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The Relevance of Technology Neutrality to the Design of Laws to Criminalise Cyberbullying

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Abstract

Despite widespread agreement that cyberbullying is a serious societal problem, there is little consensus on the laws and policies that should be developed to address this issue. Whilst some scholars frame cyberbullying primarily as a psychosocial problem that should be addressed through education and public health initiatives others view it as a legal issue that requires legislative reform. Further, whilst some commentators call for the creation of a specific new offence of cyberbullying others advance the importance of technology neutrality and recommend prosecuting online and offline bullying behaviour within a single coherent framework. In such a context, the purpose of the present article is to examine the adequacy of Australia's present law and policy on cyberbullying, and consider the merits of creating a dedicated offence of cyberbullying. In this regard, special consideration will be given to the government's 2018 report entitled *Adequacy of existing offences in the Commonwealth Criminal Code and of State and Territory criminal laws to capture cyberbullying*. After considering relevant legislation, case law, scholarship and reform discourse, the paper supports the Senate Committee's decision to not recommend the creation of a new offence of cyberbullying and suggests that such a course supports technology neutrality and enhances the consistency and longevity of laws in this area. As nations grapple with this challenging issue, the extensive Australian law reform discourse on this topic is likely to be of interest to law makers and public policy administrators around the world

Keywords: Technology law, cyberbullying, public administraion

1. Introduction

As the Internet has grown to become the leading medium of communication and social exchange in developed nations, the incidence of cyberbullying has correspondingly risen. "Cyberbullying" is commonly understood to be bullying that takes place using the Internet and has been more formally defined as "wilful and repeated harm inflicted through computers, cell phones, and other electronic devices" (Wolke, 2017, 1). Responding to societal concerns as to the potential serious psychological and emotional harm caused by cyberbullying, the Australian federal government enacted the *Enhancing Online Safety for Children Act* 2015 (Cth). The Act created a new role of an eSafety Commissioner and established a complaints service whereby the Commissioner can direct offenders to take down cyberbullying material directed at children. In 2017, pursuant to the *Enhancing Online Safety for Children Amendment Act* 2017 (Cth), the ambit of this legislation was extended from children to all Australians. In 2018, the supporting legislation of the *Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Act* 2018 (Cth) was enacted to criminalise the non-consensual online sharing of intimate images. Despite such reforms, Australia does not have a specific law criminalising cyberbullying, and such conduct is prosecuted under general federal telecommunications laws and criminal laws relating to bullying and stalking. In such a context, the objective of this article is to analyse the effectiveness of Australia's criminal laws in this area and consider the benefits of enacting a new specific cyberbullying offence. After examining the present legislative framework, case law and relevant literature, the article endorses the recommendations of the Australian Government's Senate Legal and Constitutional Affairs References Committee, articulated in its 2018 report titled *Adequacy of existing offences in the Commonwealth Criminal Code and of State and Territory criminal laws to capture cyberbullying* (Australian Government, 2018). The Committee chose not to recommend the creation of a new specific offence criminalising cyberbullying but rather recommended a serious of policy initiatives to fortify existing laws and strengthen online safety. The Committee's approach has the benefit of technology neutrality as it focuses attention to the nature of the cyberbullying conduct rather than the communication

service or platform utilised, thereby supporting the consistent treatment of offline and online bullying. However, it is suggested that such an approach should be accompanied by certain refinements to existing federal telecommunications offences to make them better suited to criminalising cyberbullying, and a harmonisation of the presently disparate State and Territory bullying and stalking laws to develop a coherent national framework to effectively prosecute bullying in its various guises.

There is compelling empirical evidence as to the detrimental health and psychosocial effects of cyberbullying. However, unlike traditional bullying which has been the subject of extensive study, the prevalence and effect of cyberbullying is less researched and potentially more complex. Unlike traditional bullying which commonly exhibits clear a demarcation between the roles of “victim” and “bully”, these roles can become blurred where there is a rapid and extensive exchange of communications and potentially bullying statements. A 2010 population-based cross-sectional study of 2125 adolescents found that in cases of cyberbullying, a significant proportion were both “cyberbullies” and “cybervictims” (Sourander et al, 2016, 725-726). Moreover, a University of New South Wales study found a significant overlap between traditional bullying and cyberbullying (Keeley et al, 2014, 2). A lack of awareness of the potential criminal nature of acts of cyberbullying also lead to lower levels of reporting to relevant authorities such as police and schools and compounds the problem of assessing the prevalence of cyberbullying. Despite these challenges, the Keeley et al study found that “the prevalence of cyberbullying has rapidly increased since it first emerged as a behaviour” (2014, 3). Further, a 2017 study by Moore et al, a meta-analysis of available evidence on the effect of bullying using PubMed, EMBASE, ERIC and PsycINFO electronic databases, identified a statistically significant association between cyberbullying victimization and mental health problems such as depression, anxiety and suicidal ideation behaviours (2017, 69), a result consistent with the subsequent adolescent mental health study by Przybylski (2017, 11). Hence in light of evidence as to the increasing prevalence of cyberbullying and its potentially serious consequences, it is critical to ensure that such behaviour is effectively prosecuted to promote online safety.

2. The Ambit of Present Laws Criminalizing Cyberbullying

2.1 Telecommunications Offences

At present, Australia does not have a specific offence criminalising cyberbullying. Offenders can however be charged pursuant to a variety of provisions in the telecommunications and general criminal law. The *Criminal Code Act* 1995 (Cth) Part 10.6, Subdivision C, creates a variety of offences relating to the use of telecommunications services. Pursuant to s 474.15 (1), a person commits an offence if they use a carriage service (defined by section 7 of the *Telecommunications Act* 1997 (Cth) as a service for carrying communications by means of guided and/or unguided electromagnetic energy) to make a threat to kill. An offence is committed if a person makes a threat to kill another and intends the person to “fear that the threat will be carried out”. Additionally under s 474.15 (2) of the *Criminal Code Act* 1995 (Cth), s 474.15(3) a person commits an offence if they use a carriage service to make a threat to cause serious harm and intends to make the recipient of that threat “fear that the threat will be carried out”. In neither case is it necessary for the recipient of the threat to experience actual fear that the threat will be carried out. Rather, the focus is on the intention of the maker of the threat. “Fear” is broadly defined to include “apprehension” and a "threat to cause serious harm to a person" is defined to include a “threat to substantially contribute to serious harm to the person” under s 474.15(3). Thus, due to its focus on the intention of the maker of the threat rather than the response of the victim, and its expansive definitions of fear and threat to harm, s 474.15 can be used in the prosecution of acts of cyberbullying. Despite this, the high threshold of risk in s 474.16, which centres on a threat to “kill”, makes it unsuitable for the prosecution of less serious acts of cyberbullying.

Whilst the threshold of harm in s 474.15 is high, s 474.17 of the *Criminal Code Act* 1995 (Cth) creates a lesser offence where a person uses a carriage service send a communication with an intention to “menace, harass or cause offence”. Penalty in this case is imprisonment for 3 years. Section 474.17(1)(b) stipulates that an offence is committed if the person menaces, harasses or causes offence in a way, whether by the method of use or the content of a communication or both, that “reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive”. Hence the provision encompasses both express threats conveyed by the words and images of the communication as well as threats that can be implied from the “method” of its communication. The provision is also technology neutral as it does not stipulate the technology used in such communications but rather relates to the method and effect of the threat. Significantly, these two criteria are not cumulative such as that menacing or harassing can occur through the content of the communication *or* the method of use. Accordingly, if a person adopts a method of communication that provides multiple or repeated posts of content that is not in itself threatening, that may in itself be sufficient to infringe s 474.17. In its report *Inquiry into Cyber Crime*, the Australian Government noted that s 474.17 is an offence of “broad application” that encompasses a variety of online communications such as stalking, bullying and harassment (2009, 5). In its *Submission* to the Senate Legal and Constitutional Affairs References Committee inquiry as to *Adequacy of Existing Offences in the Commonwealth Criminal Code and of State and Territory Criminal Laws to Capture*

Cyberbullying, the Commonwealth Attorney-General's Department further observed that whilst the prosecution does not have to establish that the accused “intended” to menace, harass or cause offence, it is necessary to prove that the accused was “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” (2018, 5). Thus, s 474.17 is a potentially powerful provision in charging perpetrators of a wide range of acts of cyberbullying.

However, some uncertainty exists in the application of s 474.17 to acts of cyberbullying as the critical phrase of “cause offence” has not been the subject of extensive judicial consideration. This same phrase has been considered in the different context of s 474.12, which creates an offence of using a postal or similar service to menace, harass or cause offence, and it is useful to examine such cases to shed light on the likely future application of s 474.17. In *Monis v Regina* [2011] NSWCCA 231, Chief Justice Bathurst and Justice Allsop of the Supreme Court of New South Wales Court of Criminal Appeal stated that for a communication to be “offensive” it had to 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 (2011, 25). It was not sufficient that its use merely “hurt or wound the feelings of the recipient, in the mind of a reasonable person” (2011, 91). The court stated that such an approach freedom of speech to be properly balanced with the need to protect individuals from harm. Further Justice Allsop noted that whilst communications which are merely insulting or annoying cannot form the basis of a charge of menacing, harassing or offensive communications, as they attract the implied freedom that the Constitution gives effect to in ensuring proper debate, communications or conduct that crosses the line into the criminal sphere cannot be protected by the implied freedom as they are antithetical to its purpose (2011, 81).

It would seem that the judicial concerns expressed as to the need to ensure that the application of 474.12 does not undermine free speech would apply equally to s 474.17. In this regard, the comments of Chief Justice Mason in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 are instructive in this regard:

> "A distinction should perhaps be made between restrictions on communication which target ideas or information and those which restrict an activity or mode of communication by which ideas or information are transmitted. In the first class of case, only a compelling justification will warrant the imposition of a burden on free communication by way of restriction and the restriction must be no more than is reasonably necessary to achieve the protection of the competing public interest which is invoked to justify the burden on communication. On the other hand, restrictions imposed on an activity or mode of communication by which ideas or information are transmitted are more susceptible of justification" (1992, 143).

Whilst *Australian Capital Television Pty Ltd v Commonwealth* held that s 471.12 only applies to this second category of communications, *Cunliffe v The Commonwealth* (1994) 182 CLR 272 further noted that the section only regulates communications which are not inherently political in nature (1994, 339). In considering the relevance of judicial pronouncements on s 474.12 to the interpretation of s 474.17, Turner suggests that “there is no apparent reason why a similarly narrow construction would not be applied to the same phraseology used in s 474.17” (2016, 32). This hence limits the application of s 474.17 to serious acts of cyberbullying that can be characterised as inherently political in nature or otherwise in the public interest.

2.2 Stalking, Harassment and Assault Offences

State and Territory criminal laws create a variety of offences that potentially apply to cyberbullying conduct. These offences commonly relate to conduct of stalking, harassment, assault and threats to individuals. In New South Wales, s 60E(1) of the *Crimes Act* 1900 (Cth) for example provides that a person who assaults, stalks, harasses or intimidates any school student or member of staff of a school while the student or member of staff is attending a school, although no actual bodily harm is occasioned, is liable to imprisonment for 5 years. Where the assault occasions actual bodily harm, the maximum term of imprisonment is 7 years pursuant to s 69E(2) of the Act. Whilst the provision does not expressly mention “cyberbullying,” it is clear that it can apply to such situations. However, the ambit of operation of the provision is limited by the condition that the harm occur on school premises. In Victoria, s 21A(2) of the *Crimes Act* 1958 (Vic) creates a wide ranging offence of stalking that encompasses “contacting the victim or any other person by post, telephone, fax, text message, e-mail or other electronic communication or by any other means whatsoever,” “publishing on the Internet or by an e-mail or other electronic communication to any person a statement or other material,” and “tracing the victim's or any other person's use of the Internet or of e-mail or other electronic communications”. Part 5A of the South Australian *Summary Offences Act* 1953 (SA) creates a range of filming and sexting offences which include distribution of an invasive image. The term "distribute" is expansively defined in s 26A to include acts of communicating, exhibiting, sending, supplying, uploading or transmitting which make the image available for access by another. It does not however include acts of distribution by a person solely in the person's capacity as an Internet service provider, Internet content host or a carriage service provider, thereby absolving such third party intermediaries of

criminal liability. Section 26D of Part 5A further creates offences of humiliating or degrading filming whilst s 26DA further criminalises threating to distribute invasive image or image obtained from indecent filming. Similar provisions exist in other States and Territories. However, as will be discussed later, whilst these offences are widely drafted and capable of encompassing acts of cyberbullying, there is some disparity in the wording and framing of the offences which impedes the consistent national treatment of acts of bullying.

2.3 The Cyberbullying Notification and Removal Regime

A variety of recent reforms have sought to fortify the operation of the above laws. In 2015, the *Enhancing Online Safety for Children Act* (Cth) created the new role of an eSafety Commissioner to promote online safety for Australians, administer a complaints system for cyber-bullying material targeted at an Australian child, coordinate activities of Commonwealth Departments, authorities and agencies relating to online safety for children, and administer a new online content scheme under sections 3 (a) to (d) of the *Broadcasting Services Act* 1992 (Cth). The Act facilitates the prompt notification and removal of "cyberbullying material", defined by section 5 as material provided on a social media service or relevant electronic service which an ordinary reasonable person would conclude is likely to have been intended to have an effect on a particular Australian child, and is likely to have the effect of seriously threatening, seriously intimidating, seriously harassing or seriously humiliating that child. A complaints service has also been established for young Australians who experience serious cyberbullying and enables the eSafety Commissioner to investigate such complaints and order the removal of the offending material. Significantly, the Act does not exclude the operation of other Commonwealth, State or Territory laws in this field. In 2017, the *Enhancing Online Safety for Children Amendment Act* (Cth) expanded the coverage to all Australians, not merely children.

Further, in August 2018, the *Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Act* (Cth) amended the *Enhancing Online Safety Act* to prohibit the posting of, or threatening to post, an intimate image without consent on a social media service, relevant electronic service or a designated Internet service. The Act also established a complaints and objections system to be administered by the eSafety Commissioner, and entrusted the Commissioner with added powers to issue removal notices or remedial directions, and administer a civil penalty regime. The above reforms do not however include the creation of a specific criminal offence of cyberbullying and the reform discourse continues on the merits of creating such an offence.

3. The Adequacy of Existing Criminal Laws

In order to determine the adequacy of the existing criminal laws, it is useful to examine some leading cases in the area. In *R v. Hooper; ex parte Commonwealth DPP* (2008) QCA 308, the court considered the application of s 474.17 of the Commonwealth *Criminal Code Act*. In the case, the accused sent two communications, one by phone and one by text. The first phone call included the statement of "Thanks for fucken telling me you borrowed my shit. If you keep taking shit and not letting me know, I'm going break your fingers" (2008, 5). After the victim apologised, the accused sent a text reading "How does get fucked sound and both of you have till mick moves in a Saturday 2 get a fucken job and think b4 you do things b4 I flog the living shit out of both of yas k! P.S. bring greg round 2 and instead of a scar 4 what he did 2 my woman I will cut his fucken head off this time k! Don't fuck with me from 2day on b careful what you do and say or I'll teach u guys a fucken lesson in life u will regret k!!!" (2008, 6). The court heard evidence that the complainant was concerned for his own welfare as he believed that the accused was likely to carry out the threats and was larger and stronger than the complainant. In the circumstances, the accused was found to have used a carriage service to menace under s 474.17.

However, whilst cyberbullying conduct can be effectively prosecuted under s 474.17, the case law suggest that the maximum penalty of three years is inadequate, resulting in many offenders receiving non-custodial or suspended sentences. In *R v. Hooper; ex parte Cth DPP* [2008] QCA 308 for instance, the accused was found to have used a carriage service to menace under s 474.17 but was discharged without proceeding to conviction upon his giving security by recognisance of $500 on condition that he be of good behaviour for two years and have no contact with the victim. In *R v Ogawa* [2009] QCA 307, an offender who was found guilty of two counts of using a carriage service to harass and two counts of using a carriage service to make a threat received a sentence of 4 months imprisonment on each charge to be served concurrently with the condition that she be of good behaviour for a two years.

The issue of the relatively low proportion of custodial sentences imposed in cases of cyberbullying was expressly noted by the court in *R v Hampson* [2011] QCA 32**.** The case concerned an accused who was found guilty under s 474.17 for deliberately posting egregiously offensive material, both images and text, on a website which had been set up as a Tribute for several deceased and missing children. In deciding whether to impose the maximum penalty of 3 years, the court had to determine whether the subject offences fell within the worst category of cases falling within s 474.17(1). The court began by noting that the conduct in question was "ghoulish and disgusting by any reasonable standards and its inevitable consequence was to cause emotional pain and distress to grieving relatives and friends of the deceased

children" (2011, 35). However the court noted that:

> "[t]he schedule of cases provided by the respondent listing sentences for offences under s 474.17(1) revealed, at least as a general proposition, that custodial terms of imprisonment were imposed only on offenders whose conduct was threatening or which caused genuine fear. The list contained only one offence of misuse of the Internet" … The schedule provided by the respondent shows that it is not uncommon for an offender in less serious cases to be placed on a good behaviour bond" (2011, 37).

The court went on to find that the present offending was not within "the worst category of cases for which the penalty of three years imprisonment is prescribed and imposed. The court distinguished *Agostina v Cleaves* [2010] ACTSC 19 where a custodial sentence was imposed in circumstances where a 19 year old offender sent threatening messages to the victim via Facebook, including a threat to kill. The court notes that on the facts of *Agnostina*, a custodial sentence was appropriate to give effect to "the necessity for general deterrence and also personal deterrence and public denunciation" (2010, 22).

The sentences imposed for acts of cyberbullying prosecuted under State bullying and stalking offences display a similar pattern of modest sentences. In *VPOL v Gerada* [2011] Y03370432, the Magistrates Court of Victoria found the accused guilty of stalking through cyberbullying. The accused sent over 300 threatening messages to the 17 year old victim, including "Don't be surprised if u get hit sum time soon" and "wait till I get my hands on u, and I'm telling u now ill put you in hospital", in the months preceding the victim's suicide (2011, 3). The accused also made critical comments about victim on MySpace. In finding the accused guilty, Magistrate Reardon noted that "SMS messages or Internet communication may have severe consequences on intended victims, whether meant to or not." The sentence consisted of an 18-month community based order and 200 hours of unpaid community work. In *Police v Ravshan Usmanov* [2011] NSWLC 40, the court found the accused guilty of publishing an indecent article under s 578C of the *Crimes Act* 1900 (NSW) in circumstances where the accused uploaded six nude photographs of his former girlfriend onto Facebook without her consent. In finding the accused guilty, Deputy Chief Magistrate Mottley stated that deterrence is a critical consideration in such cases as once material has been published online they can be widely and instantaneously accessed:

> Facebook gives instant access to the world. Facebook as a social networking site has limited boundaries. Incalculable damage can be done to a person's reputation by the irresponsible posting of information through that medium. With its popularity and potential for real harm, there is a genuine need to ensure the use of this medium to commit offences of this type is deterred (2011, 49).

Despite the acknowledged seriousness of the cyberbullying behaviour in question, a modest sentence of six months was imposed. Thus the case law suggests that whilst cyberbullying can be effectively prosecuted under existing law, the present penalty regime applying to such behaviour is inadequate.

4. Is There a Need for a New Specific Offence of Cyberbullying?

When technological change undermines the relevance of an existing body of law, there has been a tendency for legislatures to introduce a new discrete regulatory framework to govern the new technology or its effects. Over time however this can create voluminous and potentially overlapping legislative instruments that are complex and lead to inconsistent regulation of similar matters. An alternative response is to analyse the effect of the relevant technological disrupter, consider the nature of the existing law and examine whether the governance of the new technology or its effects can be embedded within the existing legislative framework. As Maxwell observes, a technology neutral approach to legal drafting involves a description of the result to be achieved without specifying the technology to be employed or regulated (2014, 1). The benefits of such an approach is that it enables the legislation to be flexibly applied and adapt to new and evolving technological landscapes. Additionally, technology neutral drafting enhances parity by supporting the consistent application of laws through "like governance of like matters" (2014, 1). Adopting such a policy of technology neutrality can hence limit negative externalities associated with having multiple laws for similar conduct in different technological environments. However, before the principles of technology neutrality drafting can be applied, it is useful to follow the following three-step process. Firstly, it is necessary to identify the characteristics of the relevant offline and online offences to determine whether they can be *potentially* encompassed within a single broadly worded technology neutral provision. Secondly, it is necessary to consider the operation of such a technology neutral law in both the offline and online environment and determine which it is the preferred option in all the circumstances. Thirdly, if it is determined that a single technology neutral law should be implemented, it is necessary to consider whether the existing laws should be fine-tuned to more effectively capture both the offline and online behaviours in question.

In the present context, the critical question is whether cyberbullying should continue to be prosecuted under the existing laws discussed above or whether a specific new cyberbullying offence should be enacted. In order to determine this

issue, the subsequent section of the paper will consider the features of bullying and cyberbullying behaviour to examine whether they can potentially be encompassed within a single statutory framework, consider whether such a technology neutral framework is the best option in all the circumstances, and determine if there are further legislative refinements that can support the effectiveness of laws in this area.

4.1 Can Offline and Online Bullying be Potentially Prosecuted under the Same Laws?

Online cyberbullying has certain logistical features which differ from offline bullying. As Olweus notes, traditional bullying commonly consists of readily identifiable physical acts, such as hitting and kicking, verbal threats causing intimidation or humiliation, or identifiable indirect acts such as social exclusion or the spreading hurtful rumours (1993, 49). In each case, the type of act committed, the perpetrator, and the magnitude of the effect can usually be effectively established. In comparison, the nature and effects of cyberbullying can be harder to ascertain. In contrast, as Sourander et al observe, cyberbullying encompasses a wide variety of acts, including harassment through the repeated sending of abusive texts or emails, denigration through the posting of hurtful images or videos online, impersonation through the perpetrator pretending to be the victim in the online sphere and the online exclusion of others (2010, 721). Furthermore, the potential anonymity of online parties, and the capacity for such threats to be liked and supported by many others, can make it difficult to identify the perpetrator(s) and accurately apportion liability (2010, 721). Further, the difficulty of escaping cyberbullying, the potential for it to reach large peer group audiences, and the potential for such cyberbullying to be on multiple distribution platforms (e.g. Twitter, Facebook) increases the magnitude of potential harm and makes it difficult to quantify than the harm occasioned by traditional bullying. Finally, due to the large numbers of parties on social media sites it is possible that a person committing an act of cyberbullying may not be aware of committing such an act or its likely effects on a particular individual, often making it more difficult to establish the required intention for the offence than for offline bullying.

However, despite these differences, it is suggested that offline and online bullying share certain fundamental conceptual features which enable cyberbullying to be addressed through a general offence criminalising bullying conduct. Firstly, the elements of intention, harm and aggression which are the fundamental elements of the offence of bullying are also the basis of the offence of cyberbullying (Langos, 2013, 295). Secondly, the concept of power imbalance which is a critical feature of bullying applies equally cyberbullying (Langos, 2013, 295). Thirdly, the criteria of repetition, to establish the ambit and significance of the act of bullying, applies equally to both the offline and online conduct (Langos, 2013, 296). Thus, whilst both bullying and cyberbullying encompass a range of negative behaviours, it is suggested that these substantial conceptual similarities enable bullying and cyberbullying to be governed by a single technology neutral statutory framework.

Further, recent studies have found that cyberbullying most commonly occurs in conjunction with traditional bullying, further supporting the case for relying on a general offence criminalising bullying conduct rather than the creation of multiple specific offences. The National Health Service Digital's 2014 *What about YOUth?* study which examined both traditional bullying and cyberbullying in adolescents found that whilst 27% reported experiencing regular bullying, most cyberbullying occurred *in conjunction* with traditional bullying. This supports the contention that a legal framework to prevent cyberbullying could be effectively encompassed within the criminal laws prohibiting traditional bullying. Such a technology neutral approach would enable offline and online bullying to be consistently treated within a unified statutory framework.

4.2 Conflicting Perspectives on the Merits of Creating a New Offence of Cyberbullying

Once it is established that offline and online behaviour can *potentially* governed by a single technology neutral provision, the next step is to determine whether this would be the most effective choice in all the circumstances. A variety of scholars have prosecuted the case for a specific offence of cyberbullying, emphasising its symbolic value in deterring cyberbullying. Davis for example argues that creating a specific offence of cyberbullying would demonstrate that "the strength of the government stands behind the victims" and send "a powerful message to the bullies and offers powerful support to the victims who no longer need to feel so alone and vulnerable" (2015, 60). Langos resonates the symbolic value of having a stand-alone cyberbullying offence, suggesting that it would "denounce conduct in an unequivocal manner" and also raise awareness of the harmfulness of cyberbullying by generating media coverage (2013, 297-298). Grierson similarly notes that the creation of such an offence would recognise "the escalating problem of cyberbullying, as a global issue" and prioritise the implementation of effective justice frameworks in to protect people's wellbeing and safety (2016, 22).

A single federal offence of cyberbullying has additionally been supported on the basis that it would enhance procedural efficiency and overcome jurisdictional conflicts. Grierson recommends that "a cohesive approach [be] established to regulate cyber-related offences," stating that "a robust cyberbullying statute at Commonwealth level would be reflected by a uniform approach in State and Territory jurisdictions" (2016, 24). In this regard, she advances New Zealand's

Harmful Digital Communications Act 2015, which creates new civil and criminal remedies for harmful digital communications, as a useful template to be considered (2016, 20). Young et al similarly acknowledge that a specific cyberbullying offence may assist in avoiding potential jurisdictional dilemmas, noting that whilst many cyberbullying activities might amount to a misuse of telecommunications under federal legislation, it is State and Territory Police who commonly respond to complaints of cyberbullying (2016, 89). Whilst addressing the criminal law reform in the United States, Davis advocates creating a federal offence of cyberbullying in order to enhance procedural efficiency and create a less fragmented and more consistent approach the problem. Davis supports a statutory two-step process which mandate a "restorative approach to doing justice" that firstly involves advice, negotiation, mediation and persuasion, and only proceeds to the more coercive aspects of the justice system if these measures are unsuccessful (2016, 89). She concludes that such a staged strategy is well-suited when responding to youth who have engaged in cyberbullying.

Despite such benefits of a dedicated anti-cyberbullying law, widespread misgiving has been expressed in relation to the potential of such an offence to increase the criminalisation of the youth population. The Submissions of the Law Council (2018, 11) and AUARA (2018, 59) to the above discussed Senate Inquiry into cyberbullying both recommended against the introduction of a new offence criminalising cyberbullying, with AUARA citing evidence from America that indicates that the criminalising cyberbullying does not reduce such behaviour. Young similarly argues that creating such an offence is likely to criminalise a significant number of young people who are presently outside the criminal justice system (2016, 91). A 2014 study of youth exposure to cyberbullying by Keeley et al found that presently police only seek to prosecute the most serious of cyberbullying cases and commonly pursue alternative course to judicial proceedings such as warnings and counselling (2104, 5). The authors also found a discrepancy between the cases of cyberbullying recorded by police and the number of such incidents reported by schools to police, suggesting that the enactment of a new offence of cyberbullying will significant increase youth prosecutions.

Noting an absence of the perspectives of educational stakeholders in the debate on cyberbullying, Young considered the opinions of employees from a range of educational institutions. One of the issues participants were asked was whether they believed a specific law should be enacted to prohibit cyberbullying. Whilst the authors report that there was division in the responses that mirrors the wider community, the majority of participants believed that a specific cyberbullying law was not warranted (Young, 97). This is consistent with the findings of the Keeley's study that found 70% of youth and 50% of adults believe "current penalties/consequences" were "appropriate and sufficient to discourage cyberbullying" (2014, 6). Whilst some respondents in the Young study believed that a specific offence of cyberbullying would be appropriate in extreme cases of cyberbullying, the authors point out that such extreme cases of cyberbullying would clearly fall within existing federal offences such as those relating to the misuse of telecommunications and stalking (2016, 91). The authors conclude by suggesting that "[c]alls by some for dedicated anti-cyberbullying laws may be a natural sentiment for those who are at the frontline of grappling for answers for what may seem an interminable phenomenon of the modern age … it speaks to a lack of awareness of how existing legislative, including civil responses can be used as deterrents" (2016, 99).

4.3 The 2018 Report of the Australian Senate Committee

In 2017, the Senate Legal and Constitutional Affairs References Committee was tasked with considering "the adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying". The Committee's Terms of Reference included the consideration of the adequacy of s 474.17 of the *Criminal Code* and measures to combat cyberbullying predominantly between school children and young people. After receiving public submissions and conducting two public hearings, the Senate Committee published its report in March 2018 entitled *Adequacy of existing offences in the Commonwealth Criminal Code and of State and Territory criminal laws to capture cyberbullying*. The Senate Committee begins by noting that "[c]yberbullying is a serious problem. It can cause severe harm to both victims and perpetrators, as well as their families, friends, and communities. It is critical that Australian governments, social media platforms, and broader society take action to reduce its incidence and the harm it causes" (2018, 59). Whilst stating existing Commonwealth, State, and Territory criminal offences "adequately cover serious cyberbullying behaviours", the Senate Committee expressed concern that some cases of potentially criminal cyberbullying have escaped judicial scrutiny (2018, 59). Difficulties raised by anonymous perpetrators and cases in which victims or perpetrators reside in different jurisdictions were cited as factors that may impede court proceedings for cyberbullying (2018, 60). Finally, it was acknowledged that such factors appeared to be compounded by inconsistencies between federal and State laws (2018, 61).

However, after a careful consideration of the public submissions made by a multitude of different stakeholders, including from the broadcasting, media, academic and law enforcement sectors, the Senate Committee chose *not* to recommend the enactment of a new specific anti-cyberbullying law. Whilst the Committee merely passingly commended s 474.17 for being a "broadly framed, technology neutral offence", its failure to recommend the creation of a new specific online bullying law implicitly supports parity in the offline and online treatment of bullying (2018, 61).

Instead, the Senate Committee made a variety of recommendations to better address the problem. A cluster of recommendations relate to education and the development of policies and strategies to counter cyberbullying. In this regard, the Senate Committee advocates consultation between federal and State and Territory governments, non-government organisations, and other relevant stakeholders in order to develop a clear definition of what constitutes bullying. Whilst the above mentioned academic literature contains debates on whether the prevention of cyberbullying is a legal or social issue, the Senate Committee advocates that the federal government view cyberbullying primarily as "a social and public health issue", and improve present prevention and early intervention strategies (2018, 59-60). The Senate Committee further recommends that the federal government implement measures to help the general public obtain a clearer understanding of how current laws apply to cyberbullying behaviour and adopt measures to ensure law enforcement authorities appropriately investigate and prosecute cyberbullying complaints.

A further cluster of recommendations are addressed at fortifying existing regulatory measures. The Senate Committee advocates ensuring that the role of the eSafety Commissioner is effectively promoted and adequately resourced, and recommends that the eSafety Commissioner have access to relevant data from social media services hosted overseas to support its investigations (2018, 62-63). The maintenance of regulatory pressure on social media networks by the federal government through substantial financial penalties for failing to expeditiously respond to cyberbullying complaints is also advanced in the report. The Committee warns that the notification scheme administered by the eSafety Commissioner is merely a "safety net" and does not limit the responsibilities of Internet operators, such Facebook, Google and Twitter, to create safe online environments for their communities.

The most innovative recommendations relate to the Senate Committee's suggestions is in relation to the governance of social media platforms. Recommendation 8 advocates that the federal government "legislate to create a duty of care on social media platforms" to ensure the safety of their users. Whilst this may raise expectations of the creation of a new basis of civil liability, no explanation is provided as to the suggested nature and ambit of such a duty of care. As legislating to create of a duty of care would entail a significant increase in the duties of social media platform providers, further details on the drafting of such a duty would have been instructive. The Committee further recommends that social media operators be required to publicise data on user complaints, delineating the types of complaints and the nature of the social media operator's response. Whilst such user-generated data may have some limitations, the Committee states that such data would assist society to better understand the nature and scale of cyberbullying and support the work of the eSafety Commissioner.

Despite the various submissions requesting refinement of the present statutory framework, the Senate Committee recommendations involve minimal interference with the existing laws. It expressly advocates *against* legislation to increase penalties for cyberbullying offences committed by minors (2018, 60). Whilst the third limb of Recommendation 4 somewhat cryptically recommends that the federal government "ensure … consistency exists between state, territory and federal laws in relation to cyberbullying" no details are provided on how this can be achieved in the absence of legislative amendments (2018, 61-62). As this matter was repeatedly cited in public submissions, it would have been useful for the Committee to have elaborated on its recommendation in this area. One notable exception to this reluctance to advance statutory reform is the recommendation to increase the maximum term of imprisonment for using a carriage service to menace, harass, or cause offence pursuant to s 474.17 of the *Criminal Code Act* from three to five years. This recommendation clearly addresses community concerns as to the leniency of sentences for cyberbullying offences, as well as the judicial deliberations on the inadequacy of existing penalties discussed above.

4.4 Refinements to Existing Technology Neutral Laws

Once it has been established that the relevant offline and online activities are best governed by single technology neutral law, the next step is to ensure that the wording of the legislation is sufficiently wide to encompass the various potential permutations of the conduct to be prosecuted. In the present case, it is suggested that a variety of further refinements to federal telecommunications offences are advisable. Firstly, the above discussed limitation in s 474.17 should be addressing by expanding it to encompass conduct that hurts or wounds the feelings of the recipient in the mind of a reasonable person. Such an amendment would extend the reach of s 474.14 to acts of cyberbullying. Secondly, s 474.17 should be amended to expressly encompass acts of cyberbullying that may also contain secondary matters of public interest to clarify the present uncertainty in this area. Thirdly, whilst the above discussed problem of the low proportion of custodial sentences in cyberbullying cases has been addressed by the Senate Committee's recommendations, it would be useful to further amend the law to enable the imposition of a non-contact order to enhance personal security. Finally, it is necessary to harmonise the various State and Territory laws that apply to bullying and stalking to enable a coherent response to acts of cyberbullying, which by reason of their publication on the ubiquitous space of the Internet, cross jurisdictional borders. AUARA for example noted discrepancies in the definitions of cyberbullying amongst the various States and urged the need for a national harmonisation of laws (2018,1). Yourtown similarly sought

harmonisation of definitions of cyberbullying and further added that such clarity would "support more efficient and effective legal redress of serious cyberbullying crimes by the police and legal agencies" (2018, 21). In addition to such variances in framing of the offence, there is significant variance in State and Commonwealth investigatory regimes, including in relation to search warrants, forensic evidence, interview procedures, and investigative detention. As these statutory refinements and harmonisation initiatives would enhance the effectiveness of the existing law and could be achieved without compromising the technology neutrality of the legislation, it would be useful to encompass these issues in future deliberations on reforming laws to better address cyberbullying.

A leading scholar on how law responds to technological change, Spar, identified four distinct stages in society's response to technological advances (2001, 187-188). The development and discovery of an innovative technology characterises the first phase of development. The second phase is driven by the commercialisation of this discovered technology. The third phase is characterised by escalating conflict between established commercial practices and the disruptive and unrestrained spirit of the new technology. The fourth phase is characterised by the involvement of government in formulating rules to regulate the new technology which has now evolved from an embryonic emerging phase to being an established element of commercial activity. However, it now appears clear that this third phase of conflict, between established legal frameworks and emerging technologies, is more in the nature of a continuum than a distinct stage within a cycle. Spar's analysis draws from earlier forms of technology such as the development of Atlantic trade routes, Morse's invention of the telegraph and the rise of broadcasting, and assumes a phase during which the pace of innovation will decelerate, when the "flashpoint of discovery" will dim, allowing society and law makers to catch up and design appropriate laws (2001, 10-11). Yet in the decades since its inception, the Internet has maintained a consistent and rapid pace of innovation and change. In such a context, it is necessary to move away from a paradigm that assumes a particular technology will coalesce and form a near permanent shape that can then be definitively addressed by laws. Hence law reform initiatives have to acknowledge the Internet's inherent dynamism, and formulate technology neutral, flexible laws that will be able to adapt and evolve with technological change. Prosecuting offline and online acts of bullying within a cohesive technology neutral statutory framework will enable the law in this area to remain flexible and adapt to future evolution of the digital landscape.

5. Conclusion

Therefore, whilst there is widespread agreement that cyberbullying is a significant issue that has the potential to cause serious emotional and psychological harm, the best way to address this problem remains a contentious issue. Whilst certain stakeholders such as Stanbrook characterise the issue as psychosocial with solutions that lie in primary the field of public health (2014, 483), others scholars such as Young (2016) describe it as primarily one of education and yet others such as Davis frame it as a legal issue to be addressed through comprehensive legislative reform (2015). These differing voices from education, media, government and law enforcement present varying options and priorities. For some, deterrence is critical while for others it is important to not increase the criminalisation of youth. In such a challenging context, the Senate Committee's clear delineation of issues and careful consideration of public submissions is to be warmly welcomed. The Senate Committee's report presents clear recommendations and provides a strong platform for reform. Moreover, by failing to recommend the creation of a specific offence of cyberbullying, the Committee supports technology neutrality in the development of laws to combat cyberbullying. As the pace of technological change accelerates and the speed of innovation makes it difficult to predict likely future advances, adopting principles of technology neutral drafting will support longevity and relevance of laws. However, it is recommended that such an approach must be accompanied by a fine-tuning of existing laws to ensure they effectively apply to both offline and online situations. Whilst the existing telecommunications offences and traditional stalking and harassment laws remain effective, they were designed for offline environments and amendments to erase the effects of their contextual heritage would enhance their relevance to the modern age. Overall the implementation of the Senate Committee's recommendations, together with the above discussed refinement of present federal telecommunications laws and a harmonisation of State and Territory bullying and stalking laws will support the development of an effective and consistent national framework to address the significant problem of cyberbullying.

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