Summary Offences Act 1953* (SA) prohibits the filming of humiliating or degrading acts without consent.<sup>24</sup> Humiliating or degrading acts are defined as ‘an assault or other act of violence against the person’ or other acts considered to be humiliating or degrading beyond minor or moderate embarrassment as determined objectively.<sup>25</sup> As such, victims of crime are offered protection from further humiliation and degradation caused by the broadcasting of their treatment by the offender.

Under s 474.17 of the Commonwealth *Criminal Code*, it is an offence to use a carriage service in a menacing, harassing or offensive way.<sup>26</sup> The provision is sufficiently broad to encompass the broadcasting of crimes such as sexual assault and assault which would be readily regarded as seriously offensive imagery according to a reasonable person.

However, the law must balance between censoring offensive material and allowing public discussions. In the United States, Facebook’s temporary removal of a video of Philando

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<sup>21</sup> Amy Dwyer and Patricia Easteal, ‘Cyber Bullying in Australian Schools: The Question of Negligence and Liability’ (2013) 38(2) *Alternative Law Journal* 92.

<sup>22</sup> Raymond Surette, ‘Performance Crime and Justice’ (2015) 27(2) *Current Issues in Criminal Justice* 195, 196.

<sup>23</sup> *Crimes Act 1900* (NSW) ss 91P–91R.

<sup>24</sup> *Summary Offences Act 1953* (SA) s 26B.

<sup>25</sup> *Ibid* s 26A.

<sup>26</sup> *Criminal Code Act 1995* (Cth) s 474.17.

Castile's death from a gunshot caused substantial outrage over the censoring of important political speech about police brutality against African-American men.<sup>27</sup> Under s 474.17, broadcasts of acts of violence which may seriously offend community standards but are, for that very reason, significant to discussing and raising awareness of social issues, would be incriminated.

The broadcasting of crimes on social media is often a morally deplorable celebration of criminal behaviour. The victim is frequently subjected to punishment from the continued cyberbullying resulting from the public humiliation and harassment caused by the broadcast and subsequent sharing or redistribution of the video by viewers. Furthermore, social media users' ability to interact with the offender and the criminal act by 'liking', commenting, sharing the video or simply by viewing the content potentially rewards the offender and encourages the perpetuation of crime through affirmation.<sup>28</sup>

As such, social media should be distinguished from other carriage services due to the potential for mass audience interaction with user generated content as well as the rapid proliferation of uncensored imagery detrimental to the victim. Given these ramifications, it is necessary for the law to issue a clear message of moral condemnation and take legal action to punish and deter the broadcasting of crimes for the purposes of celebrating criminal behaviour or to humiliate the victim.

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<sup>27</sup> Grace Studer, 'Live Streaming Violence over Social Media: An Ethical Dilemma' (2017) 11 *Charleston Law Review* 621, 627–31.

<sup>28</sup> *Ibid* 628–9.



### III PROPOSED AMENDMENTS

Any discussion of s 474.17 of the Commonwealth *Criminal Code* and the adequacy of the penalty and subsequent amendments must recognise the potential of minors to be affected. Cyberbullying predominantly affects young people, with recent estimates that 20 per cent of Australians aged eight to 17 are cyberbullied over a 12 month period.<sup>29</sup> Correspondingly, the perpetrators of these crimes against young people, are overwhelmingly young people themselves. The nature of bullying is a complicated one, and it is estimated around a quarter of victims are also the perpetrators of cyberbullying.<sup>30</sup> It has been found that children who have been victims in face-to-face confrontations are then more likely to become a cyberbully, using the unique power of anonymity in the online space.<sup>31</sup>

Thus, it is important that the system reflects the complexity of victim and perpetrator relationships in cyberbullying and the unique status of children. This is also part of our international obligations under the Convention on the Rights of the Child and the United Nations Guidelines for the Prevention of Juvenile Delinquency.<sup>32</sup> Our legal system contains principles that recognise the dependency and immaturity of children in the *Children (Criminal Proceedings) Act 1987* (Cth), and in New South Wales through the *Young Offenders Act 1997* (NSW). The current system's emphasis on avoiding the detention of juvenile offenders, and using diversionary measures such as restorative justice conferencing, police cautions, and the system of specialty courts is incredibly important.<sup>33</sup> Receiving a custodial sentence as a juvenile, or having multiple appearances in the Children's Court, makes a juvenile more likely as an adult to appear in court and to receive a custodial sentence.<sup>34</sup>

Reform of s 474.17 that creates a more serious offence based on the victim's self harm or suicide should be treated as an indictable and not a 'serious children's indictable offence' to give the justice system the ability to make the discretionary call on whether an alternative diversionary measure may be more appropriate.<sup>35</sup> Preliminary steps should be taken in the case of young people to use alternative dispute resolution if at all possible, before involving criminal sanctions. Police consistently act to divert all but the most serious cases back to schools and community based support services.<sup>36</sup> The role of the Office of the eSafety Commissioner therefore should be emphasised as an avenue to report and sort through complaints before

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<sup>29</sup> Ilan Katz et al, *Research on Youth Exposure To, and Management Of, Cyberbullying Incidents in Australia: Synthesis Report* (Social Policy Research Centre UNSW Australia, June 2014) 2.

<sup>30</sup> *Summary Offences Act 1953* (SA) s 26B.

<sup>31</sup> Hwayeon Helene Shin, Valerie Braithwaite and Eliza Ahmed, 'Cyber and Face-to-Face Bullying: Who Crosses Over' (2016) 19 *Social Psychology of Education: An International Journal*, 542.

<sup>32</sup> *United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)*, GA Res 45/112, UN GAOR, 45<sup>th</sup> sess, 68<sup>th</sup> plen mtg, UN Doc A/RES/45/112 (14 December 1990).

<sup>33</sup> Kelly Richards, 'Trends in Juvenile Detention in Australia' (2011) 416 *Trends and Issues in Crime and Criminal Justice* 1.

<sup>34</sup> Shuling Chen et al, 'The Transition from Juvenile to Adult Criminal Careers' (2005) 86 *Contemporary Issues in Crime and Justice* 6.

<sup>35</sup> *Children (Criminal Proceedings) Act 1987* (Cth) s 18(1).

<sup>36</sup> Katz et al, above n 29, 6.

involving the police. Official involvement should have the same deterrent effect reported by schools as the police.<sup>37</sup>

This submission proposes several amendments to s 474.17 that are intended to both expand the current operation of this provision (by covering incidences where the victim was humiliated), and reform societal attitudes regarding cyberbullying. In particular, it places greater responsibility on cyber-space users to refrain from engaging in cyberbullying by focusing the reasonable persons test on whether the reasonable person in the position of the victim would have been harassed, offended or intimidated. By reforming social attitudes, it is hoped that victims will be encouraged to come forward, and prosecutors to lay charges, against perpetrators of cyber-abuse. Other amendments include the specification of the mental element in relation to this offence, and increasing the maximum penalty where the victim has taken his or her own life. Lastly, it promotes the use of alternative sentencing options for both youth and first-time offenders. These amendments have been underlined as follows:

**474.17 Using a carriage service to menace, harass, humiliate or cause offence (eg, cyberbullying)**

(1) A person commits 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 in the position of the complainant(s) would regard as being, in all the circumstances, menacing, harassing, humiliating or offensive; and
- (c) the person was reckless as to whether or not his or her use of the carriage service would menace, harass, humiliate or cause offence.

(1A) For the purpose of sub-section 1(b), the age of the complainant, and any other material factor(s) known to the accused, may be taken into account.

(1B) For the purpose of sub-section 1(c), recklessness includes the definition set out in s 5.4, as well as inadvertent recklessness, where the accused failed to consider whether or not his or her use of the carriage service would menace, harass, humiliate or cause offence, and where this risk would have been obvious to someone with the accused's mental capacity.

Penalty: Imprisonment for 3 years.

(1C) Where the accused has been found guilty of an offence against sub-section (1), and the accused's use of the carriage service caused the complainant(s) to take his or her own life, the maximum penalty is imprisonment for 6 years.

(1D) Without limiting any of the above, courts are encouraged to look at alternative sentencing options to a custodial sentence for youth offenders and/or first-time offenders.

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<sup>37</sup> Ibid.

#### IV EXPANDING THE SCOPE OF SECTION 474.17

##### *A Amending sub-s 1(b): ‘humiliating’*

The rationale for introducing this criterion is that many cyberbullying incidents are not clearly captured by the existing regime. The following table outlines eight manifestations of cyberbullying according to Dr Collette Langos,<sup>38</sup> and examines the likelihood of these manifestations contravening s 474.17 in its present form.

<b>Manifestation</b>	<b>Definition</b>	<b>Probability of being covered by s 474.17</b>
Harassment	Repetitively transmitting offensive material	Probable (harass)
Cyberstalking	Harassment which causes a victim to fear for his or her safety	Probable (harass)
Denigration	Derogatory comments	Probable (menace, cause offence)
Happy slapping	Filming and broadcasting physical assault	Possibly (menace)
Exclusion	Preventing victims from entering online spaces such as chat groups	Improbable
Outing and trickery	Tricking the victim into disclosing information which is then published	Improbable
Impersonation and masquerading	Sending offensive messages pretending to be the victim	Improbable
Indirect threats	Threats relating to physical harm	Probable

This submission proposes that the word ‘humiliate’ would apply, in many circumstances, to incidents of denigration, happy slapping, outing and trickery, and impersonation and masquerading. It should be noted that introducing this criterion may not apply to incidents of exclusion; however, it is not entirely feasible to criminalise this behavior as doing so would impermissibly impose on a person’s right to self-determination (regarding who he or she chooses to interact with).

<sup>38</sup> Colette Langos, ‘Regulating Cyberbullying: A South Australian Perspective’ (2014) 16 *Flinders Law Journal* 73, 75–6.

### **B Amending the Title: ‘(eg, cyberbullying)’**

Cyberbullying has been defined in the *International Journal of Children’s Rights* as ‘any communication, with the intent to coerce, intimidate, harass or cause substantial emotional distress to a person, using electronic means to support severe, repeated and hostile behavior’.<sup>39</sup> As s 474.17 has been used in a number of cases involving cyberbullying,<sup>40</sup> reformulating the title would allow the community to better recognise what this section is used for.

### **C Introducing sub-s 1B: ‘inadvertent recklessness’**

Section 474.17 does not currently set out a mental element in relation to this offence. Consequently, s 5.6(2) of the *Criminal Code* is engaged so that the mental element is recklessness. Pursuant to s 5.4, a person is reckless with respect to a circumstance if:

- (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
- (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

One of the problems with this test is that it is purely subjective. Indeed, Dr Langos opines that the ‘eccentric’, ‘low cognitive functioning’ or ‘unreasonable’ perpetrator may escape liability if it is found that they were incapable of forming the requisite awareness of a substantial risk.

To address this issue, this submission recommends for the introduction of sub-s 1B, which prescribes inadvertent recklessness as one of the mental elements that, if satisfied, would establish the requisite fault for a conviction under s 474.17. Inadvertent recklessness is taken to mean a total failure to consider whether the person’s use of a carriage service was menacing, harassing, humiliating or would cause offense, where this risk would have been obvious to someone with the accused’s mental capacity if they had turned their mind to it.<sup>41</sup> This recommendation was inspired by the legislative reforms that transpired in the area of sexual assault, where inadvertent recklessness was included as a fault element under s 61HA(3)(iii) of the *Crimes Act 1900* (NSW).<sup>42</sup> Thus, the inclusion of inadvertent recklessness as a mental element would better protect victims of cyberbullying by increasing the likelihood of securing a conviction.

### **D Scope**

Section 474.17 recognises that it is an offence to ‘use a carriage service to menace, harass or cause offence’. It has a wide scope which enables it to encompass a substantial number of actions in the constantly changing context of social media, such as offensive Facebook messages, problematic emails, or harassing posts.<sup>43</sup> Nevertheless, the meaning of the section is

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<sup>39</sup> Department of Communications, ‘Enhancing Online Safety for Children’ (Discussion Paper, Australian Government, January 2014), citing Srivastava, Gamble and Boey, ‘Cyberbullying in Australia: Clarifying the Problem, Considering the Solutions’ (2013) 21 *International Journal of Children’s Rights* 21 (2013) 25, 27.

<sup>40</sup> *R v Hampson* [2011] QCA 132 (21 June 2011); *Agostino v Cleaves* [2010] ACTSC 19 (3 March 2010).

<sup>41</sup> *R v Tolmie* (1995) 37 NSWLR 660, 672 (Kirby P).

<sup>42</sup> David Brown et al, *Criminal Laws* (The Federation Press, 6<sup>th</sup> ed, 2015) 681, citing *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW).

<sup>43</sup> Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Report No 123 (2018), 305.

ambiguous to an ordinary person. In order to resolve this problem, the committee may resolve to introduce a simpler and clearer definition of harassment.<sup>44</sup> This may be achieved through the inclusion of ‘intimidate’ or ‘vilify’ as terms within the section.<sup>45</sup>

The penalty for the use of a carriage service in the aforementioned way is imprisonment for three years.<sup>46</sup> However, this may be an inadequate penalty where the cyberbullying is particularly vexatious and culminates in serious injury and death to a person where such a consequence is reasonably foreseeable.<sup>47</sup> Suicide is the largest killer of young Australians, with rates of death at its highest now than at any point in the last 10 years.<sup>48</sup> As such, an increase in the penalty of the section to six years where such circumstances exist can be instrumental in representing public disdain for cyberbullying where it may lead to the degradation of an individual’s mental health.<sup>49</sup>

Furthermore, infringement notices and cautions may be used as an alternative mechanism to deter young people from making harassing comments on social media.<sup>50</sup> This would ensure that the section does not merely punish but also educates and corrects wrongful behaviour among young people who are still undergoing a process of psychological and emotional development. The perception that the section is particularly onerous may exist within some sections of the general community as there were 308 successful prosecutions of young people under the age of 18 between 2008 and 2014.<sup>51</sup>

The Australian police force themselves have not always been effective in tackling the issue of harassment on social media since 77.4 per cent of overall convictions under this section have been unsuccessful.<sup>52</sup> Accordingly, the Australian police force could easily streamline reporting processes and collaborate with social media companies to improve online frameworks for the detection of unwarranted behaviour.<sup>53</sup> It may also be appropriate to train state and territory police to deal with this issue even though it falls under Commonwealth jurisdiction, especially since 74 per cent of convictions under the section have been due to referrals from state and territory police according to the Commonwealth Director of Public Prosecution.<sup>54</sup>

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<sup>44</sup> Ivor Richardson, ‘Simplicity in Legislative Drafting and Rewriting Tax Legislation’ (2012) 43 *Victoria University of Wellington Law Review* 517.

<sup>45</sup> Daniel Herborn, ‘Racial Vilification and Social Media’ (2013) 8 *Indigenous Law Bulletin* 16, 19.

<sup>46</sup> *Commonwealth Criminal Code Act 1995* (Cth) s 474.17.

<sup>47</sup> Christopher Sickles, ‘Bridging the Liability Gap: How Kowalski’s Interpretation of Reasonable Foreseeability Limits School Liability for Inaction in Cases of Cyberbullying’ (2012) 21 *The William and Mary Bill of Rights Journal* 241, 271.

<sup>48</sup> Mindframe, *Facts and Stats about Suicide in Australia* (27 September 2017) Mindframe Media

<<http://www.mindframe-media.info/for-media/reporting-suicide/facts-and-stats>>.

<sup>49</sup> Shaheen Shariff, ‘Cyberbullying Prevention and Response: Expert Perspectives’ (2013) 15 *New Media and Society* 154, 156.

<sup>50</sup> David Brown, ‘It’s All About the Benjamins: Infringement Notices and Young People in New South Wales’ (2017) 42 *Alternative Law Journal* 253, 260.

<sup>51</sup> Australian Law Reform Commission, above n 43.

<sup>52</sup> *Ibid.*

<sup>53</sup> Anna Mueller, ‘Does the Media Matter to Suicide?: Examining the Social Dynamics Surrounding Media Reporting on Suicide in a Suicide-prone Community’ (2017) 180 *Social Science and Medicine* 152.

<sup>54</sup> Australian Law Reform Commission, above n 43.

## V REFORMING SOCIETAL ATTITUDES

### *A Amending sub-ss 1(b) and 1A: 'reasonable persons in the position of the complainant' (hybrid test)*

Victim-blaming is a well-documented phenomenon which involves distinguishing victims from the general population in a way that leaves them responsible for their own victimisation.<sup>55</sup> In the case of cyberbullying, this often involves telling victims to 'turn off their computer screens' and to disengage from the internet.<sup>56</sup> It is problematic because it discourages victims to come forward, and provides an unjust cultural amnesty for perpetrators.

The proposed amendment to sub-s (1)(b) involves a consideration of whether the reasonable person in the position of the victim would be menaced, harassed, humiliated or offended. This formulation discourages jury members from blaming the victim since they are invited to consider what the use of the carriage service would have meant to the reasonable complainant. It is designed to elicit empathy and fairness, in the hope of promoting broader cultural change.

Proposed sub-s 1A draws upon the hybrid reasonable person test at common law in relation to manslaughter by criminal negligence in New South Wales. In *R v Lavender*, the High Court affirmed the approach of the learned trial judge, who instructed the jury to consider the response of 'a reasonable person [in the position of the accused] who possesses the same personal attributes as the accused' including age, experience, knowledge and the circumstances in which the accused found himself.<sup>57</sup> However, rather than consider the response of the reasonable person in the position of the accused, proposed sub-s 1A invites the court to consider how the reasonable person in the position of the victim would have perceived the use of the carriage service: that is, whether it was menacing, harassing, humiliating or offensive. Take, for example, a 12 year old child who receives an offensive message online. The reasonable person test traditionally conjures an image of 'the hypothetical person on a hypothetical Bondi tram',<sup>58</sup> one who is objective and analytical. Whilst the reasonable man or woman on the Bondi tram might choose to not take offence to the online message, a reasonable 12 year old child might due to differences in age and maturity. Thus, by considering how the end-receiver would perceive the use of the carriage service, social media users are encouraged to be conscientious in their interactions. This will discourage the type of anti-social behaviour that deliberately interferes 'with the legitimate use of the Internet by members of the public'.<sup>59</sup>

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<sup>55</sup> Tammy Garland et al, 'Blaming the Victim: University Student Attitudes Toward Bullying' (2016) 26(1) *Journal of Aggression, Maltreatment and Trauma* 69, 87.

<sup>56</sup> Elena Martellozzo and Emma Jane, *Cybercrime and Its Victims* (Taylor and Francis, 2017) 63; Aenrietta Cook, 'Private School Backlash After Bullied Kids Told to Stop Playing the Victim' (Melbourne), 16 May 2016 <<http://www.theage.com.au/victoria/private-school-backlash-after-bullied-kids-told-to-stop-playing-the-victim-20160516-gow3vx.html>>.

<sup>57</sup> *R v Lavender* (2005) 222 CLR 67, 73 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

<sup>58</sup> *Papatonakis v Australian Telecommunications Commission* (1985) 156 CLR 7, 36 (Deane J).

<sup>59</sup> *R v Hampson* [2011] QCA 132 (21 June 2011) [36] (Muir JA).

## VI SENTENCING

### **A Introducing sub-s 1C: where the complainant has taken his or her own life**

As cyberbullying is a risk factor associated with youth suicide,<sup>60</sup> it stands to reason that stricter penalties should be imposed on cyber-bullies who have caused someone to take his or her own life. Proposed sub-s 1C increases the maximum penalty to six years, both as a punitive response and for the ‘major consideration’ of general deterrence.<sup>61</sup> It also arguably better accords with community expectations, considering suicide is the leading cause of death among persons aged 15–44.<sup>62</sup>

### **B Introducing sub-s 1D: Youth Offenders & First-Time Offenders**

Sub-s 1D may increase the number of charges laid, given the fact that courts are encouraged to adjust the penalty for both youths and first-time offenders.<sup>63</sup>

#### 1 Youth Offenders

Despite the seriousness of cyberbullying, caution should be heeded when laying charges against youth offenders. This submission agrees with assertions made by Julia Davis that a ‘restorative rather than punitive response’<sup>64</sup> may be more appropriate in the context of youth offenders. Davis continues by questioning whether we want to engage the criminal law when dealing with children, due to the serious implications that a conviction carries for their future. However, under s 20C(1) of the *Crimes Act 1914* (Cth), a child or young person who is charged with a Commonwealth offence may be tried, punished or otherwise dealt as if the offence were one against the law of the State or Territory they are charged in.<sup>65</sup> A youth offender charged in NSW would have the benefit of a number of legislative provisions which offer alternatives to custodial sentences, including release subject to an undertaking,<sup>66</sup> or dismissal subject to completion of a Youth Conduct Order.<sup>67</sup> It is unlikely that he or she would receive a conviction pursuant to s 14 of the *Children (Criminal Proceedings) Act 1987* (NSW). Thus, proposed sub-

<sup>60</sup> Department of Communications, ‘Enhancing Online Safety for Children’ (Discussion Paper, Australian Government, January 2014) 3.

<sup>61</sup> *R v Hampson* [2011] QCA 132 (21 June 2011) [23] (Muir JA).

<sup>62</sup> Suicide accounts for 20 per cent of deaths for persons aged 25–44 and 31 per cent of deaths for persons aged 15–24: Australian Institute of Health and Welfare, ‘Deaths’ (Web Report, Australian Government, 7 February 2017) <<https://www.aihw.gov.au/reports/life-expectancy-death/deaths-in-australia/contents/leading-causes-of-death>>.

<sup>63</sup> Department of Communications, above n 60, 25.

<sup>64</sup> Julia Davis, ‘Legal Responses to Cyberbullying by Children: Old or New?’ (2015) 1 *University of South Australia Student Law Review* 52, 59.

<sup>65</sup> See also *Judiciary Act 1903* (Cth) ss 4J and 79, cited in Judicial Commission of New South Wales, ‘Commonwealth Offences’ (Local Court Bench Book, 2017) [15-020] <[https://www.judcom.nsw.gov.au/publications/benchbks/local/commonwealth\\_offences.html](https://www.judcom.nsw.gov.au/publications/benchbks/local/commonwealth_offences.html)>.

<sup>66</sup> *Children (Protection and Parental Responsibility) Act 1997* (NSW).

<sup>67</sup> *Children (Criminal Proceedings) Act 1987* (NSW) s 48R(2), cited in Aaron Tang and Louise Brown, ‘Criminal Records and Convictions’ (Paper presented at Legal Aid, Children’s Legal Service Conference 2016) <[https://www.legalaid.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0017/6074/Criminal-Records-and-Convictions-Aaron-Tang.pdf](https://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0017/6074/Criminal-Records-and-Convictions-Aaron-Tang.pdf)>.

s 1D simply makes this clearer by encouraging judicial officers to consider alternatives to custodial sentences where a youth offender is involved.

## 2 *First-Time Offenders*

Out of the 222 cyberbullying offences charged between 1 July 2016 and 30 June 2017, the majority were dealt with summarily (153 cases compared to 69 cases tried by indictment).<sup>68</sup> This demonstrates, *prima facie*, that most offences are of a relatively minor nature. Accordingly, given the higher likelihood that first-time offenders will be tried summarily, alternative sentencing options should be considered to provide offenders with an opportunity to rehabilitate. Currently, the maximum penalty for the summary offence is 60 penalty units (\$12,600) and/or 12 months imprisonment.<sup>69</sup>

## VII OTHER MEASURES USED TO COMBAT CYBERBULLYING

Cyberbullying is a complex phenomenon partly because it does not occur in a physical space. Unlike traditional schoolyard bullying, cyberbullying often occurs outside of school hours. Yet the school is a crucial part of combatting cyberbullying in school children and young people. The Office of the eSafety Commissioner's Rewrite your Story campaign is a good first step in developing education for students about the harmful effects of cyberbullying.<sup>70</sup> An additional step could be to introduce cyberbullying as a unique aspect of bullying into the NSW Personal Development, Health and Physical Education, and the state equivalents, beginning at the K-6 level. It is important to address because the anonymity of the virtual realm can result in disinhibition and as a result of being unable to see the victim's response, the perpetrator is less affected by empathy.<sup>71</sup> It is also important to emphasise to students that the perceived anonymity does not mean the behaviour cannot be reported. An education campaign should be created for schools which emphasises the ability of students to seek help from cyberbullying.

Education should extend to the police. One of the issues discussed in Australian Law Reform Commission Report 123 was that s 474.17 is not commonly known and therefore has limited enforcement, especially as state and territory police may be unfamiliar with the Commonwealth Criminal Code.<sup>72</sup> The links between police, schools and the restorative justice conferencing system in each state should also be strengthened. Youth justice conferencing and its derivative in each state focuses on restoring relationships between parties, and therefore can offer victim-

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<sup>68</sup> *Statistics by Crimes Act/Criminal Code* (22 September 2017) CDPP Australia's Federal Prosecution Service <<https://www.cdpp.gov.au/statistics/additional-tables>>.

<sup>69</sup> Judicial Commission of New South Wales, 'Commonwealth Offences' (Local Court Bench Book, 2017) [15-060] <[https://www.judcom.nsw.gov.au/publications/benchbks/local/commonwealth\\_offences.html](https://www.judcom.nsw.gov.au/publications/benchbks/local/commonwealth_offences.html)>.

<sup>70</sup> Office of eSafety Commissioner, 'New Cyberbullying Initiative for High Schools' (2016) 30 *ACCESS* 42.

<sup>71</sup> Colette Langos and Rick Sarre, 'Responding to cyberbullying: The Case for Family Conferencing' (2015) 20 *Deakin Law Review*, 305.

<sup>72</sup> Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Report No 123 (2014) 306.



centric outcomes such as an apology, compensation and community service. The creation of a balance of power between the victim and perpetrator is vital and studies have suggested this is much more effective than formal court processes in positive behavioural development and student relationships.<sup>73</sup> Giving schools the opportunity to access youth justice conferencing while bypassing the court system would therefore be a positive step.

The implementation of education campaigns would generate greater community awareness and understanding about cyberbullying. In turn, this education about cyberbullying improves public awareness about civil and criminal law,<sup>74</sup> facilitating individuals to understand how their online actions could lead to legal consequences.

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<sup>73</sup> Langos and Sarre, above n 71, 314.

<sup>74</sup> Michael Kirby, *Community Legal Education and Law Reform* (Australian Law Reform Commission, 1979) 103.