



## **Introduction:**

We are very pleased to have the opportunity to respond to this discussion paper on behalf of the 289 000<sup>1</sup> supporters who have joined us in our campaign for anti-bullying law reform.<sup>2</sup>

We are not lawyers or law enforcement experts. Rather, we are responding as the ‘voice’ of people who have been affected by bullying, drawing on their stories as the basis for our position.

We will present a petition to the Senate shortly, on behalf of our supporters, requesting that the Senate<sup>3</sup>

1. act to include a definition of cyberbullying into Division 474 of the Schedule to *Criminal Code Act 1995 (Cth)*;
2. create a specific offence of cyberbullying under Division 474 of the Schedule to *Criminal Code Act 1995 (Cth)*, or any other appropriate legislation, to regulate the most harmful forms of cyber bullying in a clear and comprehensive manner;
3. and take all other possible actions to regulate, prosecute and educate against bullying in all forms, and cyber bullying in particular.

We support the creation of a new cyber-bullying offence as an extension of Division 474, in fulfilment of our first and second requests, but reject the suggestion of lower penalties, preferring to see the new offence reserved for the most serious cases, with other cases being handled under uniform State and Territory laws.

We welcome the establishment of a Children’s e-Safety Commissioner. We note the urgent need for the development of an effective complaints system, backed by legislation, to get harmful material down fast from large social media sites. We also welcome the establishment of ACORN to be introduced later this year. These are all effective responses to our third request. While noting that this Discussion Paper relates only to children, we ask that these measures be extended to vulnerable adults in the very near future.

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<sup>1</sup> <https://www.facebook.com/ChloesLawAust/likes>

<sup>2</sup> (Department of Communications, 2014, p. 4)

<sup>3</sup> <http://www.gopetition.com/petitions/chloes-law-official-petition-anti-bullying-petition-to-australian-senate.html>

### **General comments on the need for law reform:**

Although we welcome the initiatives mentioned in the first two sections of the discussion paper in relation to establishment of a Children's e-Safety Commissioner and structures for rapid removal of material that is harmful to children from social media sites, we also believe there is a need for law reform, and that is the main focus of this response.

Cyber-bullying is known to cause significant harm, including mental illness and suicide. While we are not interested in criminalizing the relatively naïve actions of minors, we argue that all people, even minors, should be held accountable for their actions when those actions are known to be harmful, and especially so in the case of repeat offences or offences against large numbers of people.

### **Preference for uniform State and Territory Laws to cover most offences:**

Although there have been successful prosecutions under Division 474, as detailed in the Discussion Paper, those cases have generally involved a significant Commonwealth interest such as safety of court staff,<sup>4</sup> child exploitation material,<sup>5</sup> or matters that are already recognized as very serious, such as the posting of explicit threats.<sup>6</sup> Anecdotal evidence from a significant number of our members is that members of the general public are not able to access prosecutions under the current Division 474.

We believe bullying is best handled at the state level, so that state police can handle matters under state legislation, thus enhancing enforceability by increasing accessibility for the public. For this reason, we believe that most bullying, including cyber-bullying, is best dealt with under uniform laws across all states and territories, and we will continue to work towards that goal.

### **New offence under Division 474 of the *Criminal Code Act 1995 (Cth)* for serious cases**

Uniform state laws, if enacted, could cover the majority of cyber-bullying cases in a way that is accessible to the public through State police, with a range of lesser penalties that are appropriate to all offenders, including minors. We urge the Federal Government to encourage all states to make this a priority.

However, we also see benefit in a new specific offence of cyber-bullying under Division 474. Even with the Children's e-Safety Commissioner and State legislation covering the less harmful or serious forms of e-bullying, since penalties are to be relatively light, we believe there is value in creating a new offence, in order to cover the more serious offences under legislation which already provides for severe penalties.

Penalties under Division 474 could remain relatively severe, with prosecution reserved for the most severe or harmful cases, including cases resulting in death.

We also argue that some adult offences against youth may be more appropriately dealt with under Section 474. For example, in the case of the recent Facebook pages 'Adelaide Burn Book' and 'The Adelaide Burn Book Returns' the level of offending was increased by the

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<sup>4</sup> *R v Ogawa [2009] QCA 307*

<sup>5</sup> *R v Hampson [2011] QCA 132*

<sup>6</sup> *Agostino v Cleaves [2010] ACTSC 19*

number of youth targeted by the pages.<sup>7</sup> Offences of this type against individuals could be handled by the Children's e-Safety Commissioner. However, the large number of youth targeted and the repeat nature of the offending, in our view, also constitutes a significant collective harm that warrants a more severe penalty.

### **Educative and normative value of a new offence, in addition to punitive value:**

In addition to the punitive value of severe penalties for the more serious, or repeat offences, there is also educative and normative value in including a definition of cyber-bullying into Division 474.

Education and awareness raising measures would be better served by a clear definition of cyber-bullying. Part of the brief of ACORN will be to provide general and targeted educational advice on cybercrime. We believe that task would be easier to achieve if the legislation includes reference to, and definition of, the specific crime of cyber-bullying, particularly given the current wording of the offence, which is very general and not readily understood.

The practice of 'happy slapping', where an assault is filmed and posted online, serves as a useful example. This behaviour is not readily understood as being covered by the terms 'menace, harass or cause offence', even by 'reasonable persons' who may think it is sufficient to advise a person to simply turn off the computer or block the material. However, it is among the most harmful forms of cyber-bullying.<sup>8</sup>

A clear and comprehensive definition of cyber-bullying in Division 474, listing a comprehensive range of behaviours that constitute cyber-bullying, in the same way that State anti-stalking laws list a range of behaviours, would therefore be a valuable platform for educational campaigns. To some extent, a more comprehensive list of behaviours that constitute serious cyber-bullying, would also assist with the issue of intent to cause harm, because widespread publicity around the types and grades of harm incorporated in a new law with a new definition would help towards a presumption that the 'reasonable person' now understands that these behaviours are harmful, and sometimes fatally so.

### **Conclusion:**

Q20 In light of the Government's proposed initiatives targeting cyber-bullying set out in Chapters 1 and 2; do the current criminal laws relating to cyber-bullying require amendment?

Yes. We reject option 1. We call on the Commonwealth Government to amend current laws to include a comprehensive definition of behaviours that constitute cyber-bullying, and a new offence of cyber-bullying. We further urge the Commonwealth Government to work with all State and Territory Governments to achieve uniform State and Territory cyber-bullying laws.

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<sup>7</sup> <http://www.theaustralian.com.au/news/second-facebook-sex-rumour-page-created/story-e6frg6n6-1226496323313>; and <http://www.adelaidenow.com.au/news/south-australia/facebook-burn-page-angers-adelaide-parents/story-fni6uo1m-1226761726224>

<sup>8</sup> (Langos, 2013, p. 170)

Q21 Is the penalty set out in section 474.17 of the Criminal Code appropriate for addressing cyber-bullying offences?

Yes. If the Children's e-Safety Commissioner is used to address most cases involving minors, and State or Territory laws are used for more serious or repeat offences, then the current penalty in Division 474.17 is appropriate for the most serious offences, particularly those involving adults who target children, and offences at the most serious end of the spectrum of offences.

Q22 Is there merit in establishing a new mid-range cyber-bullying offence applying to minors?

No. We would prefer to see this covered by uniform State and Territory laws, for reasons of accessibility.

Creation of a new offence for minors is inconsistent with our preference for a new offence for all ages. If the aim is to allow lower penalties for minors, without sending the message that harm caused by juveniles is less serious than that caused by adults, we would prefer a new offence with a wide range of penalties.

Q23 Is there merit in establishing a civil enforcement regime (including an infringement notice scheme) to deal with cyber-bullying?

Yes, especially for juvenile offenders, and in order to reduce the trauma of court cases on minors, provided the usual criminal procedures are retained and enforced rigorously for the most serious situations.

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