Stephen Jones

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The submission, but for my contact details, can be made public. Please note that, despite listing a [redacted] email address, the submission is made in a personal capacity. Should you wish to use an alternative email address I can be reached at [redacted].

I welcome the opportunity to provide input into the Statutory Review of the Online Safety Act 2021.

In 2021, I was awarded a Doctor of Juridical Science for my thesis examining the threshold at which cyberbullying by children should be subject to criminal law. The thesis can be accessed here, and is referenced in my submission: https://bridges.monash.edu/articles/thesis/_Sufficiently_serious_behaviour_When_should_cyberbullying_by_children_be_subject_to_criminal_law_/22152044

The abstract of the thesis is replicated here to give the Review an understanding of the work and its relevance to the Review.

> Cyberbullying is a growing phenomenon, widely viewed as being a significant social and public health issue. Responding to cyberbullying is a complex task, particularly when there is a need to engage the criminal law. The Australian government has repeatedly asserted that the criminal law may apply to 'sufficiently serious' cyberbullying incidents.
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> This thesis explores the threshold at which the law in Victoria, Australia, can identify and respond to 'sufficiently serious' cyberbullying incidents.

Firstly, the thesis explores academic work to establish what is meant by some key terms, especially 'cyberbullying'. This exploration necessitates an interdisciplinary approach consisting of research from a broad range of disciplines such as law, psychology, and education.

Secondly, the thesis undertakes a doctrinal analysis of the various legal responses to cyberbullying. This analysis involves an overview of tort and regulatory law before moving on to criminal law. The two offences that form the focus of this thesis are s 474.17 of the Criminal Code 1995 (Cth) which prohibits using a carriage service to menace, harass or cause offence; and s 21A of the Crimes Act 1958 (Vic) that makes stalking an offence.

Finally, the thesis assesses the extent to which those legal responses can effectively identify and respond to 'sufficiently serious' incidents of cyberbullying.

One of the key findings of the thesis is that exploring responses to cyberbullying, where there are no identifiable responses to similar behaviour offline, is nonsensical. There is a need to consider bullying behaviour as a whole – it is aggressive behaviour accompanied by an intent to cause harm. Many of the nuances associated with cyberbullying are secondary, rather than primary, indicators of harm.

This thesis argues that the Victorian legal framework requires more protection of children from being exposed to the criminal justice system. Further, it argues that the regime administered by the (Commonwealth) Office of the eSafety Commissioner does little to respond to bullying by children. However, the uptake in the number of applications and granting of Personal Safety Intervention Orders suggests that victims of bullying are increasingly seeking forms of redress that are not regulatory actions exercised by the state or the criminal law.

Presently, cyberbullying correlates closer to an offence punishable by a three-year maximum term of imprisonment, whereas adding offline (or 'in person') behaviour arguably escalates that to an offence with a ten-year maximum term of imprisonment. The disparity in maximum penalty is of concern as most forms of

offline bullying have not historically been considered criminal behaviour, and most instances of cyberbullying involve some forms of offline behaviour.

Significant reform is required to ensure that an adequate response exists to bullying and cyberbullying by and of children in the State of Victoria. The argument for reform is in Chapter Seven of the thesis.

The responses below focus primarily on the issue of cyberbullying and the relevant provisions of the Online Safety Act. As my thesis argues, there is a strong need to understand the 'real world' version of problematic behaviours to properly regulate online or cyber versions of those behaviours.

I bring to your attention that the Online Safety Act commenced during the examination of my thesis - see the commentary at page 180.

Questions and responses

Part 3 – Protecting those who have experienced or encountered online harms

8. Are the thresholds that are set for each complaints scheme appropriate?

In my view, the threshold at which action can be taken to investigate or address cyberbullying complaints is too high. Section 6.2.1 of my thesis addresses this issue, albeit based on the former version of the Online Safety Act.

Section 7 of the Online Safety Act still requires that the material be of a kind that causes 'serious harm' to a child, and that has (historically at least) set a high bar for action by the Office of the eSafety Commissioner. Further, the wording at para 7(1)(c) of the Act is likely to require a higher threshold for action than that required by section 474.17 of the *Criminal Code Act 1995.*

See also, section 7.4.1.1 of the thesis.

9. Are the complaints schemes accessible, easy to understand and effective for complainants?

The cyberbullying provisions framework does not feature sanctions for cyberbullying perpetrators. Instead, the removal regime offers a limited remedy. It does not actively condemn the underlying behaviour, and despite the purpose of end-user notices being to put the bully on notice of their behaviour, issuing a notice ought not to be considered a severe form of response, and an effective enforcement regime needs implementing.

10. Does more need to be done to make sure vulnerable Australians at the highest risk of abuse have access to corrective action through the Act?

Yes, more needs to be done to provide tangible outcomes to vulnerable Australians. Overall, the Online Safety Act lacks the 'moral voice' that the criminal law possesses and requires further work to ensure the regime can actively condemn and address cyberbullying behaviour rather than rely on the statutory take-down scheme.

16. What more could be done to promote the safety of Australians online, including through research, educational resources and awareness raising?

See Chapter 7 of my thesis, in particular part 7.2 which deals with education and communication.

Part 5 – International approaches to address online harms

21. Should the Act incorporate any of the international approaches identified above? If so, what should this look like?

See section 4.4.5 of my thesis for commentary supporting the approach adopted in New Zealand being best practice.

In summary, the overall regime established by the *Harmful Digital Communications Act 2015* (NZ) (HDCA) provides a stronger and clearer approach to dealing with harmful digital communications and forms a strong model for an Australian response to cyberbullying.

The HDCA also applies to harmful communications more broadly, such as harassment, and offers more flexible remedies for harmful communications beyond cyberbullying. More importantly, the HDCA addresses harmful behaviour at the hands of the alleged wrongdoer.

In addition to having comparable take down provisions to the Australian regime, the HDCA contains strong criminal and civil law responses.

24. Should there be a mechanism in place to provide researchers and eSafety with access to data? Are there other things they should be allowed access to?

Yes, see part 7.7.2 of my thesis.

Part 6 – Regulating the online environment, technology and environmental changes

29. Should the Act address risks raised by specific technologies or remain technology neutral? How would the introduction of a statutory duty of care or Safety by Design obligations change your response?

The Act should be technology neutral, focusing on the underlying behaviours and actions of perpetrators.

This is not to say that the Act should not contain strong powers for the eSafety Commissioner to direct platforms, service providers etc., to undertake a broad range of actions (e.g. take down notices).

30. To what extent is the Act achieving its object of improving and promoting online safety for Australians?

The Act, and its predecessor, suffers from a desire to achieve too much too quickly. As noted in the Statutory Review of the eSafety Act, the powers and functions of the eSafety Commissioner were not well focused or articulate. The same may be said of the Online Safety Act.

Stephen Jones

16 June 2024