

Opening Statement



9 February 2018

Opening Statement to Senate Committee Hearing on:

The adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying.

Arthur Moses SC, President-elect, Law Council of Australia

1. As the Committee would be aware, the Law Council is the peak national body representing the legal profession in Australia.
2. I would like to thank the Committee for the opportunity to provide evidence to its inquiry on the adequacy of existing offences in the Commonwealth Criminal Code and of state and territory laws to capture cyberbullying.
3. Each time a teenager dies or harms themselves because of cyberbullying it's necessary for us in the community, and the legal profession, to ask whether we have the appropriate protective and deterrent mechanisms in place.
4. Clearly, the recent reports of teenage deaths as a result of cyberbullying suggests that something is not working.
5. The Law Council welcomes this inquiry as it seeks to find out how we as a nation can do better to guard against the tragic consequences of cyberbullying.
6. Ensuring that the criminal justice system includes adequate offences to combat cyberbullying is one important tool for society. There are also other equally important tools, including: education, victim support, early intervention and prevention, including civil avenues.
7. Section 474 of Part 10.6 of the Commonwealth Criminal Code Act 1995 contains a range of offences which criminalise the use of telecommunications services to engage in certain damaging behaviour.
8. Section 474.17 of the Criminal Code criminalises the use of a carriage service, including the internet or a phone, in a way that a reasonable person would regard as being, in all the circumstances, menacing, harassing or offensive. This offence has been successfully used to prosecute cyberbullying.
9. Other offences also exist in the Criminal Code which may apply where there is cyberbullying conduct. For example, section 474.14 criminalises the use of a telecommunications network with the intention of committing a serious offence against a foreign law, or against a law of the Commonwealth, state or territory. Section 474.25C captures online conduct that prepares or plans to harm a child, including mental harm that can arise from cyberbullying.
10. The Law Council considers that these offences adequately criminalise conduct at the federal level. There is, on our review, no need for a new offence of broadcasting assaults and other crimes via social media platforms. This is because the existing Commonwealth Criminal Code offences must also be seen in the context of broader state and territory offences which may also be used to prosecute cyberbullying conduct.

The Law Council of Australia is the national voice of the legal profession, promoting justice and the rule of law.

11. In other cases, the Law Council considers that the utilisation of a civil penalty regime, and the eSafety Commissioner's powers, and other less formal methods, such as school or mediation-based matters, should be considered.
12. The Law Council has made a number of recommendations in our submission in relation to this matter.
13. The one thing I want to emphasise is in relation to when you enact laws which in effect overlap with existing laws there becomes a degree of ambiguity, or a lack of understanding in the community as to the type of conduct that is prohibited or that would be caught by various provisions of the Criminal Code.
14. The key principle of the rule of law is that the law must be both readily known and available and certainly clear. We do have a concern that, given the nature of cyber bullying, there is a high risk of a number of school age children that could be caught by the proposed provision.
15. Under the Crimes Act, a child under ten years old cannot be liable for an offence against the law of the Commonwealth and that operates by virtue of Section 4 M, but a child aged ten years or more, but under 14 years old, can only be liable for an offence against the Commonwealth if the child knows that his or her conduct is wrong.
16. The burden falls on the prosecution to establish the question of whether a child knows if his or her conduct is wrong.
17. So, there is a concern that, because of what has occurred here, we will of course take the immediate reaction of saying what laws can we introduce in order to deter such conduct. But you also have to equally be on guard to ensure that we don't in effect then have children being subject to criminal charges as a result of behaviour that has come about, which at the end of the day could have been prevented, either through better parenting or better training at school.
18. We see this quite a lot and we well understand Parliament's concerns in relation to the matter.
19. We have made a number of suggestions in our submission and are happy to take any questions.

You can access the Law Council's submission to the Senate References Committee on Legal and Constitutional Affairs [here](#).

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