Submission in Response to the Government Paper

Enhancing Online Safety for Children

By

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Although I am the Chair of the National Centre against Bullying, I make this submission in my personal capacity because time has not permitted me to properly consult my colleagues at the Centre. These submissions are primarily directed to the issue of cyber-bullying, although I have also commented on the nature and role of the E- Safety Commissioner for Children.

Establishment and functions of an E Safety Commissioner

I have no comment on this section of the discussion paper beyond saying that I am in broad agreement with the proposal.

Q1. As to taking over existing programs, as the paper points out some have been very successful and it would seem better for the Commissioner to co-ordinate such programs in conjunction with those conducting them. However this may depend upon the type of Commissioner chosen from the options.

> Q2. Considering the intended leadership role and functions of the Commissioner, which option would best serve to establish the Commissioner?

Q2. In my view serious consideration should be given to Option 1 despite the cost factors associated with it. We are here dealing with a vital issue affecting not just children and youth but all members of our society. The problems associated with E- Safety are massive and will continue to grow and require substantial resources. The Government is to be commended for this initiative but it should also be conscious that something more than what might be thought to be a token effort is needed. As the discussion paper points out, this option would provide the highest degree of independence of any of the options and again the significance of this factor should not be understated.

Option 2 is a possible compromise position but I would be concerned if administrative support was to come from ACMA and/or the Department of Communications. I suggest that a body more

independent of Government such as the Australian Human Rights Commission would be more suitable, if properly funded for the purpose.

I think that there are serious problems about Option 3 from an independence point of view. This is not intended as a criticism of ACMA but the fact is that it is an instrument of Government cannot be avoided and I do not believe that appointing a member of the ACMA Board as suggested would solve this problem.

A combination of Option 4 with Option 2 might be workable. I say this because the NGO could provide many of the support functions to the Commissioner, thus reducing dependence on a supporting Departmental type organisation and achieving the advantages associated with an NGO set out in the discussion paper. I agree that there appear to be difficulties about the NGO acting to enforce the legislation and consider that this would be better in the hands of an independent Commissioner as suggested in Option 2 working closely with the NGO. Failing this I would generally favour Option 4 if Option 1 cannot be achieved.

Options for a Commonwealth cyber-bullying offence

Option 1 – Leave the existing offence unchanged and implement education and awareness raising measures to better explain the application of the current offence.

Option 2 – Create a separate cyber-bullying offence covering conduct where the victim is a minor (under 18 years), with a lesser maximum penalty such as a fine.

Option 3 – Create a separate civil enforcement regime to deal with cyber-bullying modelled on the New Zealand 'Approved Agency' approach

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

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

Q24 What penalties or remedies would be most appropriate for Options 2 and 3?

Before turning to the specific options and questions it is perhaps appropriate at this point to refer to the Bullying Young People and the Law Symposium conducted in Melbourne in July 2013.

Symposium on Bullying, Young People and the Law 2013

In July 2013 this Symposium drew together Judges and retired judges, including the President of the Court of Appeal in Victoria, the Principal Youth Court Judge of NZ and the President of the Children's Court of Victoria together with some of the nation's pre-eminent legal experts, law enforcement and educational experts to meet in Melbourne to address issues surrounding bullying, young people and the law. The Symposium was a joint initiative between The Alannah and Madeline

Foundation's National Centre Against Bullying (NCAB), the Australian Federal Police and the Sir Zelman Cowen Centre, Victoria University.[1]

The need for this conversation arose out of widespread concern about the problems bullying and cyberbullying can create for young people. Current laws differ between states and the law does not currently define bullying or clarify the legal duty of schools, teachers, parents and carers.

The Symposium debated the questions of whether Australia should have unified laws to address bullying, whether there is a need for a legal definition of bullying and whether it should it be a criminal offence.

Its unanimous recommendations were that the approach involve:

a) Education

b) Appropriate responses by organisations to incidences of bullying and cyberbullying

c) The establishment of a national digital communication tribunal similar to that proposed in New Zealand, and

d) An appropriate legal framework to address bullying and cyberbullying

The symposium recommended:

- All governments to consider the introduction of a specific, and readily understandable, criminal offence of bullying, including cyberbullying, involving a comparatively minor penalty to supplement existing laws which are designed to deal with more serious forms of bullying conduct. In developing the above approaches, it is necessary to take into account:

  i. *the voices of children and human rights*

  ii. *summary offences that do not require proof of specific intent to cause harm* [2]

  iii. *appropriate penalties that in the case of children do not include incarceration*

- The Federal Government to establish a national digital communication tribunal with the power to act, speedily and in an informal manner, to direct the immediate removal of offensive material from the internet.

- The adoption of the recommendation of the Victorian Law Reform Committee Report on Sexting in all States and Territories.

Limiting the suggested new offence to children

I think that another issue that needs to be addressed by the Government is the overall one of whether there should be a separate lower grade cyber-bullying offence that applies to adults as well, as does the New Zealand proposal, while at the same time retaining the existing offences or better

[1] http://ncab.org.au/bypal13recommendations/

[2] This was not a recommendation for a strict liability offence but rather that the offence be constituted by where the perpetrator knew or **ought to have known** that the conduct was harmful

still, amending them to make it clear that they also apply to cyber-bullying of a more serious nature as discussed below. Otherwise it might be said that rather than protecting children, the new offence places them in a worse position than that of adults when they engage in cyber-bullying. For example a 17 year old could be charged under the new offence but an 18 year old could only be charged under the more serious offence. Because of its more serious nature police might choose to ignore the 18 year old but charge a 17 year old with the lesser offence.

A legal analogy to my suggested scale of offences is the law of assault, which also applies to minors and provides a scale of offences commencing with common assault and escalating to assault causing actual bodily harm, assault with intent to do grievous bodily harm etc, with increasing penalties for the more serious assaults.

This would have the benefit of identifying cyber-bullying as a crime with various grades of seriousness. As with assault, trivial assaults would normally be ignored by police and prosecuting authorities or be the subject of admonition or warning and more serious cases would be the subject of charges.

By identifying it as a crime, this would make it clear that it is regarded as so unacceptable as to be unlawful and would have a readily understandable impact on children and adults.

At present bullying and cyber-bullying remain the only forms of serious antisocial behaviour that are not directly proscribed by the law despite their serious consequences in so many cases. It is I believe, no answer to say that there are offences into which the more serious forms of cyber-bullying can be fitted. This is a prosecution oriented mentality which only looks at whether a charge can be laid for particular types of conduct. What is much more important is that a law should have both an educational and deterrent effect which cannot happen until the particular type of conduct involved is well understood to be a crime. While appreciating that the Commonwealth cannot legislate to criminalise bullying *per se*, it can certainly do against cyber-bullying. The object of this would be prevention rather than prosecution. The importance of directly identifying it as criminal behaviour would hopefully lead to a reduction in the incidence of this behaviour rather than increased numbers of prosecutions.

Defining cyber-bullying

The discussion paper does not discuss this issue which of necessity involves consideration of what bullying is. I suggest that this is vital in considering what the nature of any amendment to existing legislation should be and the nature of any new offence.

The following statement, which is drawn from a submission made by the Alannah and Madeline Foundation and The National Centre against Bullying to the Victorian Coroner contains what I believe to be a useful discussion of the issue:

> "***Before turning to the issue of definitions it is first necessary to discuss that bullying is. AMF and NCAB accept the general research understanding that there are four main kinds of bullying.***
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> ***Physical bullying, including hitting, kicking, tripping, pinching and pushing or damaging property.***
> ***Verbal bullying, including name calling, insults, teasing, intimidation, homophobic or racist remarks, or verbal abuse.***
> ***Covert bullying, which is often harder to recognise and can be carried out behind the bullied person's back. It is designed to harm someone's social reputation and/or cause humiliation. Covert bullying includes: lying and spreading rumours, negative facial or physical gestures, menacing or contemptuous looks, playing nasty jokes to embarrass and humiliate, mimicking unkindly,***

encouraging others to socially exclude someone or damaging someone's social reputation or social acceptance.
Cyberbullying is overt or covert bullying behaviours using digital technologies. Examples include being sent derogatory or harmful text messages/pictures/video clips/emails or having them posted on the internet or sent to others. It can also be the deliberate exclusion of someone from social networking spaces. Cyberbullying can happen at any time. It can be in public or in private and sometimes only known to the target and the person bullying.

In general bullying is not usually regarded as consisting of single episodes of social rejection or dislike, single episode acts of nastiness or spite, random acts of aggression or intimidation, mutual arguments, disagreements or fights.

As discussed below, with the development of cyber bullying there are cases where a single episode can have a multiple effect, such as placing offensive material on a website about a person, or widely distributing an offensive photograph or email. Also for the purposes of the law, it is difficult to see why a single wrongful act which has serious effects on a victim should be characterised any differently from a repeated act, although the fact that the act is repeated may go to penalty. In such circumstances the requirement that an act must be repeated to constitute bullying must be qualified and is qualified in the statutory definitions discussed below.

It is important to note that AMF and NCAB regard bullying as arising from social contexts. It is therefore a relationship problem requiring relationship solutions.

Nevertheless, we consider that there should be a legal framework against which conduct can be judged, which would have the effect of setting boundaries and providing community education as to the type of conduct that the law regards as unacceptable, as well as providing a degree of deterrence.

Historically there has been no generally accepted legal definition of bullying. The word is widely used to describe all sorts of offensive conduct by one person or persons to other(s). It is against this background that academic researchers sought to distinguish it from random individual acts.

The pioneering Norwegian researcher, Daniel Olweus defined bullying as follows:

A person is being bullied when he/she is exposed, repeatedly and over time, to negative actions on the part of one or more other persons. Negative action is when a person intentionally inflicts injury or discomfort upon another person, through physical contact, through words or in other ways. Note that bullying is both overt and covert behaviours.[3]

Professor Rigby, an internationally regarded expert on bullying (and an NCAB member) in an article discussing the difficulties of definition of bullying, arrived at the following formulation:

"Bullying involves a desire to hurt + hurtful action + a power imbalance + (typically) repetition + an unjust use of power + evident enjoyment by the aggressor and a sense of being oppressed on the part of the victim. (Rigby, 2002)[4]

AMF and NCAB have adopted the following generally accepted definition of bullying:

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[3] http://www.cobbk12.org/preventionintervention/Bully/Definition%20of%20Bullying.pdf (Accessed 7 November 2013)

[4] http://www.kenrigby.net/02a-Defining-bullying-a-new-look (Accessed 7 Nov. 2013)

"Bullying is when someone or a group of people with more power repeatedly and intentionally causes hurt or harm to another person or group of people who feel helpless to respond. Bullying can continue over time, is often hidden from adults and will probably continue if no action is taken."[5]

There are numerous other definitions. The House of Representatives Committee on Health and Safety Inquiry into workplace bullying suggested the following definition.

Workplace bullying is repeated, unreasonable behaviour directed towards a worker or group of workers, that creates a risk to health and safety.[6]

S 789 FD of the commonwealth Fair Work Act 2013, which received Royal Assent in June 2013 and comes into effect in July 2014, in substance adopted that definition.

We think that a distinction needs to be drawn between the traditional definitions of bullying adopted by Olweus and Rigby and followed by AMF and legal definitions, because the traditional definitions have evolved in an environment where bullying has never been an offence and has thus never had to be defined in legal terms.

<u>Canada</u>

Some interesting definitions have been adopted by Canadian Provinces that have recently defined bullying. Ontario has defined bullying in the following terms:

"Bullying" means aggressive and typically repeated behaviour by a pupil where,

- ***a. the behaviour is intended by the pupil to have the effect of, or the pupil ought to know that the behaviour would be likely to have the effect of,***
  - ***i. causing harm, fear or distress to another individual, including physical, psychological, social or academic harm, harm to the individual's reputation or harm to the individual's property, or***
  - ***ii. creating a negative environment at a school for another individual, and***
- ***b. the behaviour occurs in a context where there is a real or perceived power imbalance between the pupil and the individual based on factors such as size, strength, age, intelligence, peer group power, economic status, social status, religion, ethnic origin, sexual orientation, family circumstances, gender, gender identity, gender expression, race, disability or the receipt of special education."***

This legislation is confined to bullying in a school environment but could easily be converted into a more general form. [1]

Nova Scotia legislation created bullying and cyber bullying as criminal offences following an extensive public inquiry and report into bullying.It is important to note that the definitions adopted differed from the traditional definition of bullying.

These definitions are as follows:

Bullying means behaviour, typically repeated, that is intended to cause or should be known to cause fear, intimidation, humiliation, distress or other harm to another person's body, feelings, self-esteem, reputation or property, and can be direct or indirect, and includes assisting or encouraging the behaviour in any way.

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[5] http://www.ncab.org.au/whatisbullying/ (accessed 8 November 2013)

[6] Workplace Bullying: We Just Want It To Stop, House of Representatives Committee on Health and Safety, 26 November 2012 http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=ee/bullying/report.htm (Accessed 8 November 2013)

Cyberbullying means bullying by electronic means that occurs through the use of technology, including computers or other electronic devices, social networks, text messaging, instant messaging, websites or e-mail."

<u>New Zealand</u>

A Harmful Communications Bill has been introduced by the Government into the NZ Parliament which creates new offences relating to cyber bullying. The NZ Bill does not deal with any other type of bullying than cyber bullying and the Law Commission's terms of reference were confined to cyber bullying. This probably reflects media attention to cyber bullying.

These new offences consist firstly of inciting a person to commit suicide where no suicide or attempted suicide has occurred, which carries a penalty of up to three years imprisonment. This amends an existing section of the NZ Crimes Act, which hitherto dealt only with inciting suicide where a person has attempted to commit or has committed suicide and which carries a penalty of 10 years imprisonment.

Secondly an offence of harmful digital communication is created carrying a penalty of up to three months imprisonment. Clause 19 of the Harmful Communications Bill is as follows:

Causing harm by posting digital communication

- ***(1)A person commits an offence if—***
    - ***(a)the person posts a digital communication with the intention that it cause harm to a victim; and***
    - ***(b)posting the communication would cause harm to an ordinary reasonable person in the position of the victim; and***
    - ***(c) posting the communication causes harm to the victim.***

  (2) In determining whether a post would cause harm, the court may take into account any factors it considers relevant, including—
    - ***(a) the extremity of the language used:***
    - ***(b) the age and characteristics of the victim:***
    - ***(c) whether the digital communication was anonymous:***
    - ***(d) whether the digital communication was repeated:***
    - ***(e) the extent of circulation of the digital communication:***
    - ***(f) whether the digital communication is true or false:***
    - ***(g) the context in which the digital communication appeared.***

Interestingly enough the NZ Parliament has avoided defining cyber bullying. The Bill follows the recommendations of the NZ Law Commission in its 2012 Report.

A reading of the Commission Report suggests that the reluctance to define cyber bullying may be due to the difficulty of definition coupled with the desire to express the offence of cyber bullying widely enough to cover every situation of harmful electronic communication. In that context that approach may be valid but it loses the value of sending a message that all forms of bullying are against the law.

<u>Further Discussion</u>

In the Nova Scotia legislation, the need for the conduct to be repeated to constitute bullying has been modified so that it is no longer an absolute requirement but is said to be 'typically repeated'. This also appears in the Ontario legislation. There are concerns about the rigidity of this requirement in the classic definition, which has been exacerbated by cyber bullying where one act

can effectively be repeated by the extent of its dissemination to others. Nevertheless what distinguishes bullying as a particularly hurtful form of conduct is its repetition and arguably this modification recognises this while leaving open the possibility that a single act may have the same effect.

However the new Commonwealth legislation in Australia referred to above preserves the requirement of repetition as an essential factor in relation to workplace bullying, presumably to distinguish bullying as more serious conduct than single acts of harassment

Secondly the need for a power imbalance to be present has disappeared from the Nova Scotia definition. It is retained in the Ontario legislation but the word used are "real or perceived" in respect of the power imbalance, which again modifies it.

If it is to be retained we think it better to use the words "typically involving a power imbalance". We say this because the bullying itself may have created a power imbalance where none existed before. It is not uncommon as I understand it for talented or distinguished individuals to be the subject of bullying by others of less distinction (the tall poppy syndrome) and it is the effect on them that creates the power imbalance in favour of those doing the bullying which did not exist before. Similar considerations apply to cases where teachers are bullied and particularly cyber bullied by pupils. It would normally be expected that the power imbalance lies with the teacher, but this shifts as a result of the bullying."

However DSM V[7], in its discussion of Social Exclusion or Rejection (in the adult section p 370, V 62.2) appears to require the necessity to prove a power imbalance stating:

'This category should be used when there is an imbalance of social power such that there is recurrent social exclusion or rejection by peers. Examples of social exclusion include bullying, teasing, intimidation by others; being targeted by others for verbal abuse and humiliation; and being purposefully excluded from the activities of peers, workmates or others in one's social environment.'

The DSM V does not discuss school bullying.

Intention required to constitute Bullying

Both Canadian provincial Acts referred to are interesting in that they deal with the question of intention on a "knew or ought to have known" basis. However the New Zealand Bill requires proof of specific intent and additionally a finding that posting the communication would cause harm to an ordinary reasonable person in the position of the victim.

In our view the Canadian qualification is important in the context of bullying where the explanation on behalf of the perpetrator is so often that "We were only joking' or "We didn't mean any harm".

I turn now to the various options contained in the discussion paper. It follows from what I have already said that I do not regard Option 1 as acceptable because it is not really designed to deal with cyber-bullying. This issue was debated at the above Symposium where some speakers preferred the retention of the status quo as Option 1 suggests but the unanimous view of the Symposium set out above was the final result.

As the discussion paper notes, the existing Commonwealth legislation is not well understood, particularly by young people and its terminology is such that it is not likely to be, no matter how

[7] American Psychiatric Association. (2013). *Diagnostic and statistical manual of mental disorders* (5th ed.). Arlington, VA: American Psychiatric Publishing.

much effort is put into education and raising awareness. Its problem is that it was never designed to deal with cyber-bullying and is expressed in terms that might arguably exclude certain types of harmful cyber-bullying, as can be seen from the discussion of bullying definitions above. For example it would be difficult to fit a policy of cyber-bullying involving deliberate exclusion and isolation of a person into the ambit of the current offence and yet it may constitute a particularly damging and dangerous form of conduct.

A considerable amount of effort has already been put into education and awareness with minimum effect and the evidence is that the vast majority of young people are completely unaware that cyber-bullying may be a crime. Young people who participated in the Bullying Young People and the Law Symposium and were strongly of the view that cyber-bullying should constitute an identifiable crime.

The discussion paper suggests the following possible objections to the criminalisation of cyber-bullying.

the possibility that it may over-extend to behaviour which should not be treated as a criminal offence, and encourage over-reporting of incidents;

- Comment
- I refer to the analogy with assault where this does not happen and suggest that this is pure speculation. This is surely a matter for the prosecuting authorities to control as they do at present with other offences.
- a potential large increase in reporting of cyber-bullying to police, who may not have the resources to respond in many cases;
- Comment
- If we accept that cyber-bullying has potentially serious effects on many children, as the paper recognises, this is not a very convincing argument. Police are selective now as to which matters to which they will respond, often on a resources basis and this will no doubt continue.
- more minors being charged with criminal offences, thereby increasing pressure on the legal system, and increasing trauma for offenders and victims due to the seriousness of criminal sanctions;
- Comment
- If cyber-bullying is serious antisocial behaviour that causes much harm this argument is not convincing either. We do not hesitate to charge minors now when an existing offence is serious enough to do so.
- a new law may also cause confusion regarding the application of the existing offence.
- Comment
- This could easily be cured by amending the existing legislation by defining cyber-bullying and creating it as an offence punishable under the section The offence could be differentiated from the lesser offence under discussionby reference to intention e.g. of a specific intention to harm and/or the seriousness of the effect caused by the cyberbullying. For example the NZ specific intention test could apply to the serious offence and the ‘knew or ought to have known that the action might cause harm’ test to the lesser offence.

Subject to my general remarks above as to the extension of the new offence to adults as well as children coupled with amendment of the existing legislation I would favour a combination of Options 2 and 3, but if option 2 was to be used I would not favour the penalty being confined to a fine.

A simple fine is a singularly inappropriate penalty for most young people, many of whom are in no position to pay it and it would be no deterrent to those who are in a financial position to do so. If charges are laid, Children's Courts should have the usual range of non custodial options available to them that they have in other cases, which could include a fine where the court thinks it appropriate. They should also have the advantage of other diversion options available in the particular State or Territory concerned. A system of police warnings such as that operating in Victoria and other jurisdictions would be particularly appropriate to most cases of cyber-bullying and would involve no conviction or police record.

I think the point should be made however that if we are serious about creating an offence of cyber-bullying it would be sending entirely the wrong message to attach to it a penalty that most would regard as trivial or inappropriate. The fact is that children do commit other crimes that are the subject of criminal charges which can involve a penalty of detention in certain circumstances, often following repeated offences and it is difficult to see why repeated offences of cyber-bullying should be treated differently. I would accordingly suggest that the offence should provide for a maximum of 3 months detention, to be confined to situations where there has been a second or subsequent offence and only in circumstances where the court considers no other disposition to be appropriate. An offence expressed in this way would have both a deterrent and educational effect and hopefully operate to reduce the incidence of commission of the offence.

I see no reason why this approach could not operate alongside option 3 which addresses the remedying of a situation that has been created by cyber-bullying. I would support the approach of option 3 for the reasons set out in the discussion paper and which might well have the effect of reducing the need for prosecutions in cyber-bullying cases. I think that the reference by the Commissioner to another body should be to the Federal Circuit Court rather than to the Administrative Appeals Tribunal because of its wider geographical spread and readier availability together with a greater capacity to act quickly. I have some difficulty with the concept of confining the penalty for failing to comply with a notice to a fine for the reasons already stated and think that the penalty should have more deterrent effect than that suggested because it would usually involve the deliberate failure to comply with a lawful direction.

Dated 7 March 2014