

REPORT ON BULLYING

Report No 44

August 2018

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ABBREVIATIONS

ADC	NT Anti-Discrimination Commissioner
Commission	Fair Work Commission
FWA	<i>Fair Work Act 2009</i> (Cth)
NT	Northern Territory
NTRLRC	Northern Territory Law Reform Committee
RTW Act	<i>Return to Work Act</i> (NT)
Senate Committee	Australian Senate Legal and Constitutional Affairs Committee
Standing Committee	House of Representatives Standing Committee on Education and Employment
TLRI	Tasmania Law Reform Institute

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TERMS OF REFERENCE

On 27 September 2017, the Attorney-General and Minister for Justice, NATASHA KATE FYLES, asked the Northern Territory Law Reform Committee to investigate, examine and report on the law reform in relation to whether the Northern Territory should consider enacting criminal laws, similar to 'Brodie's Law', in the NT to make serious bullying behaviour an offence.

Matters for the Northern Territory Law Reform Committee to Consider:

1. The Committee is directed to make recommendations relating to any necessary reform to the Criminal Code.
2. In formulating this report, the Committee ought to consider:
 - a. identification of the NT's current law and legal frameworks that may be used to address bullying; and
 - b. whether the law adequately captures bullying and whether it may be enhanced.

Background

'Brodie's Law' was developed and introduced in response to the Victorian Café Vamp case, which was heard and determined in the Melbourne Magistrates' Court. In that case, four employees of Café Vamp (the business) were prosecuted under the *Occupational Health and Safety Act 2004* (Vic) for the severe and prolonged bullying of another employee, 19-year-old Brodie Panlock.

The prolonged exposure to serious bullying contributed to her eventual suicide. In February 2010, each of the perpetrators was convicted of offences under that Act and, as a result, penalties totalling \$335 000 were imposed.

The case illustrated the limitations in the law in Victoria at the time concerning bullying, especially bullying that results in self-harm. The tragedy of Ms Panlock's death was compounded by the fact that none of those responsible for the bullying were charged with a serious criminal offence under the *Crimes Act 1958* (Vic).

On 31 May 2011, the Victorian Parliament passed the *Crimes Amendment (Bullying) Act 2011* (known as Brodie's Law) which amended the stalking offence in section 21A of the *Crimes Act 1958* (Vic), making clear that serious bullying is a crime in Victoria. The anti-bullying legislative amendments contained in Brodie's Law commenced in Victoria on 13 June 2011.

The Second Reading Speech from the Victorian Parliamentary Debates on 6 April 2011, explained that Brodie's Law amended the stalking provisions in the *Crimes Act 1958* (Vic) to address bullying as 'stalking' in four key ways:

- a. it was made clear that threats and abusive or offensive words or acts were included in the actions able to establish a 'course of conduct', which is an essential element of the offence;
- b. the description of 'course of conduct' was broadened to include conduct that could reasonably be expected to cause the victim to harm himself or herself physically;

- c. it was made clear that intention to cause the victim to harm himself or herself physically could satisfy the fault element; and
- d. 'mental harm' was inclusively defined by reference to psychological harm and causing a victim to engage in suicidal thoughts.

The Office of Public Prosecutions in Victoria have advised that to date no prosecutions have occurred under section 21A of the *Crimes Act 1958* (Vic).

In the NT, section 189 of the *Criminal Code* (NT) establishes the offence of stalking and is equivalent to section 21A of the *Crimes Act 1958* (Vic) as it was prior to Brodie's Law. It is highly arguable that section 189 of the *Criminal Code* (NT) contains the same deficiencies that previously existed in Victoria, regarding prosecution for serious bullying.

It is also possible that other offences such as threats to kill (section 166 of the *Criminal Code* (NT)) or threats (section 200 of the *Criminal Code* (NT)) could apply in some situations to serious bullying. Again, despite similar provisions in the Victorian legislation, Brodie's Law was still considered necessary to deal with the issue of serious bullying.

In response to a petition to the Tasmanian Attorney-General in 2013, a review into anti-bullying laws in Tasmania was undertaken. In January 2016, the Tasmanian Law Reform Institute released a report entitled 'Bullying Final Report No. 22' which recommended replacing the offence of 'stalking' with a new offence of 'stalking and bullying' under section 192 of the Tasmanian Criminal Code, and expanding the provision to include intentionally causing a person extreme humiliation or causing them to harm themselves physically by:

- a. making threats to the other person;
- b. using abusive or offensive words to or in the presence of the other person;
- c. performing abusive or offensive acts in the presence of the other person;
- d. directing abusive or offensive acts towards the other person; or
- e. acting in another way that could reasonably be expected to cause the other person extreme humiliation or to harm himself or herself physically or to be apprehensive or fearful.

No amendments have been progressed to date in Tasmania. No other state or territory has enacted Brodie's Law. Like the NT, all other states and territories continue to have an assortment of various criminal laws that are potentially relevant to bullying.

On 10 September 2017, the ABC website featured an article titled 'Anti-bullying law proposal in South Australia sparks debate after teenager Libby Bell's suicide'.¹ The article reports that Australian Conservatives MP Dennis Hood has drafted a Bill, informally called 'Libby's Law', which will go before Parliament within weeks and is closely modelled on Brodie's Law. The article reports that 60 people have been charged under Brodie's Law, but it does not provide information on the outcome of those charges.

¹ The article, referred to in the Terms of Reference as 'Attachment A', is not reproduced in this report.

Since the introduction of Brodie's Law, the NT has enacted national model work health and safety laws, through the *Work Health and Safety (National Uniform Legislation) Act 2011* (NT), that impose a primary duty of care on a person conducting a business or undertaking to ensure, so far as is reasonably practicable, the health and safety of workers. The term 'health' was redefined to mean both physical and psychological health to ensure that duty holders were obliged to effectively manage issues such as stress and bullying as well as the more 'traditional' issue of physical wellbeing. There are also duties imposed on workers to take reasonable care that their acts or omissions do not adversely affect the health and safety of other persons.

National model work health and safety laws have been implemented by all jurisdictions, with the exception of Victoria and Western Australia, which have made minor variations to their existing legislation to ensure consistency.

In 2013, the *Fair Work Act 2009* (Cth) was amended by the *Fair Work Amendment Act 2013* to allow a worker who has been bullied at work to apply to the Fair Work Commission for an order to stop the bullying. The Fair Work Commission must act within 14 days and may make any orders it considers appropriate. The *Fair Work Act 2009* (Cth) defines a worker as bullied at work if:

- a. the worker is at work in a 'constitutionally-covered business'; and
- b. an individual or a group of individuals repeatedly behave unreasonably towards the worker or a group of workers of which the worker is a member; and
- c. the behaviour creates a risk to health and safety.

The anti-bullying provisions cover 'constitutionally-covered' businesses, which are defined as:

- a. a person that is a 'constitutional corporation';
- b. the Commonwealth;
- c. a 'Commonwealth authority', or a body corporate incorporated in a Territory; or
- d. the person conducting a business or undertaking principally in a Territory or Commonwealth place.

The Attorney-General requested the NTLRC to report by 29 March 2018. Due to the complexity and significance of issues to be considered, on 13 March 2018, the NTLRC was granted an extension to 31 August 2018 to complete its Report.

RECOMMENDATIONS

Recommendation 1 – The Northern Territory Government should enact legislation which criminalises bullying, but the criminal offence should be confined to the most serious or egregious instances of bullying behaviour.

Recommendation 2 – The Northern Territory Government should amend the *Criminal Code* (NT) to include a specific and separate offence of bullying.

Recommendation 3 – The behaviours referred to in the definition of ‘bullying’ in section 20A(2) of *Statutes Amendment (Bullying) Bill 2017* (SA) should be used for the purpose of defining ‘bullying’ in the *Criminal Code* (NT).

Recommendation 4 – The offence of bullying should comprise:

- with respect to the acts comprising the course of conduct, a fault element of intention; and
- with respect to causing harm, a fault element of:
 - intention (meaning ‘if the person means to bring it about or is aware that it will happen in the ordinary course of events’); or
 - recklessness.

Recommendation 5 – The causing of harm (including mental harm) should be an element of the recommended offence of bullying.

Recommendation 6 – For the purposes of creating a new offence of ‘bullying’ in the Northern Territory, ‘mental harm’ should be defined in the terms set out in s 20A of the *Statutes Amendment (Bullying) Bill 2017* (SA).

Recommendation 7 – A person under the age of 18 who engages in bullying behaviour should initially be referred to counselling, education and/or diversion programs, rather than being charged with the offence of bullying. The laying of criminal charges only should occur as a last resort. Accordingly, the Northern Territory Government should not prescribe the offence of bullying as a ‘serious offence’ for the purpose of s 39 of the *Youth Justice Act* (NT).

CHAPTER ONE

SCOPE OF THE INQUIRY

1.0 Introduction

By Terms of Reference dated 27 September 2017, the Honourable Natasha Fyles, Attorney-General and Minister for Justice, requested that the Northern Territory Law Reform Committee (the 'NLTLC') investigate, examine and report on whether the Northern Territory ('NT') should consider enacting criminal laws in the NT to make bullying behaviour an offence. In particular, the NLTLC was asked to consider whether legislation similar to 'Brodie's Law', which was enacted in Victoria in 2011, warranted inclusion in the NT's criminal law. The NLTLC was to report by 29 March 2018, however, at the request of the NLTLC, the reporting date was extended to 31 August 2018 so that the NLTLC could consider comprehensively the recommendations contained in the report of the Australian Senate Legal and Constitutional Affairs Committee (the 'Senate Committee'), *Adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying*. The Senate Committee published its final report in March 2018.

'Brodie's Law' is the name given to amendments made in 2011 to the stalking provisions in the *Crimes Act 1958* (Vic) by the *Crimes Amendment (Bullying) Act 2011* (Vic). The stalking offence in s 21A of the *Crimes Act 1958* (Vic) was amended in three key ways:

- the description of 'course of conduct' in s 21A(2), which is an essential element of the offence of stalking, was expanded to include the following acts done with "the intention of causing physical or mental harm to the victim, including self-harm, or of arousing apprehension or fear in the victim for his or her own safety or that of any other person":
 - "making threats to the victim" (s 21A(2)(da));
 - "using abusive or offensive words to or in the presence of the victim" (s 21A(2)(db));
 - "performing abusive or offensive acts in the presence of the victim" (s 21A(2)(dc));
 - "directing abusive or offensive acts towards the victim" (s 21A(2)(dd));
 - acting in a way that "could reasonably be expected to cause physical or mental harm to the victim including self-harm" (s 21A(2)(g)(i)), or
 - "to arouse apprehension or fear in the victim for his or her own safety or that of any other person" (s 21A(2)(g)(ii));

- it was made clear that an intention “to cause physical or mental harm to the victim, including self-harm, or arouse apprehension or fear in the victim for his or her own safety or that of any other person” (s 21A(3)) in the circumstances set out in s 21A(3)(a) and (b) would satisfy the fault element of the offence; and
- ‘mental harm’, within the context of s 21A(8) was defined to include psychological harm and suicidal thoughts.

The amendments to s 21A of the *Crimes Act 1958* (Vic) were introduced “after the tragic suicide of a young woman, Brodie Panlock, who was subjected to relentless bullying in her workplace”.² Whether similar amendments should be made to the stalking offence in the *Criminal Code* (NT), s 189, or whether a separate offence of bullying should be introduced into the *Criminal Code*, are the questions addressed in this report.

1.1 Legislative responses to bullying

The NT is not the only jurisdiction currently considering the vexed question of legislative responses to bullying. In the report referred to above, the Senate Committee concluded that the:³

existing Commonwealth, state and territory criminal offences adequately cover serious cyberbullying behaviours. In particular, section 474.17 of the *Criminal Code Act 1995* [Cth] ... is a broadly framed, technologically-neutral offence.

While the Senate Committee made no recommendation for additional criminal offences, the majority did recommend that the Australian Government consider increasing the maximum penalty for a breach of section 474.17 from three years imprisonment to five years.⁴ It was recommended further that the increased penalty not apply to minors.⁵

Tasmania also has recently considered whether bullying should be criminalised in that state. The Tasmania Law Reform Institute (‘TLRI’) in its 2016 report entitled, *Bullying*, recommended that the stalking offence in the *Criminal Code Act 1924* (Tas), s 192, be amended to cover common bullying behaviours.⁶ To date, the

² Department of Justice and Regulation, *Bullying – Brodie’s Law*, Victoria State Government <<http://www.justice.vic.gov.au/home/safer+communities/crime+prevention/bullying+-+brodies+law>> (accessed 30 April 2018).

³ Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying* (March 2018) at [5.9].

⁴ Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying* (March 2018) Recommendation 5.15.

⁵ Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying* (March 2018) Recommendation 5.12.

⁶ Tasmania Law Reform Institute, *Bullying*, Final Report No 22 (January 2016) Recommendation 1.

recommendation has not been implemented by the Tasmanian Government, however, during the recent election in Tasmania the governing Liberal Party evidenced an intention to criminally sanction bullying, and in particular cyber-bullying, should it be re-elected.⁷

Across the Tasman, the New Zealand government has passed the *Harmful Digital Communications Act 2015* (NZ). Pursuant to that Act, it is a criminal offence for a person to post a digital communication with the intention to cause harm to a victim (s 22(1)(a)), if such a post “would cause harm to an ordinary reasonable person in the position of the victim” (s 22(1)(b)), and the post “causes harm to the victim” (s 22(1)(c)). Further, the *Crimes Act 1961* (NZ), s 179, makes it an offence for anyone to incite, counsel, or procure “any person to commit suicide, if that person commits or attempts to commit suicide in consequence thereof”. The maximum penalty is 14 years imprisonment (s 179(1)). Even if the person does not commit or attempt to commit suicide, the offence still applies (s 179(2)), however, the maximum penalty for the lesser offence is 3 years (s 179(3)).⁸

1.2 The Law Reform Process

Given the limited resources available to the NTLRC, it was not possible to consult widely regarding the subject-matter of this inquiry. The NTLRC sub-committee with carriage of this inquiry, however, did meet with the NT Anti-Discrimination Commissioner (ADC), Ms Sally Sievers, the NT Children’s Commissioner, Ms Colleen Gwynne and the Executive Director of NT Worksafe, Mr Stephen Gelding.

The reports of the Senate Committee and the TLRI were of great assistance to the NTLRC in the preparation of this report. As a small jurisdiction consisting of volunteer members for the research and preparation of its reports, the NTLRC relies heavily on the excellent work being done by other law reform bodies in Australia.

The conduct of an inquiry is conducted by a sub-committee of the NTLRC. The sub-committee for the Bullying inquiry consisted of:

- Acting-President Professor Les McCrimmon;
- Chief Judge of the NT Local Court Dr John Lowndes;
- Mr Richard Bryson of the NT Police;
- Ms Peggy Cheong of Hunt and Hunt Lawyers; and
- Mr Russell Goldflam of the NT Legal Aid Commission.

The sub-committee conducts consultations and prepares a draft report for the review of all members of the NTLRC. Once all emendations are made, the final report is

⁷ Tasmanian Liberals, *Cyber bullies to be prosecuted under Tasmania's criminal code*, <<https://www.tas.liberal.org.au/news/cyber-bullies-be-prosecuted-under-tasmanias-criminal-code>> (accessed 30 April 2018).

⁸ See also Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying* (March 2018) AT [1.42].

provided to the full NTLRC for final approval before formal submission to the NT Attorney-General.

1.3 Organisation of the Report

This report is divided into five chapters. Chapter 1 contains introductory matters. In Chapter 2, methods to tackle bullying other than through criminal sanction are canvassed briefly. Given that the Terms of Reference specifically direct the NTLRC to consider criminal sanctions, the treatment of such other methods is brief. It must be noted, however, that the NTLRC agrees with the views expressed by the Office of the eSafety Commissioner, noted in Chapter 2, that bullying behaviour is complex. The use of the criminal law to sanction such behaviour must be used only in the most serious cases.

Chapter 3 reviews the current federal and NT criminal offences that apply to conduct that constitutes bullying. The current legislative framework for the criminal punishment of bullying can legitimately be described as a patchwork of NT and Commonwealth laws which do not cover all conduct which may constitute bullying.

Chapter 4 discusses the definition of bullying. For a criminal offence to apply, the acts falling within course of the sanctioned conduct must be defined specifically. Further, the inquiry has revealed that the definitions of what constitutes such conduct in those jurisdictions that have criminalised bullying varies. Whether the NT needs a specific offence relating to bullying also is canvassed in Chapter 4. The view of the NTLRC is that such an offence is required. The scope of that offence is addressed in the chapter.

Chapter 5 provides a summary of the main findings of this inquiry. It also addresses briefly some issues worthy of greater inquiry which, due to the narrow scope of the terms of reference, were not addressed in this inquiry.

CHAPTER TWO

WAYS OTHER THAN THE CRIMINAL LAW TO COMBAT BULLYING

2.0 Introduction

While the focus of this report is on possible criminal responses to bullying, such behaviour cannot be viewed only from the perspective of the criminal law and potential sanctions arising from such conduct. During the consultation and research phases it became apparent to the NTLRC that bullying can be more properly considered as a whole-of-community problem that needs to be addressed by way of education and prevention reserving criminal sanction for only the most serious cases of bullying. As was noted in the submission of the Office of the eSafety Commissioner to the Senate Committee:

Key to the success of eSafety in this area is our belief that working holistically with others to resolve complaints is the best prevention of matters reaching a level that would merit criminal sanctions. This is because a multi-sectoral approach can in most instances powerfully addresses [sic] many of the complex factors that lead to cyberbullying. This whole-of-community approach recognises that – in the majority of cases – cyberbullying is best understood as a social and cultural challenge, rather than a criminal one.⁹

This view was reflected in a number of other submissions to the Senate Committee's inquiry.¹⁰ While the focus of the Senate Committee inquiry was narrower than the scope of the NTLRC inquiry, in that it focused only on bullying occasioned over the internet, it is the NTLRC's view that similar issues apply to all forms of bullying.

2.1 Anti-Discrimination

When consulting with the NT ADC, Ms Sally Sievers, it was explained to the NTLRC that the ADC does deal with complaints relating to bullying. Before the ADC can intervene, however, the complaint must fall within one or more of the 16 recognised discrimination attributes under the *Anti-Discrimination Act* (NT), s 19. Difficulties arise when there is no factual link between an attribute and the alleged discrimination, which limits the ADC's ability to intervene.

The ADC has adopted a practice framework to expedite the handling of complaints, including bullying complaints that fall within the ADC's jurisdiction. Such framework

⁹ Office of the eSafety Commissioner, Submission No 13 to the Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Adequacy of Existing Offences in the Commonwealth Criminal Code and of State and Territory Criminal Laws to Capture Cyberbullying*, October 2017, at 12.

¹⁰ The following submissions to the Senate Committee made a similar point: Mental Health Commissions of Australia, Submission No 9, 13 October 2017 at 2; yourtown, Submission No 6, at 2; Facebook, Submission No 4, 18 October 2017 at 8; Australian Universities' Anti-bullying Alliance, Submission No 1, October 2017, at 3.

ensures that a complaint is accepted or rejected within 10 days and a compulsory conciliation must occur within 6 weeks. Further, the threshold for accepting a complaint is low, and the ADC adopts a solution-focused approach.

The ADC expressed concerns about any intended amending legislation that would criminalise the bullying behaviour of children. It noted that if criminalising such behaviour is adopted by the NTLRC, a safeguard should be implemented which required for the consent from the Director of Public Prosecutions before any prosecution against children was initiated. The ADC noted that similar safeguards have been proposed in the *Criminal Code Amendment (Intimate Images) Bill 2017* (NT).

Commissioner Sievers also noted that the NT Education Department was currently updating its bullying and well-being policy to incorporate education, investigation and response. A similar approach has been adopted in the United Kingdom where all state schools are required to have a policy in place that includes measures to prevent all forms of bullying. The policy must be properly communicated to teachers, parents and students.¹¹

2.2 NT Worksafe and the Fair Work Commission

Bullying also is prevalent in the workplace. Data provided to the NTLRC by the Executive Director of NT Worksafe, Mr Stephen Gelding, shows a consistent number of bullying and harassment complaints are made each year in relation to both government and private employers. There has been an average of over 100 complaints per year for the past 5 years (See Appendix 1).

The Fair Work Commission (the 'Commission') made a written submission to the NTLRC's inquiry highlighting the role the Commission has in dealing with bullying complaints in the NT. It also outlined the statutory powers with which the Commission is vested to deal with such complaints. It noted that the *Fair Work Amendment Act 2013* (Cth) conferred a new anti-bullying jurisdiction upon the Commission, which took effect from 1 January 2014. This amendment to the *Fair Work Act 2009* (Cth) (the 'FWA') followed an earlier parliamentary inquiry and report by the House of Representatives Standing Committee on Education and Employment (the 'Standing Committee'). The report of the Standing Committee is titled *Workplace Bullying: We just want it to stop* (tabled on 26 November 2012). The report called for new model of work health and safety regulations which set minimum standards for managing workplace bullying risks.

The Standing Committee's report also encouraged all state and territory governments to ensure that their criminal laws were as extensive as Brodie's Law. It recommended that the Commonwealth Government implement arrangements to

¹¹ See UK Government, *Bullying at school*, <<https://www.gov.uk/bullying-at-school>> (Accessed 30 April 2018).

allow individuals a right of recourse if they were the target of workplace bullying, and to provide remedies through an adjudicative process. The *Fair Work Amendment Act 2013* (Cth) gave effect to the Government's response to the report. It enabled a worker who is bullied at work to apply to the Commission for an order to stop the bullying.¹²

The FWA jurisdiction now provides a mechanism whereby an individual worker can resolve a bullying matter quickly and inexpensively, so they do not suffer further harm or injury. The jurisdiction does not create an 'offence' of bullying in the workplace. Instead, the Commission is empowered to identify actions and behaviours that may constitute workplace bullying, and, if necessary, issue orders to prevent future bullying behaviour if there is a risk it may continue. The orders are not punitive or compensatory in nature, rather they focus on preserving workplace relationships. A failure to comply with an order, however, can be enforced through the courts.¹³

In addition to options available within the jurisdiction of the Commission, bullying in the workplace can lead to compensable injuries under the *Return to Work Act* (NT) ('the RTW Act'). It is well recognised that bullying, in addition to affecting employees, can lead to significant disruption, downtime, administrative burdens and increased costs for an employer.

Despite community perception and awareness of bullying as an ongoing issue, bullying in the workplace and employment environment is still poorly understood. Such behaviour can give rise to significant claims for compensation under the RTW Act and be an ongoing barrier to an injured worker's ability to return to work in the same workplace or an alternative workplace. Often those responsible for such behaviour are oblivious to the fact that their conduct constitutes bullying.

2.3 Conclusion

Criminalising bullying in the school yard and the workplace is unlikely to be the best option to combat such behaviour. The key to preventing bullying is education, and such efforts should target both young children and their families.

The NTLRC is encouraged by the fact that the NT Department of Education is already involved in developing programs to address bullying within the education system. Such programs will need to assist students to understand what constitutes bullying behaviour, and to appreciate the likely adverse effects that may result from bullying. Similarly, the students' families need to be involved in the education

¹² See Fair Work Commission, *Anti-bullying jurisdiction: Summary of the case management model* (20 November 2013) <<https://www.fwc.gov.au/documents/documents/resources/anti-bullying-case-mgmt-model.pdf>>.

¹³ See Fair Work Commission, *Guide: Anti-bullying jurisdiction* (17 January 2018) <https://www.fwc.gov.au/documents/documents/factsheets/guide_antibullying.pdf>.

process so that the positive messages and concepts are reinforced at home as well as at school.

In the employment arena, the training of employers and managers to recognise and deal with bullying should be compulsory. Often managers reach such positions based on their technical skills and performance, rather than on their management ability. It should be an important part of any promotion, or appointment, to a management position that successful candidates are armed with the knowledge and skills to combat bullying in the workplace.

Education is the key to the minimisation and prevention of bullying. Even with the current level of community awareness of the potentially tragic effects of bullying, there are still people in the community who are unaware that their conduct, comments and behaviour towards another constitutes bullying. Further, such people usually have limited insight into the effect of their bullying behaviour until it is too late. While the way in which such education can take place is outside the scope of this inquiry, it is generally accepted that more needs to be done to make the public aware of what constitutes bullying, and to empower others to prevent such behaviour.

The NT Government also should continue to support federal and international efforts to improve awareness of the effects of bullying in the community. In addition, the NT Government is encouraged to provide for, or sponsor, targeted local events that will further highlight the potential tragic consequences of bullying. Finally, mechanisms should be made available for those who are witnesses, or subject, to bullying to deal with such behaviour.

CHAPTER THREE

NORTHERN TERRITORY AND COMMONWEALTH OFFENCES RELATED TO BULLYING

3.0 Introduction

There is no specific criminal offence in NT legislation which prohibits, and sanctions, conduct amounting to bullying. While offences such as ‘unlawful stalking’,¹⁴ assault,¹⁵ ‘threats to kill’,¹⁶ ‘recklessly endangering serious harm’,¹⁷ and ‘negligently causing serious harm’¹⁸ in the *Criminal Code Act* (NT), Schedule 1, may capture some conduct that would fall within the definition of bullying, it is far from comprehensive.

If the bullying arises through the use of a telecommunication service, Division 474 of Part 10.6 of the *Criminal Code* (Cth) “contains a number of offences which criminalise the use of telecommunications services to engage in inappropriate behaviour”.¹⁹ Of these offences, s 474.17 of the *Criminal Code* (Cth) is most relevant to bullying.

The major limitation of the section in the context of the current inquiry is that an offence is committed only if a person uses a carriage service. As defined in s 7 of the *Telecommunications Act 1997* (Cth), a ‘carriage service’ means “a service for carrying communications by means of guided and/or unguided electromagnetic energy”. While bullying which occurs over the internet or a person’s mobile phone may be caught, face-to-face bullying is not covered by the provision.

3.1 Stalking

The offence which is most applicable to bullying conduct is the offence of unlawful stalking in s 189 of the *Criminal Code* (NT). It provides:

- (1) A person (**the offender**) stalks another person ("the victim") if the offender engages in conduct that includes repeated instances of or a combination of any of the following:

¹⁴ *Criminal Code* (NT) sch 1, s 189.

¹⁵ *Criminal Code* (NT) sch 1, s 188.

¹⁶ *Criminal Code* (NT) sch 1, s 166.

¹⁷ *Criminal Code* (NT) sch 1, s 174D.

¹⁸ *Criminal Code* (NT) sch 1, s 174E.

¹⁹ Attorney-General's Department (Cth), Submission No 20 to the Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Adequacy of Existing Offences in the Commonwealth Criminal Code and of State and Territory Criminal Laws to Capture Cyberbullying*, October 2017, at [8].

- (a) following the victim or any other person;
- (b) telephoning, sending electronic messages to, or otherwise contacting, the victim or another person;
- (c) entering or loitering outside or near the victim's or another person's place of residence or of business or any other place frequented by the victim or the other person;
- (d) interfering with property in the victim's or another person's possession (whether or not the offender has an interest in the property);
- (e) giving offensive material to the victim or another person or leaving it where it will be found by, given to or brought to the attention of, the victim or the other person;
- (f) keeping the victim or another person under surveillance;
- (g) acting in any other way that could reasonably be expected to arouse apprehension or fear in the victim for his or her own safety or that of another person,

with the intention of causing physical or mental harm to the victim or of arousing apprehension or fear in the victim for his or her own safety or that of another person and the course of conduct engaged in actually did have that result.

- (1A) For the purposes of this section, an offender has the intention to cause physical or mental harm to the victim or to arouse apprehension or fear in the victim for his or her own safety or that of another person if the offender knows, or in the particular circumstances a reasonable person would have been aware, that engaging in a course of conduct of that kind would be likely to cause such harm or arouse such apprehension or fear.
- (2) A person who stalks another person is guilty of an offence and is liable:
 - (a) to imprisonment for 2 years; or
 - (b) where:
 - (i) the person's conduct contravened a condition of bail or an injunction or order imposed by a court (either under a law of

the Commonwealth, the Territory, a State or another Territory of the Commonwealth); or

- (ii) the person was, on any occasion to which the charge relates, in the possession of an offensive weapon,

to imprisonment for 5 years.

The TLRI in its *Bullying* report²⁰ identified the potential problems with applying the Tasmanian equivalent²¹ of s 189 of the *Criminal Code* (NT) to bullying:²²

- uncertainty as to the parameters of harm, particularly mental harm, covered by the section;
- it is not clear whether ‘apprehension or fear’ is to be given a broad interpretation to include things like fear of harm to reputation and embarrassment, or a narrow interpretation relating only to personal safety or the safety of others; and
- it is not clear whether verbal, face-to-face bullying (such as name-calling, humiliation and harassment) and physical bullying fall within the stalking provision.

The NTLRC has similar concerns with respect to the application of s 189 of the *Criminal Code* (NT) to conduct amounting to bullying. This is addressed in greater detail in Chapter 4.

3.2 Cyberbullying

‘Cyberbullying’ has been defined by the Office of the eSafety Commissioner as, “the use of technology to bully a person or group with the intent to hurt them socially, psychologically or even physically”.²³ As the charity yourtown notes, however, “given the nature of the digital world and constantly new and emerging technologies and online behaviours, cyberbullying is a constantly evolving concept”.²⁴

Offences in the *Criminal Code Act 1995* (Cth) relevant to bullying, and in particular cyberbullying, include:²⁵

²⁰ Tasmania Law Reform Institute, *Bullying* (Final Report No 22, 2016).

²¹ *Criminal Code Act 1924* (Tas) Sch 1, s 192.

²² Tasmania Law Reform Institute, *Bullying* (Final Report No 22, 2016) at [2.1.5].

²³ <https://www.esafety.gov.au/esafety-information/esafety-issues/cyberbullying> (accessed 18 April 2018).

²⁴ Submission of yourtown to the Senate Legal and Constitutional Affairs References Committee Inquiry into the *Adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying*, at 4.

²⁵ Senate Legal and Constitutional Affairs References Committee, *Adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying*, (March 2018) at [3.9].

- section 474.14 (using a telecommunications network with intention to commit a serious offence);
- section 474.15 (using a carriage service to make a threat);
- section 474.16 (using a carriage service for a hoax threat);
- section 474.17 (using a carriage service to menace, harass or cause offence); and
- section 474.29A (using a carriage service for suicide related material).

Discussion of the effectiveness of criminalising conduct relating to cyberbullying centres primarily on the use of a carriage service to menace, harass or cause offence, which is prohibited by s 474.17 of the *Criminal Code* (Cth). That section provides:

- (1) A person commits an offence if:
 - (a) the person uses a carriage service; and
 - (b) the person does so in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.

Penalty: Imprisonment for 3 years.

- (2) Without limiting subsection (1), that subsection applies to menacing, harassing or causing offence to:
 - (a) an employee of an NRS provider; or
 - (b) an emergency call person; or
 - (c) an employee of an emergency service organisation; or
 - (d) an APS employee in the Attorney-General's Department acting as a National Security Hotline call taker.

An offence under s 474.17 carries a maximum term of imprisonment of 3 years or, in appropriate circumstances, a maximum fine of \$37,800.²⁶ It covers both serious conduct and “very low level offending”.²⁷ Whether the offence is committed is

²⁶ Attorney-General's Department (Cth), Submission No 20 to the Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Adequacy of Existing Offences in the Commonwealth Criminal Code and of State and Territory Criminal Laws to Capture Cyberbullying*, 24 October 2017, at [36].

²⁷ Attorney-General's Department (Cth), Submission No 20 to the Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Adequacy of Existing Offences in the Commonwealth*

determined objectively through the use of the ‘reasonable person test’. The offence is framed “by reference to what a reasonable person would regard as menacing, harassing or offensive, not what the accused intended”.²⁸ While the prosecution does not have to prove that the accused intended to menace, harass or cause offence,²⁹ it must prove that the accused:³⁰

intended to use the carriage service and have been reckless as to whether they were using a carriage service in a way that the ‘reasonable person’ would regard, in all the circumstances, as menacing, harassing or offensive.

Since the introduction of s 474.17 in 2004, of the offences prosecuted by the Commonwealth Director of Public Prosecution, 927 charges against 458 defendants were found proven.³¹ While not discussed in the Commonwealth Attorney-General’s submission, it is assumed that these statistics cover the period from 2004 to 24 October 2017 (being the date of the submission). These figures do not include offences under s 474.17 prosecuted by state and territory agencies.³²

In its submission to the Senate Committee, the NT Police noted a significant shortcoming with s 474.17 of the *Criminal Code* (Cth) in tackling cyberbullying. According to the NT Police, the maximum penalty of three years imprisonment is “currently a limiting factor when considering potential avenues of investigation”.³³ For example, the penalty “fails to meet the serious offence test under the *Telecommunications (Interception and Access) Act 1979* (Cth) limiting the scope for using data interception techniques to progress ... investigations”.³⁴

Criminal Code and of State and Territory Criminal Laws to Capture Cyberbullying, 24 October 2017, at [38].

²⁸ Attorney-General’s Department (Cth), Submission No 20 to the Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Adequacy of Existing Offences in the Commonwealth Criminal Code and of State and Territory Criminal Laws to Capture Cyberbullying*, 24 October 2017, at [12].

²⁹ Attorney-General’s Department (Cth), Submission No 20 to the Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Adequacy of Existing Offences in the Commonwealth Criminal Code and of State and Territory Criminal Laws to Capture Cyberbullying*, 24 October 2017, at [12].

³¹ Attorney-General’s Department (Cth), Submission No 20 to the Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Adequacy of Existing Offences in the Commonwealth Criminal Code and of State and Territory Criminal Laws to Capture Cyberbullying*, 24 October 2017, at [27].

³² Attorney-General’s Department (Cth), Submission No 20 to the Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Adequacy of Existing Offences in the Commonwealth Criminal Code and of State and Territory Criminal Laws to Capture Cyberbullying*, 24 October 2017, at [28].

³³ Northern Territory Police Force, Submission No 22 to the Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Adequacy of Existing Offences in the Commonwealth Criminal Code and of State and Territory Criminal Laws to Capture Cyberbullying*, October 2017, at 2.

³⁴ Northern Territory Police Force, Submission No 22 to the Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Adequacy of Existing Offences in the Commonwealth Criminal Code and of State and Territory Criminal Laws to Capture Cyberbullying*, October 2017, at 2.

In its report the Senate Committee recommended that offences committed by minors not be increased,³⁵ however, the majority did recommend an increase to a maximum of five years imprisonment for adults convicted of the offence.³⁶ The Government members on the Senate Committee did not support an increase in the maximum penalty.³⁷ Whether the perceived shortcoming identified by the NT Police will be rectified in the near to medium term remains to be seen.

Another concern with an offence directed only at conduct committed over a carriage service is that bullying generally involves both traditional forms of bullying, such as face-to-face bullying, and cyberbullying. As yourtown notes, in a recent study of over 120,000 children and young people in England, “of the 30% who reported being bullied, only 1% reported being cyberbullied only”.³⁸

Finally, the overlap of State and Commonwealth laws relating to conduct that may constitute bullying has an impact on the willingness of the police to investigate such offences. As the NT Police noted:³⁹

While the use of Commonwealth legislation such as section 474.17 is available to members and can be used to fill in gaps in NT legislation, the complexities and nuances in using different legislation discourages police members from using this option.

It was the view of the NT Police that “[s]pecific NT legislation to address this activity is preferable as it would better enable the NT Police Force to investigate and prosecute cyberbullying”.⁴⁰

Similar concerns to those expressed by the NT Police have been noted by the Tasmanian Government. In its submission to the Senate Committee, it noted:⁴¹

³⁵ Senate Legal and Constitutional Affairs References Committee, *Adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying* (March 2018) Recommendation 3.

³⁶ Senate Legal and Constitutional Affairs References Committee, *Adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying* (March 2018) Recommendation 5.15.

³⁷ Senate Legal and Constitutional Affairs References Committee, *Adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying* (March 2018) Additional Remarks at [1.6].

³⁸ yourtown, Submission No 6 to the Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Adequacy of Existing Offences in the Commonwealth Criminal Code and of State and Territory Criminal Laws to Capture Cyberbullying*, October 2017, at 4.

³⁹ Northern Territory Police Force, Submission No 22 to the Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Adequacy of Existing Offences in the Commonwealth Criminal Code and of State and Territory Criminal Laws to Capture Cyberbullying*, October 2017, at 3.

⁴⁰ Northern Territory Police Force, Submission No 22 to the Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Adequacy of Existing Offences in the Commonwealth Criminal Code and of State and Territory Criminal Laws to Capture Cyberbullying*, October 2017, at 3.

⁴¹ Tasmanian Government, Submission No 19 to the Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Adequacy of Existing Offences in the Commonwealth Criminal Code and of State and Territory Criminal Laws to Capture Cyberbullying*, October 2017, at 4.

Investigatory regimes and police powers are significantly different under State and Commonwealth legislation. This includes search warrants, collection of forensic evidence, interview procedures, arrest powers and investigative detention. The majority of state police [in Tasmania] have no experience with Commonwealth procedures. The Tasmanian Government notes that it is preferable that the offending conduct be covered by State-based offences where possible if there is an expectation that the offence will be enforced by state police.

3.3 Conclusion

The current legislative framework for the criminal punishment of bullying is a patchwork of NT and Commonwealth laws. While NT criminal law can be used to address some aspects of traditional, face-to-face, bullying, cyberbullying is addressed primarily in the *Criminal Code Act 1995* (Cth). Further, as is discussed in Chapter 4, the current offences in the *Criminal Code* (NT), and in particular s 189 (stalking), do not cover all conduct which may constitute bullying. Finally, the maximum penalties – 2 years imprisonment in the case of stalking, and 3 years imprisonment in the case of using a carriage service to menace, harass or cause offence – hinder the ability of the NT Police to investigate effectively such crimes.

CHAPTER FOUR

THE CRIMINALISATION OF BULLYING AND ITS STRUCTURE AS A CRIMINAL OFFENCE

4.0 Introduction - Bullying should be made an offence

The first issue to be considered is whether bullying should be made a criminal offence in the NT.

A number of considerations are relevant to determining whether particular conduct should be criminalised:⁴²

A criminal offence is the ultimate sanction for breaching the law and there can be far reaching consequences for those convicted of criminal offences. Consequently, Ministers and agencies should consider the range of options for imposing liability under legislation and select the most appropriate penalty or sanction.

A criminal offence is the benchmark against which other sanctions are measured.

The ALRC's Report 95: Principled Regulation: Federal Civil and Administrative Penalties in Australia, states:

The main purposes of criminal law are traditionally considered to be deterrence and punishment. Central to the concept of criminality are the notion of individual culpability and the criminal intention for one's actions.

The Report continues:

...a key characteristic of crime, as opposed to other forms of prohibited behaviour, is the repugnance attached to the act, which invokes social censure and shame.

Certain conduct should be almost invariably classified as criminal due to the degree of malfeasance or the nature of the wrongdoing involved. Examples include conduct that results in physical or psychological harm to other people (murder, rape, terrorist acts) or conduct involving dishonest or fraudulent conduct (false and misleading statements, bribery, forgery). In addition, criminal offences should be used where the relevant conduct

⁴² Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, at [2.2.1]
<<https://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf>>.

involves, or has the potential to cause, considerable harm to society or individuals, the environment or Australia's national interests.

As noted by the TLRI, bullying can "vary widely in form and severity".⁴³ The Report goes on to say:⁴⁴

It can consist of a an extremely wide range of behaviours, including social exclusion, name-calling, cyber-harassment, gesturing, physical contact, the spreading of rumours, teasing, publishing materials relating to the victim and masquerading as the victim online. It can permeate almost any social environment, and can be perpetrated and/or experienced by anyone. The same "bullying" behaviour that has little or no effect on one individual may be incredibly damaging to another.

The TLRI addressed the justification for a legal response to bullying:⁴⁵

Given the serious harm that can be caused by bullying, a social response alone may be insufficient and a legal response may be justified. The law has an important declaratory effect and deterrent function and rendering behaviour "unlawful" provides a clear statement of society's unwillingness to accept the behaviour.⁴⁶ Recognition of the wrongfulness of the behaviour and provision of accessible legal avenues for resolution of the problem may also be beneficial to victims.⁴⁷

The TLRI also turned its mind to whether it is appropriate for there to be a criminal justice response to bullying:⁴⁸

The imposition of criminal liability is the most punitive response to bullying. The criminal law is censuring and stigmatising and can result in the deprivation of liberty. The potentially harsh consequences associated with the enforcement of the criminal law suggest that it should be reserved for serious wrongdoing that cannot be dealt with in another way. At a basic level, in order to justify a criminal law response to bullying, the behaviour should be shown to be harmful and the criminal law should be shown to be able to make a contribution to dealing with the problem that other responses cannot make.

⁴³ Tasmania Law Reform Institute, *Bullying*, Final Report No 22 (2016) at [1.1.4].

⁴⁴ Tasmania Law Reform Institute, *Bullying*, Final Report No 22 (2016) at [1.1.4].

⁴⁵ Tasmania Law Reform Institute, *Bullying*, Final Report No 22 (2016) at [2.2.4].

⁴⁶ See New Zealand Law Commission, *Harmful Digital Communications: The Adequacy of the Current Sanctions and Remedies*, Ministerial Briefing Paper (2012) at 98.

⁴⁷ See New Zealand Law Commission, *Harmful Digital Communications: The Adequacy of the Current Sanctions and Remedies*, Ministerial Briefing Paper (2012) at 98.

⁴⁸ Tasmania Law Reform Institute, *Bullying*, Final Report No 22 (2016) at [3.3.1].

It is noteworthy that the Tasmanian Office of the Director of Public Prosecutions submitted that a criminal justice response is only appropriate where the bullying behaviour is very serious.⁴⁹

As was noted in the Second Reading Speech in relation to the *Crimes Amendment (Bullying) Bill 2011* (Vic), there is a need to address serious bullying in the community.⁵⁰ The Second Reading Speech included a statement that “where serious bullying occurs it will now be charged and punished with the ‘full force and stigma of the criminal law’...”.⁵¹

In the Second Reading Speech in relation to the *Statutes Amendment (Bullying) Bill 2017* (SA) the Hon D.G.E Hood said:⁵²

We have gone to great lengths to ensure that only the very serious and prolonged attacks that actually cause harm and were intended to cause harm are captured under this legislation, making a clear distinction between bullying and simple name calling, for example. We further believe that a protection against frivolous accusation is that all acts carry a mental intention; that is, an intent to cause harm or recklessly cause harm. Without this, bullying cannot be proved and it is not our intention that it be done under this bill. We believe we have struck the right balance between providing an effective bill for the victims of bullying and ensuring that trivial issues will not be pursued at the cost of the taxpayer under this bill.

Later in the Second Reading Speech, the Hon D.G.E Hood states that the Bill “recognises the serious harm caused by bullying and creates an approach whereby serious actions do have consequences”,⁵³ and is “intended to capture cumulative acts of targeted bullying where the perpetrator specifically intends to cause harm”.⁵⁴

⁴⁹ Tasmania Law Reform Institute, *Bullying*, Final Report No 22 (2016) at [3.3.3].

⁵⁰ Victoria, *Parliamentary Debates*, Legislative Assembly, 6 April 2011, at 1019 (Robert Clark).

⁵¹ Victoria, *Parliamentary Debates*, Legislative Assembly, 6 April 2011, at 1020 (Robert Clark).

⁵² South Australia, *Parliamentary Debates*, Legislative Council, 27 September 2017, at 7664 (Dennis Hood).

⁵³ South Australia, *Parliamentary Debates*, Legislative Council, 27 September 2017, at 7665 (Dennis Hood).

⁵⁴ South Australia, *Parliamentary Debates*, Legislative Council, 27 September 2017, at 7665. We note that the *Statutes Amendment (Bullying) Bill 2017* (SA) was introduced into, and passed by, the South Australian Legislative Council but was not considered by the House of Assembly before the March 2018 general election.

The NTLRC has concluded that there should be a criminal justice response to bullying, but its criminalisation should be confined to very serious or egregious instances of bullying behaviour.

Recommendation 1 – The Northern Territory Government should enact legislation which criminalises bullying, but the criminal offence should be confined to the most serious or egregious instances of bullying behaviour.

4.1 Bullying should be a specific and separate offence

Once it is accepted that there should be a criminal response to bullying behaviour, it remains to consider what form that response should take.

There appear to be two options. The first is to amend current “stalking” legislation to extend its application to bullying behaviour.⁵⁵ The second option is to create a specific and separate offence of bullying.⁵⁶

It is noted that of the eight submissions received by the TLRI, four respondents favoured the creation of a specific and separate offence of bullying, with three supporting an extension of the current “stalking” legislation and one favouring a combination of the two options.⁵⁷

Relevantly, the Law Society of Tasmania submitted that “the primary goals of legislating a criminal justice response should be deterrence and community condemnation of bullying behaviours, and that the creation of a new offence specifically targeted at bullying serves these goals most effectively”.⁵⁸ In a similar vein, the Tasmanian Anti-Discrimination Commissioner noted that “the creation of an offence of bullying or harassment under the *Police Offences Act 1935* (Tas) has the capacity to provide for significant deterrence in serious instances of bullying and that a separate offence may offer flexibility to specify a broad range of behaviours, as well as remedies, conditions and exceptions”.⁵⁹

The NTLRC favours the second option of creating a specific and separate offence of bullying. One of the main purposes of the criminal law is to “protect the public from the commission of [criminal offences] by making it clear to the offender and to other persons with similar impulses that if they yield to them, they will meet with severe

⁵⁵ See for example s 21A(2) of the *Crimes Act* (Vic) and the recommendation of the Tasmania Law Reform Institute, *Bullying* (Final Report No 22, 2016).

⁵⁶ See for example s 20C of the *Statutes Amendment (Bullying) Bill 2017* (SA).

⁵⁷ Tasmania Law Reform Institute, *Bullying*, Final Report No 22 (2016) at [3.3.14].

⁵⁸ The Law Society of Tasmania, Submission to the Tasmania Law Reform Institute Inquiry into *Bullying*, 19 August 2015, at 12.

⁵⁹ Tasmanian Anti-Discrimination Commissioner Submission to the Tasmania Law Reform Institute Inquiry into *Bullying*, 19 August 2015, at 23.

punishment”.⁶⁰ In *Munda v Western Australia* (2013) 87 ALJR 1035 at [54] the High Court affirmed the importance of the principles of general and specific deterrence in the criminal law.

Despite significant differences of opinion as to the deterrent effect of sentences, “the fact that penalties operate as a deterrent is a structural assumption of our criminal justice system”: *R v Wong* (1999) 48 NSWLR 340 at [127] – [128] per Spigelman CJ. Although the weight of empirical evidence indicates that *increasing* sentences for existing offences has no deterrent effect, the criminalisation of conduct by creating new offences has been shown to deter people from engaging in that conduct.⁶¹

Consistent with this structural assumption, the NTLRC considers that the creation of a specific and separate offence of bullying is the most effective way of deterring and expressing public condemnation of “bullying behaviours” that fall within the ambit of the offence creating provision.

The NTLRC considers that this approach is preferable to extending the provisions of current “stalking” legislation⁶² to cover proscribed bullying behaviours – including a reference to “bullying” alongside “stalking” in the title to the relevant provisions.⁶³ In the NTLRC’s view, this alternate approach would not be effective enough to “communicate the law’s denunciation of [bullying behaviours] and to educate victims, perpetrators and the community about the seriousness with which the law views such conduct”.⁶⁴

Recommendation 2 – The Northern Territory Government should amend the *Criminal Code* (NT) to include a specific and separate offence of bullying.

4.2 How should bullying be defined at criminal law?

The next issue to consider is how should bullying be defined for the purposes of creating a new offence of bullying in the NT.

Section 20A(2) of *Statutes Amendment (Bullying) Bill 2017* (SA), which specifically criminalises bullying behaviours, contains the following definition of “bullying”:

⁶⁰ *R v Radich* [1954] NZLR 86 cited with approval in *R v Goodrich* (1955) 72 WN(NSW) 42 and *R v AEM* [2002] NSWCA 58 at [92].

⁶¹ Bagaric and Alexander, “(Marginal) general deterrence doesn’t work - and what it means for sentencing” (2011) 35 *Criminal Law Journal* 269.

⁶² The stalking provision is discussed in Chapter 3.

⁶³ By way of example, the TLRI recommended that s 192 of the *Criminal Code* (Tas) not only be amended to cover “bullying behaviours” but that the section be retitled “Stalking and Bullying”: Tasmania Law Reform Institute, *Bullying*, Final Report No 22 (2016) at [3.3.36].

⁶⁴ It should be noted that the TLRI took a contrary view: see Recommendation 1 of the Tasmania Law Reform Institute, *Bullying*, Final Report No 22 (2016).

- (2) For the purposes of this Division, a person bullies another person if the person does 1 or more of the following:
- (a) expressly or implicitly threatens to cause harm to the person;
 - (b) degrades, humiliates, disgraces or harasses the other person, or expressly or implicitly threatens to do so;
 - (c) uses abusive or offensive language towards the other person;
 - (d) gives or sends offensive material to the other person, or leaves offensive material where it will be found by, given to or brought to the attention of the other person;
 - (e) publishes or transmits offensive material by means of the internet or some other form of electronic communication in such a way that the offensive material will be found by, or brought to the attention of the other person;
 - (f) engages in any other conduct that could reasonably be expected to –
 - (i) degrade, humiliate, disgrace or harass the other person; or
 - (ii) cause apprehension or fear in the other person,
- and a reference to an act of bullying is to be construed accordingly.

The NTLRC recommends that the behaviours referred to in the South Australian definition be defined as bullying for the purposes of the NT definition of bullying. The NTLRC is of the view that the type of conduct referred to in this provision captures the essence and spectrum of behaviour that is most commonly found in serious instances of bullying, and differentiates bullying behaviours that warrant the intervention of the criminal law from minor or trivial instances of bullying behaviour that do not justify a criminal law response.

Recommendation 3 – The behaviours referred to in the definition of ‘bullying’ in section 20A(2) of *Statutes Amendment (Bullying) Bill 2017* (SA) should be used for the purpose of defining ‘bullying’ in the *Criminal Code* (NT).

4.3 The offence of bullying should involve a course of conduct

It is noted that the definitions of bullying contained in s 21A of the *Crimes Act 1958* (Vic), s 20C of the *Statutes Amendment (Bullying) Bill 2017* (SA) and the

recommended amendment to s 192 of the *Criminal Code Act 1924* (Tas) all contain a temporal element as part of the physical elements of the offence. For example, s 21A(2) of the *Crimes Act 1958* (Vic) requires the offender to engage in “a course of conduct” which includes any of the proscribed actions. Similarly, the proposed amendment to s 192 of the *Criminal Code Act 1924* (Tas) requires the offender to pursue “a course of conduct” made up of one or more of the proscribed actions. However, the temporal element in the proposed South Australia legislation noted above takes a different form: the offender is required to have committed “more than 1 act of bullying against the other person over a period of not less than 7 days”.⁶⁵

It is accepted that by definition bullying consists of more than merely engaging in conduct that meets the definition of bullying behaviour. Bullying is constituted and characterised by a continuity of purpose; and the jurisdictions referred to above have attempted to reflect that fundamental characteristic in the temporal element that they formulated as part of the physical elements of the offence.

After considering the different approaches taken in other jurisdictions, the NTLRC concludes that the approach taken in Victoria and Tasmania is preferable to that taken in the South Australian Bill; and that the physical element of the proposed offence of bullying in the NT should consist of a “course of conduct” involving behaviour of the type described in the definition of “bullying”. This is consistent with the approach taken in relation to the cognate of “stalking” in s 189 of the *Criminal Code* (NT).

A requirement that bullying behaviour occur as part of a course of conduct ensures that casual or one-off acts of bullying do not incur criminal liability. The requirement ensures that only sustained or repetitive bullying behaviour attracts a criminal law response. The importance of criminalising only sustained or repetitive bullying behaviour is reflected in the legislative initiatives taken in the other Australian jurisdictions by way of a criminal law response to bullying.

The phrase “course of conduct” has a well-established meaning at law. A number of authorities establish that in order for proscribed acts to amount to “a course of conduct” those acts must have amounted to a pattern of conduct, evidencing a “continuity of purpose” with respect to the victim.⁶⁶ The relevant authorities also establish that as a bare minimum, the proscribed acts “must have been committed on more than one occasion or have been protracted in nature (for example, an extended act of surveillance)”.⁶⁷

⁶⁵ *Statutes Amendment (Bullying) Bill 2017* (SA) s 20A(2).

⁶⁶ See the Judicial College of Victoria Bench Notes (updated 12 September 2014) at 7.4.7.1 where the following authorities are cited: *Berelyn v Brouskos* (2002) 134 A Crim R 111; *Nadarajamoorthy v Moreton* [2003] VSC 283; *Thomas v Campbell* (2003) 9 VR 136; *R v Hoag* [2007] VSCA 117; *R v Anders* [2009] VSCA 7.

⁶⁷ See the Judicial College of Victoria Bench Notes at 7.4.7.1 where the following authorities are cited: *Gunes v Pearson* (1996) 89 A Crim R 297; *Berelyn v Brouskos* (2002) 134 A Crim R 111; *Nadarajamoorthy v Moreton* [2003] VSC 283; *Thomas v Campbell* (2003) 9 VR 136; *R v Hoang* [2007] VSCA 117.

However, “conduct which was committed on more than one occasion, or which was protracted, will not always constitute a pattern of behaviour evidencing a continuity of purpose”; and “something additional about the conduct or surrounding circumstances must be shown before it can be said of the conduct that it amounts to such a pattern”.⁶⁸

The following propositions can be extracted from the relevant case law:

- “The continuity of purpose must have been in relation to the particular victim. It is not sufficient for the victim to have coincidentally been the subject of actions which were not specifically targeted at him or her personally”.⁶⁹
- “The course of conduct may be spread over a period of years.”⁷⁰
- “An episode of harassment of short duration does not constitute a course of conduct, evidencing a continuity of purpose”.⁷¹
- “If the alleged acts were not premeditated, there cannot have been a continuity of purpose”.⁷²

Given the abundance of authorities on the meaning of “course of conduct”, the NTLRC considers that it is not necessary for the purposes of a new offence of bullying in the NT to define “course of conduct”. Neither Victoria nor Tasmania have seen the need to define this temporal element.

Although the *Statutes Amendment (Bullying) Bill 2017 (SA)* is intended to ensure that bullying behaviour should only attract criminal liability where the offending behaviour constitutes a pattern of conduct, evidencing a continuity of purpose, a perceived difficulty with s 20C of the *Statutes Amendment (Bullying) Bill 2017 (SA)* is that the introduction of a timeline of “not less than 7 days” between separate acts of bullying is unduly restrictive and has the potential to exclude serious instances of bullying that amount to a pattern of conduct over a shorter period of time. The Victorian approach which is predicated upon proof of “a course of conduct” is preferable because it captures serious bullying behaviour that occurs over a period of time ranging from years, down to months or even a matter of days or hours. Of course,

⁶⁸ See the Judicial College of Victoria Bench Notes at 7.4.7.1 where *Nadarajamoorthy v Moreton* [2003] VSC 283 is cited as authority for that proposition.

⁶⁹ See the Judicial College of Victoria Bench Notes at 7.4.7.1 where *R v Anders* [2009] VSCA 7 is cited as authority for that proposition and the following example is given:

For example, it will not be sufficient to prove that the accused was undertaking surveillance of a particular location, and coincidentally happened to photograph the same person on more than one occasion. The accused must have intended to target the particular victim: *R v Anders* [2009] VSCA 7.

⁷⁰ See the Judicial College of Victoria Bench Notes at 7.4.7.1 where *R v Hoang* [2007] VSCA 117 is cited as authority for that proposition.

⁷¹ See the Judicial College of Victoria Bench Notes at 7.4.7.1 where *Nadarajamoorthy v Moreton* [2003] VSC 283 is cited as authority for that proposition.

⁷² See the Judicial College of Victoria Bench Notes at 7.4.7.1 where *Thomas v Campbell* (2003) 9 VR 136 is cited as authority for that proposition.

the shorter the period of time over which the conduct occurs the more difficult it might be to establish a pattern of behaviour. However, that exercise should not be artificially governed by an arbitrary temporal expression of the kind contained in s 20C of the *Statutes Amendment (Bullying) Bill 2017* (SA).

4.4 The fault elements of the offence of bullying

The question that arises is what fault elements should accompany the conduct element of the proposed offence of bullying in order to attract criminal liability. In other words, how morally blameworthy or morally culpable should a person engaging in bullying behaviours be before incurring criminal liability for the conduct?

It is assumed that in accordance with current policy the offence would be drafted in accordance with Part IIAA of the *Criminal Code* (NT). As only serious instances of bullying are to be criminalised, that needs to be reflected in the constituent elements of the new offence of bullying.

Given that human beings have a measure of choice as to their actions, the alleged offender must have committed the act or acts (constituting the “course of conduct”) voluntarily and intentionally. This is to ensure that accidental or non-intentional acts of bullying do not attract criminal liability.

The next question to consider is whether the proposed offence of bullying should contain a fault element over and above the basic or general intent which must accompany the bullying behaviour. It is instructive to look at how the Victorian and South Australian jurisdictions have dealt with the further mental or fault elements of the offence of bullying.

Section 21A(2) of the *Crimes Act 1958* (Vic) provides that a person stalks another person if they engage in a course of conduct which includes conduct of the type described in ss 21A(2)(a) – (g) with the intention of causing physical or mental harm to the victim, including self-harm, or of arousing apprehension or fear in the victim for his or her own safety or that of any other person.

Section 21A(3) provides as follows:

For the purposes of this section an offender also has the intention to cause physical or mental harm to the victim, including self-harm, or arouse apprehension or fear in the victim for his or own safety or that of any other person if –

- (a) the offender knows that engaging in a course of conduct of that kind would be likely to cause such harm or arouse such apprehension or fear;
- (b) the offender in all the particular circumstances ought to have understood that engaging in a course of conduct of that kind would be likely to cause such harm or arouse such apprehension or fear and it actually did have that result.

Section 189(1) of the *Criminal Code* (NT), which deals with the cognate offence of stalking, requires that the proscribed conduct be engaged in with the intention of causing physical or mental harm to the victim or of arousing apprehension or fear in the victim for his or her own safety or that of another person.

Section 189(1A) provides that an offender has the intention to cause physical or mental harm to the victim or of arousing apprehension or fear in the victim for his or her own safety or that of another person if the offender knows, or in the particular circumstances a reasonable person would have been aware, that engaging in a course of conduct of that kind would be likely to cause such harm or arouse such apprehension or fear.

The position in South Australia is quite different. The fault element in s 20C(1) of the *Statutes Amendment (Bullying) Bill 2017* (SA) requires the offender to have intended to cause harm or to have been reckless as to whether harm will be caused to another person at the time of engaging in the bullying conduct.

Whilst the requisite intention is not defined in the Bill, recklessness is defined in s 20A as follows:

A person is reckless in causing harm to another person if the first person –

- (a) is aware of a substantial risk that the person's conduct could result in harm; and
- (b) engages in the conduct despite the risk and without adequate justification.

In setting the alternative fault element in terms of "recklessness" the South Australian legislature has largely followed the definition of "recklessness" adopted in s 5.4 of the *Criminal Code 1995* (Cth):

A person is reckless with respect to a result if:

- (a) he or she is aware of a substantial risk that the result will occur; and

having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

This in turn is substantially similar to the definition of “recklessness” in s 43AK of the *Criminal Code* (NT).

Having the benefit of the legislative initiatives taken in other Australian jurisdictions by way of a criminal justice response to bullying behaviours, it remains for the NTLRC to consider what specific fault elements should constitute a new offence of bullying in the NT. Clearly, acts of bullying simpliciter – even if intentionally committed – should not attract criminal liability. To attract criminal liability there needs to be an added element of moral culpability, which ensures that only serious instances of bullying are caught by the operation of the criminal law. That additional element is supplied by making an intention to produce a particular result an essential element of the offence. Although there are differences in the approach taken by the various jurisdictions, all jurisdictions agree that the offence should include an intention to cause harm or apprehension or fear or a similar result.

Although the stalking provisions of s 189 of the *Criminal Code* (NT) relate to a cognate offence, and therefore provide a valuable starting point, they should not be treated as being determinative of how the requisite intention is to be defined for the purposes of the proposed offence of bullying.

Engaging in bullying behaviour with the actual intention of causing harm (including, as will be discussed below, apprehension or fear) is the most morally culpable and reprehensible form of bullying and therefore is a serious instance of bullying. For this reason, actual intention should be given prominence as a fault element on “the staircase of criminal liability” – to borrow the phrase used by Hemming.⁷³ Furthermore, if actual intention is proved, that will be a factor that is relevant to the appropriate sentence, particularly where the offence-creating provision prescribes alternative fault elements that are lower on the “staircase of criminal liability”.

Given that actual intention should be the primary fault element for the proposed offence, it remains to consider how it should be defined. The NTLRC’s view is that, for the sake of clarity, actual intention should be defined for the purposes of the proposed new offence of bullying.

Although s 43AI(2) of the *Criminal Code* (NT) provides that “a person has intention in relation to a result if the person means to bring it about or is aware that it will happen in the ordinary course of events”, it is by no means clear that the provisions of s 43AI apply to a specific fault element to produce a particular result that is prescribed in the

⁷³ A. Hemming, “Reasserting The Place of Objective Tests in Criminal Responsibility: Ending the Supremacy of Subjective Tests” (2011) 13 *University of Notre Dame Australia Law Review* 69, 103.

offence creating provision.⁷⁴ For that reason, actual intention should be defined for the purposes of the offence creating provision; and there is no reason why it should not be defined in the same manner that it is defined in s 43AI. It is entirely appropriate to define actual intention in relation to a particular result either in terms of meaning to bring it about or being aware that the result will happen in the ordinary course of events – the latter involving “a belief that that it is certain [the result] will occur, unless something extraordinary occurs to prevent it”.⁷⁵

The next question is whether the specific fault element for the new offence should be extended beyond actual intention. That question has been affirmatively answered in other jurisdictions, as well as in the NT in relation to the cognate offence of stalking.

The NTLRC considers that, using the framework of Part IIAA of the *Criminal Code* (NT), it is appropriate to establish an alternative fault element of “recklessness”, as defined by s 43AK of the Code, namely that the person is reckless as to causing harm (including apprehension or fear). This is consistent with the approach taken in the *Statutes Amendment (Bullying) Bill 2017* (SA). After “intention”, “recklessness” is the next relevant rung on the “staircase of criminal liability”.

Recommendation 4 – The offence of bullying should comprise:

- with respect to the acts comprising the course of conduct, a fault element of intention; and
- with respect to causing harm, a fault element of:
 - intention (meaning ‘if the person means to bring it about or is aware that it will happen in the ordinary course of events’); or
 - recklessness.

4.5 Causing harm should be an element of the offence of bullying

Having dealt with the specific fault elements for the proposed new offence of bullying, it remains to consider the vexed issue of whether proof of actual harm should be an element of the offence. The various jurisdictions are divided on this issue.

Section 21A(3)(b) of the *Crimes Act 1958* (Vic) only requires proof of the result (i.e. the causing of harm or arousal of apprehension or fear) where the specific fault element relied upon is that “the offender in all the particular circumstances ought to

⁷⁴ S. Odgers, *Principles of Federal Criminal Law* (Thomson Reuters, 3rd ed, 2015) at [5.2.100].

⁷⁵ S. Odgers, *Principles of Federal Criminal Law* (Thomson Reuters, 3rd ed, 2015) at [5.2.230].

have understood that engaging in a course of conduct of that kind would be likely to cause such harm or arouse such apprehension or fear”.

It is worth noting that prior to its amendment in 2003, s 21A(1) of the *Crimes Act 1958* (Vic) required that stalking conduct must result in physical or mental harm to the victim or apprehension or fear in the victim for his or her safety in order to constitute an offence. Furthermore, prior to the amendment in 2003, s 21A(3) of the *Crimes Act 1958* (Vic) provided that:

For the purposes of this section an offender also has the intention to cause physical or mental harm to the victim or to arouse apprehension or fear in the victim for his or her own safety or that of any other person if that offender knows, or in all the circumstances ought to have understood, that engaging in a course of conduct of that kind would be likely to cause such harm or arouse such apprehension or fear and it actually did have that result.⁷⁶

The new s21A(3) which replaced the previous s 21A(3) is divided into two parts.⁷⁷ The new s21A(3)(a) requires “a subjective form of intention where no relevant harm, apprehension or fear is caused to the victim of the stalking”.⁷⁸ However, “the new s21A(3)(b), like the old s 21A(3), deems the offender to have the necessary intention where ‘the offender in all the particular circumstances ought to have understood’ that the course of conduct would be likely to cause the relevant harm, apprehension or fear and it actually did have that result”.⁷⁹

The effect of the 2003 amendment was that if the offender either intended to cause harm or arouse apprehension or fear, or knew that such effects were likely to result from his or her conduct - both of which are subjective states of mind - the specific fault element would be satisfied, regardless of whether the conduct actually did cause such harm, apprehension or fear. However, the amendment retained the requirement of proof of actual harm, apprehension or fear in relation to the imputed understanding of the offender as to the effects of the conduct on the victim.

The rationale for this distinction was explained in *R v Hoang*:⁸⁰

The policy reason for this distinction is to (a) ensure that an offender who knew harm, fear or apprehension was likely, does not escape prosecution simply because the victim “is not easily frightened”; and (b) to “ensure that a person is not exposed to criminal liability where he or she has no

⁷⁶ See *R v Hoang* [2007] VSCA 117 at [102].

⁷⁷ See *R v Hoang* [2007] VSCA 117 at [102] fn [30].

⁷⁸ See *R v Hoang* [2007] VSCA 117 at [102] fn [30].

⁷⁹ See *R v Hoang* [2007] VSCA 117 at [102] fn [30].

⁸⁰ See *R v Hoang* [2007] VSCA 117 at [102] fn [30].

subjective intention to cause harm or fear and does not actually cause harm or fear”: see the Explanatory Memorandum to the *Crimes (Stalking) Bill 2003*, clause 4.

By way of contrast, s 20C(1) of the *Statutes Amendment (Bullying) Bill 2017* (SA) not only requires proof that the offender intended to cause harm or to have been reckless as to whether harm will be caused to another person at the time of engaging in the bullying conduct, but also proof that harm or serious harm was thereby caused to the other person. However, the rationale or policy reason underpinning this legislative initiative does not appear to have been publicly articulated.

The recommended legislative response in Tasmania has been to take a mid-way approach by not requiring proof of physical or mental harm or apprehension or fear where the offender has the actual intention to cause another person such harm, apprehension or fear, but requiring proof of these consequences where the offender is found to have possessed an alternative state of mind based on knowledge or imputed knowledge.⁸¹ Again, the rationale for this distinction does not appear to have been publicly explained.

Finally, while s 189 of the *Criminal Code Act* (NT) does not require proof of an actual intention to cause physical or mental harm to the victim or to arouse apprehension or fear in the victim for his or her own safety or that of another person, the prescribed fault element for the offence requires proof of consequential harm, apprehension or fear. To that extent, the provision is “on all fours” with the Tasmanian approach.

There are sound public policy reasons for not making proof of actual harm an element of the proposed new offence of bullying in the NT. As noted in the Tasmania Law Reform Institute, *Bullying* (Report No 22 January 2016) at [2.2.3]:

The harm caused by bullying can be very victim-specific as the consequences of different types of bullying can vary widely depending on the victim.⁸² In relation to mental harm in particular, the same bullying behaviour that causes very serious harm in one victim may be almost entirely “brushed off” by another”.

This is a very relevant consideration against a requirement that consequential harm be an element of the offence.

⁸¹ Tasmania Law Reform Institute, *Bullying*, Final Report No 22 (2016) at [2.1.4]:

The mental element of stalking is an intent to cause another person physical or mental harm or to be apprehensive or fearful. Where this intent cannot be proven, it may be deemed to exist under s 193(3) if actual harm, fear or apprehension was caused and the perpetrator knew or ought to have known that such a consequence would occur or be likely to occur.

⁸² K Rigby, *New Perspectives on Bullying* (Jessica Kingsley Publishers, 2002) 41.

Other reasons based on public policy for not making proof of harm were comprehensively advanced in the Law Council of Australia's submission to the Senate Committee.⁸³

There is a real concern that if the prosecution were required to prove harm as an element of the proposed offence, the prosecution would have to establish beyond reasonable doubt that the harm (whatever that may be) occasioned to the victim was caused by the actions of the offender.⁸⁴ As pointed out in the Law Council of Australia's submission:⁸⁵

This would seem difficult to prove to the relevant standard and would necessarily require a victim (if available) to give evidence as to the harm they suffered and be cross-examined as to the causation of that harm. In circumstances where a victim self-harmed as a result of bullying, this would undoubtedly be a difficult, and perhaps traumatic experience.

However, notwithstanding these considerations, the NTLRC has come to the view the causing of harm, apprehension or fear should be an element of the proposed offence of bullying, for the following reasons:

- the inclusion of harm as an element embodies the view of the NTLRC that only serious instances of bullying should be criminalised;
- the NTLRC proposes that the definition of harm be sufficiently broad to provide that a course of bullying conduct will attract criminal liability unless such conduct has had no significant adverse impact on anyone at which it is directed;⁸⁶
- the NTLRC considers that the proposed broad definition of harm will not impose an onerous burden on the prosecution to prove this element to the criminal standard;
- the NTLRC considers that in the interests of simplicity and clarity, an offence with bifurcated combinations of elements (such as applies in Victoria and Tasmania) is undesirable; and

⁸³ Law Council of Australia, Submission No 15 to the Senate Legal and Constitutional Affairs Committee, *Inquiry into the Adequacy of Existing Offences in the Commonwealth Criminal Code and of State and Territory Criminal Laws to Capture Cyberbullying*, 20 October 2017, at [36]-[45].

⁸⁴ Law Council of Australia Submission No 15 to the Senate Legal and Constitutional Affairs Committee, *Inquiry into the Adequacy of Existing Offences in the Commonwealth Criminal Code and of State and Territory Criminal Laws to Capture Cyberbullying*, 20 October 2017, at [39]-[40].

⁸⁵ Law Council of Australia, Submission No 15 to the Senate Legal and Constitutional Affairs Committee, *Inquiry into the Adequacy of Existing Offences in the Commonwealth Criminal Code and of State and Territory Criminal Laws to Capture Cyberbullying*, 20 October 2017, at [39]-[40]

⁸⁶ See below, section 4.6.

- although there is a risk that victims will be re-traumatised when required to give evidence of the harm they have suffered, it is expected that in almost all contested cases the victim will in any event be exposed to the ordeal of cross-examination, and that accordingly the risk of re-traumatisation is unlikely to be significantly elevated by the requirement that harm be proved.

Recommendation 5 -The causing of harm (including mental harm) should be an element of the recommended offence of bullying.

4.6 How “harm” should be defined for the offence of bullying

Finally, the NTLRC needs to consider how harm, apprehension or fear should be defined for the purposes of creating a new offence of bullying in the NT. It should be noted at the outset that the NT should follow Victoria’s and South Australia’s lead in making it clear that the intention to cause physical or mental harm to the victim includes self-harm. It is further recommended that the requisite intent be extended to an intent to cause “extreme humiliation”, which is a typical effect of bullying.⁸⁷

Section 21A(8) of the *Crimes Act 1958* (Vic) defines “mental harm” as including –

- (a) psychological harm; and
- (b) suicidal thoughts.

Proposed s 192(5) of the *Criminal Code Act 1924* (Tas) defines “mental harm” in identical terms.

Section 20A of the *Statutes Amendment (Bullying) Bill 2017* (SA) defines “mental harm” as including –

- (a) psychological harm; and
- (b) emotional harm; and
- (c) suicidal ideation; and
- (d) thoughts of self-harm; and
- (e) distress, anxiety, or fear, that is more than trivial.

⁸⁷ See the proposed amendment to s 192(1) of the *Criminal Code Act 1924* (Tas) as recommended in the Tasmania Law Reform Institute, *Bullying*, Final Report No 22 (2016).

In relation to the cognate offence of stalking in the *Criminal Code* (NT) s 189, which requires proof of an intention of causing physical or mental harm or arousing apprehension or fear, none of these injurious consequences are defined.

However, s 1A of the *Criminal Code* (NT) defines “harm” as follows:

- (1) Harm is physical harm or harm to a person’s mental health, whether temporary or permanent.
- (2) Physical harm includes unconsciousness, pain, disfigurement, infection with a disease and any physical contact with a person that a person might reasonably object to in the circumstances, whether or not the person was aware of it at the time.
- (3) Harm to a person’s mental health includes significant psychological harm, but does not include mere ordinary emotional reactions such as those of only distress, grief, fear or anger.
- (4) Harm does not include being subjected to any force or impact that is within the limits of what is acceptable as incidental to social interaction or to life in the community.

The NTLRC is of the view that for the purposes of creating a new offence of bullying in the NT, “mental harm” should be defined in the terms set out in s 20A of the *Statutes Amendment (Bullying) Bill 2017* (SA), as that definition covers the full spectrum of mental harm, including apprehension and fear, that one would reasonably expect to be caused by serious bullying conduct. Furthermore, where it is required that actual mental harm be proved as part of the offence, proof of any one of the prescribed effects on the victim could properly be viewed as sufficiently serious to attract criminal liability.

Recommendation 6 – For the purposes of creating a new offence of ‘bullying’ in the Northern Territory, ‘mental harm’ should be defined in the terms set out in s 20A of the *Statutes Amendment (Bullying) Bill 2017* (SA).

4.7 Conclusion

The NTLRC recommends that the *Criminal Code* (NT) be amended to include an offence of bullying. Such offence should have the following features:

- bullying conduct be defined in accordance with the relevant provisions in the *Statutes Amendment (Bullying) Bill 2017* (SA);

- the person committing the offence must have engaged in a course of conduct comprised of one or more acts of bullying;
- the acts of bullying must have been intentionally committed;
- the person committing the offence must have engaged in that course of conduct intending to cause harm, or being reckless as to whether harm will be caused, to another person, and by so doing causes harm to the other person; and
- for the purpose of the recommended offence, “harm” should be defined in accordance with the relevant provisions in the *Statutes Amendment (Bullying) Bill 2017 (SA)*.

The NTLRC is of the view that the proposed structure of the new offence of bullying – including its constituent physical and fault (mental) elements – encapsulates and reflects what the community would generally accept to be serious and morally blameworthy bullying behaviour, and to be deserving of punishment at the hands of the criminal law. The NTLRC believes that the proposed new offence strikes the appropriate balance between bullying behaviours that warrant the intervention of the criminal law and those that do not justify a criminal justice response.

CHAPTER FIVE

CONCLUSION

5.0 Introduction

In this report the NTLRC has recommended that the *Criminal Code* (NT) be amended to include a specific offence of bullying. As is stressed in Chapter 4, such an offence is designed to apply only to the most serious instances of bullying.

Tackling the problem of bullying requires a coordinated approach. In its submission to the Senate Committee, yourtown, a charity specifically aimed at assisting young people, stated:⁸⁸

To effectively prevent and address cyberbullying, a multi-sectoral approach is required, which seeks to prevent cyberbullying through society-wide and targeted education programs, supports victims and perpetrators through adequate counselling, rehabilitation and other support services, and appropriately uses the law to deter and prosecute serious cyberbullying offences as well as placing legal duties, alongside social expectations, on social media providers to remove offensive material in a timely manner and to develop supporting technologies to more effectively deal with harmful and unwanted online use.

While the yourtown submission focused on cyberbullying, it is the NTLRC's view that the above-noted comments apply equally to all forms of bullying behaviour.

5.1 Vulnerable groups

Children and young people

The NTLRC is cognisant of the fact that the use of the criminal law to address anti-social behaviour is a blunt instrument. Often both perpetrators of bullying, and the victims of bullying, are children and young people. The NTLRC agrees with the observations of the Mental Health Commissions of Australia in its submission to the Senate Committee, and suggests that it applies equally to all forms of bullying:⁸⁹

[T]he problem of cyberbullying is not fundamentally a legal problem, but a social one. Especially in the case of school children and young people, bullying will best be countered by social arrangements that involve parents, teachers and the affected children. While noting that cyberbullying can have

⁸⁸ yourtown, Submission No 6 to the Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Adequacy of Existing Offences in the Commonwealth Criminal Code and of State and Territory Criminal Laws to Capture Cyberbullying*, October 2017, at 12.

⁸⁹ Mental Health Commissions of Australia, Submission No 9 to the Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Adequacy of Existing Offences in the Commonwealth Criminal Code and of State and Territory Criminal Laws to Capture Cyberbullying*, 13 October 2017, at 5.

catastrophic outcomes, it needs to be seen along a continuum of behaviours, with criminal penalties for only the most serious of cases.

The NTLRC considers that persons under the age of 18 who engage in bullying behaviour should initially be referred to counselling, education and/or diversion programs before the criminal law is engaged. The laying of criminal charges only should occur as a last resort. Accordingly, the offence of bullying should not be prescribed as a 'serious offence' for the purpose of s 39 of the *Youth Justice Act* (NT).

Recommendation 7 – A person under the age of 18 who engages in bullying behaviour should initially be referred to counselling, education and/or diversion programs, rather than being charged with the offence of bullying. The laying of criminal charges only should occur as a last resort. Accordingly, the Northern Territory Government should not prescribe the offence of bullying as a 'serious offence' for the purpose of s 39 of the *Youth Justice Act* (NT).

Persons with a mental illness

Similar considerations apply when the perpetrator of bullying is suffering from certain types of mental illness. As the Mental Health Commissions of Australia noted its submission to the Senate Committee:⁹⁰

There is potential for a person experiencing certain types of mental health issues to engage in behaviours that might be considered online harassment or cyberbullying as a result of their illness. Laws regarding cyberbullying should offer some safeguards to ensure people engaging in cyberbullying as a direct result of their mental illness receive an appropriate response.

The interaction between people with mental health issues and the criminal justice system was the subject of a report of the NTLRC in 2016. In that report the NTLRC recommended that the assessment and diversion of persons with a mental health issue should remain a matter for the NT Police.⁹¹ When making such an assessment, however, the NT Police should keep in mind that charging an individual with the offence recommended in this report likely will not address the underlying issues giving rise to the bullying behaviour. Diversion to counselling often will be more effective.

⁹⁰ Mental Health Commissions of Australia, Submission No 9 to the Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Adequacy of Existing Offences in the Commonwealth Criminal Code and of State and Territory Criminal Laws to Capture Cyberbullying*, 13 October 2017, at 6.

⁹¹ Northern Territory Law Reform Committee, *Report on the Interaction between people with Mental Health Issues and the Criminal Justice System*, Report No 42 (May 2016) Recommendation 4.

5.2 Conclusion

The NTLRC recognises that, in serious cases of bullying, the impact on the person subjected to the bullying, and on the family and friends of that person, often can be severe. With the advent of new and evolving technology, the ways in which bullying can be perpetrated has increased dramatically. Actions have consequences, and the criminal law does have a role to play to punish those who engage in the most serious and egregious instances of bullying behaviour; often with little or no regard for the impact such behaviour has on the person being bullied.

As has been noted in this report, a number of Australian jurisdictions are currently grappling with ways to deal with bullying. Further, given that bullying behaviour often falls both within federal and NT jurisdiction, a coordinated approach to criminal sanctions is a desirable goal. While outside the scope of this inquiry, the NTLRC hopes that consideration will be given by federal, state and territory governments to implementing a uniform approach to the criminalisation of bullying. Until then, however, the recommendations in this report, if implemented, will go some way to addressing the consequences of serious bullying.

APPENDIX 1

NT WorkSafe Data

BULLYING & HARASSMENT CLAIMS 2012 - 2017

INDUSTRY	2012			2013			2014			2015			2016			2017			TOTAL ALL YEARS
	Acc	Rej	Def	Acc	Rej	Def	Acc	Rej	Def	Acc	Rej	Def	Acc	Rej	Def	Acc	Rej	Def	
PRIVATE/NGO	33	47	5	39	79	1	24	75	0	26	44	0	33	38	1	26	36	9	516
GOVERNMENT	7	9	0	13	23	0	6	14	0	8	19	0	3	13	0	5	16	1	137
Total Claims	40	56	5	52	102	1	30	89	0	34	63	0	36	51		31	52	10	653