

Our ref: 789

31 January 2019

Kathrine Morgan-Wicks
Secretary
Department of Justice

By email: legislation.development@justice.tas.gov.au

Dear Secretary

Re: Draft Criminal Code Amendment (Bullying) Bill 2019

Thank you for the opportunity to provide comment in response to the draft Criminal Code Amendment (Bullying) Bill 2019 which proposes amendments to the *Criminal Code Act 1924*.

As I understand the situation, the proposed amendments would have the effect of criminalising certain serious bullying behaviours including those which involve the use of technology.

The role of the Commissioner for Children and Young People

As you may be aware, the office of Commissioner for Children and Young People (CCYP) is established under the *Commissioner for Children and Young People Act 2016* (CCYP Act). The Commissioner's functions include:

- (a) advocating for all children and young people in the State generally;
- (c) researching, investigating and influencing policy development into matters relating to children and young people generally;
- (d) promoting, monitoring and reviewing the wellbeing of children and young people generally; and
- (e) promoting and empowering the participation of children and young people in the making of decisions, or the expressing of opinions on matters, that may affect their lives.¹

In performing these and other functions under the CCYP Act, I am required to do so according to the principle that the wellbeing and best interests of children and young people are paramount and I must observe any relevant provisions of the United Nations *Convention on the Rights of the Child*.²

¹ Section 8.

² Section 3 (1).



Further, I must give special regard to the needs of children and young people who are vulnerable or disadvantaged for any reason. My work must also be performed according to the principle that the views of children on all matters affecting them should be given serious consideration and taken into account.³

Consistent with my statutory functions, my comments in relation to the proposed amendments focus on those matters which, in my view, will affect or which have the potential to affect, the health and wellbeing of children and young people who have not yet attained the age of 18 years in Tasmania.

There is no doubt that bullying is pervasive and its impact on children and young people's health, wellbeing and educational engagement can be profound. All children and young people have the fundamental right to be safe and to feel safe wherever they are, and we all have a part to play in making sure this happens.

The incidence and impact of bullying is of significant concern to children and young people in Tasmania, as it is across Australia.⁴ For example, members of the CCYP Children and Young People Consultative Council consistently raised bullying (including cyber bullying) as an issue of major concern to them during their meetings in 2018. During their discussions, Council members commented on their experiences of current responses to bullying and made suggestions for action, including (but certainly not limited to) the need for increased accountability for those who engage in bullying behaviour. I have outlined some of the major themes arising from Council members' discussions in Appendix A to this letter.

Comment

The draft bill proposes amendments to section 192 of the *Criminal Code Act 1924* to:

- Amend the current offence of stalking to capture bullying behaviour;
- Expand the fault elements relating to the state of mind of the accused to include an intention to cause another person extreme humiliation or self-harm;
- Expand the conduct elements to include:
 - Actions of making threats and/or abusive acts;
 - Acting in another way that could reasonably be expected to cause the other person extreme humiliation or physical or mental harm (including self-harm);
- Include a requirement that the Director of Public Prosecutions is to consent to a prosecution for the amended offence.

As indicated above, I understand that the effect of the proposed amendments will be to criminalise certain serious bullying behaviours, including those which involve the use of technology.

The approach proposed in the draft Bill is consistent with Recommendation 1 of the Tasmanian Law Reform Institute (TLRI) in its comprehensive final report of its inquiry into bullying. Specifically, the TLRI emphasised the desirability of developing a criminal justice response to bullying by extending section 192 to cover common bullying behaviours.⁵

³ Section 3(2).

⁴ <http://accg.org.au/wp-content/uploads/2018/07/ACCG-Joint-Participation-Paper-2018.pdf>.

⁵ Tasmanian Law Reform Institute, Final Report No. 22, Bullying, January 2016, vii (Recommendation 1).



It is my understanding that the amendments will apply to children and young people aged less than 18 years who engage in bullying behaviour of the type contemplated by the amended offence.

Whilst I am generally supportive of there being the option of a criminal justice response to serious bullying behaviours, I have reservations about its appropriateness and efficacy in the context of bullying between children except in the most serious of cases. To illustrate this point, I draw your attention to and endorse the comments made by the Director of Public Prosecutions and the former Commissioner for Children in their submissions to the TLRI's inquiry into bullying and which were discussed in the final report:

1.1.11...[A]s noted by the Commissioner for Children, Mark Morrissey, categorising children as either 'perpetrators' or 'victims' in the context of bullying is not in the best interests of the child. The Commissioner explained that legal, and particularly criminal justice, responses to bullying raise a number of concerns including:

- The introduction of children to the criminal justice system and the resulting stigma attaching to young offenders;
- The difficulty the legal system may have in accommodating or defining the complexities of bullying between children and the highly individualised nature of occasions of bullying within interpersonal relationships;
- The need for support for victims and participants in bullying behaviour to rebuild relationships and prevent future occurrences;
- The potential oversimplification of bullying and its causes; and
- The need for broader educational and social responses rather than punitive responses.

1.1.12 Similarly, the Director of Public Prosecutions noted that, other than in extreme cases, prosecuting anyone under the age of 18 would not be appropriate at first instance, and that it would be more appropriate for the behaviour to be dealt with by the school or by way of a caution. Tasmania Police were also concerned that if the criminal law is used to deal with bullying, children may be the subjects of the majority of complaints.⁶

In my opinion, except in the most serious of cases, children and young people under the age of 18 years who engage in bullying behaviours will be more appropriately dealt with and responded to by alternative non-punitive and restorative means. I am therefore pleased to see that the draft Bill includes a requirement that the Director of Public Prosecutions (DPP) is to consent to a prosecution for the amended offence and, on that basis, I can indicate my in-principle support for the draft Bill.

It is widely accepted that a whole-of-community response to bullying is required if we are to successfully reduce its occurrence and respond effectively when it does occur. A criminal justice response is just one element of a broader societal approach to tackling bullying.

I acknowledge the work currently being progressed at all levels of Government to better understand the underlying drivers of bullying and to strengthen approaches to combatting bullying behaviours among children. In particular I commend the Tasmanian Government's investment of \$3 million over four years to combat bullying and cyber bullying in all Tasmanian Government

⁶ Tasmanian Law Reform Institute, Final Report No. 22, Bullying, January 2016, 3-4 [footnotes omitted]



schools. I note also the work of the COAG Education Council's Bullying and Cyberbullying Senior Officials Working Group to consider existing strategies and potential initiatives to reduce bullying and cyberbullying. The Working Group has identified the need to address prevention of student bullying and cyberbullying (including cultural change), respond effectively to student bullying and cyberbullying behaviour and support individuals and the community. It has also developed a nationally agreed definition of bullying to include cyberbullying and reflect current research.⁷

The importance of promoting community awareness and understanding of the online environment, how to deal with online issues and where to go for help in the event of cyberbullying or online abuse cannot be underestimated. The rapid pace of technological change can pose challenges for parents and carers in supporting their children to have safe online experiences. In this regard, I think it is important to acknowledge and promote the important work of the Office of the eSafety Commissioner in administering a national complaints service for young people who experience serious cyberbullying. The Office of the eSafety Commissioner also provides advice and resources to parents, schools and the police to assist in addressing cyberbullying incidents and delivers audience-specific outreach programs for young people, parents and carers, teachers and community groups to help educate about online safety.⁸

Thank you again for the opportunity to provide comment in response to the draft Bill.

Please do not hesitate to contact my office should you wish to discuss any aspect of my submission.

Yours sincerely

Leanne McLean
Commissioner for Children and Young People

cc: *Attorney-General*
cc: *Minister for Human Services*
cc: *Minister for Education*

⁷ National Education Council, Bullying and Cyberbullying Senior Officials Working Group, 2018, Enhancing Community responses to student bullying, including cyberbullying Report and Work Program, <https://www.coag.gov.au/sites/default/files/communique/bcsowg-report-work-program.pdf>

⁸ <https://www.esafety.gov.au/> Accessed 31 January 2019.



Appendix A

CCYP Children and Young People Consultative Council 2018 Key Themes - Bullying

Bullying was frequently raised as an issue of concern for children and young people during discussions with members of the CCYP Children and Young People Consultative Council in 2018. The views and opinions expressed, and suggestions for possible action were diverse but some key themes were clearly identified.

Bullying in contemporary society

- Council members advised that bullying in the school environment, online, and in the broader community (including on public transport) is an issue of significant ongoing concern for children and young people in Tasmania.
- The impact of bullying on mental wellbeing was acknowledged and it was broadly agreed that young people can experience significant distress as a result of bullying.

Underlying causes of bullying

- Some Council members expressed the view that there is a need to better understand the underlying causes of bullying.
- For example, the role of the family in the context of bullying was discussed. One Council member said: *“Your family is who you come from and who you look up to. If your family are not treating you in a respectful way, you learn from and follow them. If you try to get it out, it hurts your head.”*

Responding to bullying

- Council members expressed the view that the current support systems and methods to address and respond to bullying are not working as well as they could be.
- Many Council members identified that strategies currently used by schools to manage and prevent bullying could be improved.
- Some Council members said they would like bullies to be held more accountable. Potential options for consequences for bullying behaviours were discussed, including fines.
- It was generally acknowledged that it is important to get both sides of the story.
- Council members discussed the need for children who bully (and their families) to receive more help to address the underlying causes of their bullying behaviour so that it doesn't continue.
- Some Council members expressed concern that disclosure of bullying by a victim or bystander to a teacher or other person in a position of authority could have negative consequences (e.g. could lead to an increase in bullying behaviour).

Education and the role of schools

- Council members consistently expressed the view that children and young people would benefit from more education around what bullying is (and is not).
- Council members said they would like to be better informed so that they can identify when friends may need support due to bullying, and what to do to help them. Many said they would benefit from increased awareness of the services that are available to young people if and when they need help.



- Some Council members thought that teachers would benefit from additional training on how to support young people affected by bullying (including those with mental health issues) and how to respond to bullying in a fair and timely way.
- Council members identified the need to start conversations with children about bullying, and the links between bullying and mental health earlier. One Council member said, “*At primary school you are a bit more sheltered and it is easier to stop an issue before it gets worse.*”
- Council members suggested that supports in schools should be more readily accessible (e.g. psychologists, social workers and counsellors). For example, one Council member commented: “*There are 1,400 kids at my school and only one psychologist and one social worker. That is just not enough to help all the kids who need it.*”