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Submission to the inquiry into the adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying 2017

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| Submitted by: | Victorian Women Lawyers Association Inc (VWL) |
| Sent by email: | Committee Secretary Senate Legal and Constitutional Affairs Committee PO Box 6100 Parliament House Canberra ACT 2600 |
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About us

Victorian Women Lawyers (**VWL**) is a voluntary association that promotes and protects the interests of women in the legal profession. Formed in 1996, VWL now has over 700 members. VWL provides a network for information exchange, social interaction and continuing education and reform within the legal profession and broader community. VWL has undertaken research into work practices affecting women in the legal profession, and provided protocols and training to effect change.

Details of our publications and submissions are available at www.vwl.asn.au under the 'Publications' tab.

Since 1996 VWL has advocated for the equal representation of women and promoted the understanding and support of women's legal and human rights by identifying, highlighting and eradicating discrimination against women in the law and in the legal system, and achieving justice and equality for all women.

Terms of Reference

On 7 September 2017 the Senate referred the following matter to the Legal and Constitutional Affairs References Committee (**Committee**) for inquiry and report by **29 November 2017**:

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.

Women and cyberbullying – overview

VWL submits that both Commonwealth and state and territory laws do not sufficiently address the transformations to societal interactions that have been created by technological advances and, in particular, the uniqueness of social media as a tool for bullying and harassment.



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Australian women and girls are more likely to be the victims of cyberbullying,¹ with young women particularly vulnerable to many forms of cyberbullying including sexual harassment and stalking.²

VWL believes that there is currently a gap in the law in relation to the area of cyberbullying and it should be addressed in order to protect women. The increasing nation-wide concern about the harm associated with cyberbullying demonstrates the inadequacy of existing laws to deal with the issue.

VWL welcomes the opportunity to make this submission to the Committee and supports the creation of specific a criminal offence at the Commonwealth level to deal with cyberbullying.

1. The broadcasting of assaults and other crimes via social media platforms

The law has not advanced efficiently with respect to the issue of filming and broadcasting crime online. Incidents of broadcasting crime on social media platforms has a significant impact upon society; such behaviour causes further harm of humiliation to the victim and also impacts upon non-associated members of the public who view the footage. Due to the widespread impact that such actions have, and in particular on vulnerable women and young girls, it is integral that there is adequate understanding and enforcement of appropriate laws.

The existing laws applicable to broadcasting crimes on social media are many and varied nationwide. They operate both at state and federal level and are a combination of legislation and common law. For instance, broadcasting crimes on social media platforms can fall within the scope of crimes such as invasion of privacy, voyeurism, child pornography, defamation, discrimination, stalking and harassment. While South Australia have made it an offence to film and distribute footage of a humiliating or degrading act,³ other states and territories have fallen behind. As a result, the circumstances of each act must be analysed to determine if such behaviour falls within the scope of other general crimes. The problems associated with this became apparent at the time of the incident known as the 'Australian Defence Force sex scandal' which was broadcast on Skype. Tony Negus, Australian Federal Police Commissioner, highlighted that it was difficult to determine whether the act breached any laws given there was no specific offence, but rather, an array of potentially applicable general offences.⁴

Given the nature of cyberspace, applying varied laws from state to state is problematic in itself. The result is inconsistent, convoluted, and produces unsatisfactory outcomes. In circumstances where the victim and perpetrator are located in different states there can be a lack of consistency and cooperation with respect to regulation and enforcement. With the exception of South Australia, existing state and territory laws are also inadequate in that they were not initially designed to capture this type of behaviour, and hence, their application can be problematic. Lastly, while there are existing laws in Australia that could cover such conduct, many people, especially young women who are often affected, may not be aware

¹ Cross, D. (2009). Australian Covert Bullying Prevalence Study. Child Health Promotion Research Centre, Edith Cowan University, WA.

² Maeve Duggan, 'Online Harassment', Pew Research Centre (22 October 2014), page 3.

³ *Summary Offences Act 1953* (SA), s 26B.

⁴ Australian Broadcasting Corporation, 'AFP scrutinises law after cadet sex claims' (20 Apr 2011), page 1.



that the existing laws apply. Hence, there is a need for education and reform around the issue.

VWL encourages drafting new federal legislation to cover a specific offence for cyberbullying by way of broadcasting crimes on social media platforms. Similar to that in France, legislation could be drafted to ensure that anyone who filmed illegal acts and posted it online would be considered an accomplice to the crime.⁵ This would provide a clear message of condemnation of acts of broadcasting crime online on behalf of the federal government and as well as providing greater access to justice for victims and acting as a deterrent for potential perpetrators. A cohesive approach to regulate the issue by way of legislation at Commonwealth level would produce a uniform approach in state and territory jurisdictions. We believe that explicit Commonwealth legislation will also reduce levels of cross-jurisdictional complication when parties reside in different states or territories. VWL submits that this would also lead to increased awareness and understanding with respect to the behaviour and great clarity around the types of behaviours considered illegal.

2. 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

Under section 474.17, a person commits an offence if they use a carriage service in a way reasonable persons would regard as being menacing, harassing or offensive. This offence carries a maximum penalty of three years imprisonment or otherwise punishable by a fine. The law does not define the terms ‘menacing’, ‘harassing’ or ‘offensive’. The Honourable Chief Justice Tom Bathurst has remarked that in order for the conduct to be considered offensive, ‘it is necessary that the use be calculated or likely to arouse significant anger, significant resentment, outrage, disgust, or hatred in the mind of a reasonable person in all the circumstances’.⁶ Hence the application of the section is limited in providing justice in that it is not enough that the conduct simply hurt or wound the feelings of the recipient in the mind of a reasonable person.

VWL submits that the application of section 474.17 is also problematic as the terminology is not entirely clear or actively enforced. For example, the Office of the Commissioner for Privacy and Data Protection have highlighted that there is a low level of knowledge among law enforcement officials with respect to this section.⁷ This obviously presents issues of inconsistency in circumstances when the section will apply and can then be a barrier to justice. In addition to these problems, if it is the case that law enforcement officers have little knowledge with respect to section 474.17, it is even more likely to be so for members of the general public. Hence, this section provides little deterrence in relation to such conduct.

With respect to the adequacy of the penalty, it must be acknowledged that social media platforms are now being used as a tool in cases of gender-based violence, and in particular, to perpetrate sexual violence, humiliation or harassment against women. VWL does

⁵ Peter Sayer, IDG News Service, ‘France bans citizen journalists from reporting violence’ March 6, 2007.

⁶ *Monis v The Queen* (2011) 256 FLR 28 at 39 [44].

⁷ The Commissioner for Law Enforcement Data Security, *Social Media and Law Enforcement* (2013).



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acknowledge that consideration of a penalty, particularly where a victim has taken their own life, is difficult in that the outcome of cyberbullying behaviour often varies. Further, outcomes are not always immediately apparent and often do not emerge until days, weeks or months later. Additionally, associating a specific incident of cyberbullying with one particular outcome or the long-term repercussions can be difficult because the outcome may be experienced due to a variety of causes. For example, a victim of an offence under section 474.17 may suffer from depression but this may also be linked to other external factors unrelated to an occurrence of behaviour falling within the ambit of section 474.17. Despite the difficulties associated, it is evident that cyberbullying can have an extreme impact on individuals. Hence, it is imperative that the penalty acts as a deterrent. VWL encourages consideration of whether the severity of the penalty is achieving appropriate outcomes, especially having a deterrent effect, to protect the vulnerabilities of women and young girls.

3. The adequacy of the policies, procedures and practices of social media platforms in preventing and addressing cyberbullying

All the major social media platforms have their own rules, policies and procedures which aim to address cyberbullying. These policies tend to be broadly expressed. For example, Facebook's "community standards" state that Facebook does not tolerate bullying or harassment and that they "will remove content that appears to purposefully target private individuals with the intention of degrading or shaming them".⁸ Further, technology is currently being developed to address cyberbullying on social media platforms. Twitter, for example, has begun to focus on tackling abuse on its network through methods such as algorithms which identify tweets that appear to be harassing e.g. through the use of certain language.⁹ The companies behind social media platforms also work with the Australian government in enforcement of Australian anti-cyberbullying laws and in preventative measures such as anti-bullying campaigns.

Despite such measures being taken by social media platforms, the issue of online abuse of Australian women is pervasive. A recent United Nations study found that almost three quarters of women online have been exposed to some form of "cyber violence".¹⁰ As a country where the majority of citizens are internet users (with a majority of internet users on social media platforms), VWL believes that the Australian government and state governments must prioritise establishing a cohesive, collaborative, and efficient response to cyberbullying.

This must be done in close collaboration with social media companies in order to succeed. A survey of internet users found that – in response to racism on social media – targets and witnesses of racism preferred to respond "within platform" i.e. using Facebook by reporting the content and blocking or "unfriending" the perpetrator.¹¹ This indicates the importance of social media platforms taking on a key role in the process of combating cyberbullying as they are often the first source of redress sought out by victims of online abuse.

⁸ See Facebook's Community Standards at www.facebook.com/communitystandards.

⁹ Kayla Webley, *Using Twitter to Crack Down on Bullying*, Time <http://newsfeed.time.com/2012/08/17/using-twitter-to-crack-down-on-bullying/>.

¹⁰ *Cyber Violence Against Women and Girls*, UN Broadband Commission for Digital Development Working Group on Broadband and Gender, 2017.

¹¹ Kevin Dunn, Yin Paradies and Rosalie Atie, *Preliminary Result: Cyber Racism and Community Resilience the Survey* (Research Report, 28–29 May 2014) 3.



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VWL recommends, in conjunction with creating a Commonwealth law specifically targeted at cyberbullying (as discussed above), strengthening the role of the Australian Cybercrime Online Reporting Network (**ACORN**).¹² This could involve providing ACORN with greater enforcement powers in relation to its interactions with social media platform operators, as well as placing a greater emphasis on ACORN's role in coordinating responses to cyberbullying between government agencies, social media platform operators and other relevant bodies and ensuring victims are heard and their cyberbullying issue is addressed.

Concluding remarks

VWL supports the creation of a specific law at the Commonwealth level that addresses cyberbullying in order to protect all individuals that interact online, with particular regard to the vulnerabilities of women and young girls. A singular law would assist in providing clarity to the interpretation of cyberbullying cases. It would also assist in preventing complications in legal cases involving multiple jurisdictions. A targeted law could also enable courts with the flexibility to apply the appropriate penalties to cyberbullying cases and ensure that the law has the desired effect of deterrence.

In regards to social media platforms and their role, VWL further supports the idea of Commonwealth and state governments working closely with social media platform operators. Further, the role of ACORN should be strengthened in order to assist victims in their complaints and requests to have material removed or actions taken against perpetrators. This is in order to allow ACORN to ensure that - between the social media operators, the police, government agencies, schools, workplaces and the various other actors that could assist the victim - one or more of these actors responds to the victim and takes action.

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¹² ACORN is a national policing initiative of the Commonwealth, state and territory governments. It is a national online system that allows the public to securely report instances of cybercrime.