



Tasmanian Council of Social Service Inc.

Criminal Code Amendment (Bullying) Bill 2019

January 2019



INTEGRITY
COMPASSION
INFLUENCE

About TasCOSS

TasCOSS is the peak body for the community services sector in Tasmania. Our membership includes individuals and organisations active in the provision of community services to low-income Tasmanians living in vulnerable and disadvantaged circumstances. TasCOSS represents the interests of its members and their clients to government, regulators, the media and the public. Through our advocacy and policy development, we draw attention to the causes of poverty and disadvantage, and promote the adoption of effective solutions to address these issues.

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Introduction

TasCOSS advocates on behalf of low-income Tasmanians who often live in vulnerable and disadvantaged circumstances. We advocate for public policy that values and respects the diversity of Tasmanians and makes a real difference to the lives of people who are experiencing vulnerability. We work to ensure that the human rights of all Tasmanians are integrated into government consultation processes, policy approaches and budget allocations.

Our submissions and advocacy are strongly informed by the expertise of our members and the lived experiences of the Tasmanians we represent. For this submission, we have consulted the Youth Network of Tasmania, Engender Equality, and Sexual Assault Support Services. We also have contacted the Victorian Council of Social Service, the Victorian Department of Justice, Victorian Legal Aid, and Victoria's Youthlaw and Westlaw to gain a sense of the impact of the inclusion of bullying in the Victorian Criminal Code as a consequence of what has been called Brodie's Law (2011).

Our vision

Our vision is for a Tasmania where all people feel safe. We advocate for an end to all physical and emotional violence and bullying, and for a therapeutic jurisprudence approach.¹

Key issues

Bullying, whether of children or of adults, is dismayingly common in Australia.

- Bullying of Australian children has been more studied than bullying of adults. An estimated 25% of Australian students experience some form of bullying every year, with the figure potentially rising to 33% between the ages of 10-11.² Australian primary schools indeed have been found to be among those with the highest reported incidence of bullying in the world.³
- Around 9.5% of Australian adult workers report being bullied in the workplace.⁴

The many manifestations of bullying, ranging from face-to-face bullying to cyberbullying, have received significant public attention in recent years, sparking both Federal- and state-level examinations of potential responses.⁵ While most responses to school-age bullying have focused on school-, family- and community-based prevention initiatives, many have argued for (or at least expressed an understanding for) the need for inclusion of bullying in criminal codes in order to respond to adult bullying as well as to establish a social standard of unacceptable behaviour against which education and empowerment

¹ <http://www.austlii.edu.au/au/journals/MULR/2008/34.html>;
http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2225-71602018000100007

² <https://aifs.gov.au/cfca/publications/children-who-bully-school/understanding-school-bullying>

³ Cited in <https://aifs.gov.au/cfca/publications/children-who-bully-school/understanding-school-bullying>

⁴ <https://www.safeworkaustralia.gov.au/system/files/documents/1705/bullying-and-harassment-in-australian-workplaces-australian-workplace-barometer-results.pdf>

⁵ See, for example, the 2018 examination by the Australian Senate Legal and Constitutional Affairs References Committee into the adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying.

initiatives can be positioned.⁶ In 2011, the Victorian legislature passed amendments to Victoria's *Crimes Act 1958* (often known as 'Brodie's Law') that extend that legislation's definition of 'stalking' to encompass conduct that amounts to serious bullying. Since then:

- In 2016, the Tasmanian Law Reform Institute issued a report into bullying that recommended that Section 192 of the *Criminal Code* be extended to cover common bullying behaviours through:
 - Retitling from "Stalking" to "Stalking and Bullying"
 - The inclusion of "extreme humiliation" or self-harm as an intended consequence of the action.⁷
- In 2017, a bill was introduced to the South Australian legislature in 2017 that attempted to amend that state's *Criminal Law Consolidation Act 1935* to create a separate offence of bullying.⁸
- In 2018, the Northern Territory Law Reform Committee recommended that the Northern Territory Government enact legislation that criminalises the most serious or egregious instances of bullying behaviour.⁹
- Also in 2018, the NSW Government announced that it would seek strengthened legislation against cyberbullying.¹⁰

The draft Criminal Code Amendment (Bullying) Bill 2019

In relation to amendments to the *Criminal Code Act 1924* (Tas), the draft Bill adheres closely to the recommendations of the Tasmanian Law Reform Institute, in the process:

- Avoiding the definitional issues involved in the creation of a separate offence of bullying—a factor that may have contributed to the non-passage of the South Australian bill.
- Responding to the concerns voiced in submissions to the TLRI in relation to criminalising children by specifying that a prosecution under Section 192 must not be commenced without the consent of the Director of Public Prosecutions. The DPP's submission to the TLRI argued that other than in extreme cases, prosecution would not be appropriate for anyone under the age of 18 at first instance.¹¹

The last concern is one raised in relation to the draft bill by TasCOSS members focused on young people, who have expressed their fears that a criminalisation of bullying behaviours will lead to more young people coming into contact with the criminal justice system. These concerns extend beyond the community sector: in a submission to the TLRI review, for instance, the Tasmanian Commissioner for Children and Young People (CCYP) noted concerns around a criminal justice response to bullying

⁶ http://www.utas.edu.au/_data/assets/pdf_file/0011/789698/Bullying_FR_A4_Print.pdf ; Alannah and Madeleine Foundation submission to the above Senate inquiry.

⁷ https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Cyberbullying/Submissions

⁸ http://www.utas.edu.au/_data/assets/pdf_file/0011/789698/Bullying_FR_A4_Print.pdf

⁹ <http://classic.austlii.edu.au/au/legis/sa/bill/sab2017322/>

¹⁰ https://justice.nt.gov.au/_data/assets/pdf_file/0009/596637/ntlrc-report-44-bullying-august-2018.pdf

¹¹ <https://www.abc.net.au/news/2018-10-07/online-trolls-and-cyberbullies-in-nsw-face-tougher-new-laws/10348246>

¹² http://www.utas.edu.au/_data/assets/pdf_file/0011/789698/Bullying_FR_A4_Print.pdf

between children.¹² Similar concerns have been expressed in a different context by the Northern Territory Law Reform Committee in relation to people with a mental illness.¹³

These concerns are particularly acute given that the draft Bill proposes changes to the *Community Protection (Offender Report) Act 2005* (Tas) that would include bullying as a Class 2/3 offence, requiring offenders who were children at the time of the relevant offence to report for 4 years if the offence is against an adult and for 7 years and 6 months if the offence is against a child. Since the bulk of offences by people under the age of 18 will be against people their age or younger, this has the potential to lead to young people being kept on the Community Protection Offender Register and facing reporting requirements until they are over 25 years old—a measure that is likely to generate community opposition.¹⁴ Such a situation would be likely to lead to the type of confusion and legislative change that accompanied Victoria’s ‘sexting’ laws a few years ago.¹⁵

TasCOSS members have also voiced different but parallel concerns about the draft Bill’s potential inability to address a range of bullying behaviours, in particular what Engender Equality has called “third party bullying.”¹⁶ Examples of this behaviour include:

- Getting a friend or associate to inflict abuse on a target
- Drawing known trolls into social media comments with the purpose of causing fear and intimidation
- Single-instance circulation of information or photos on social media sites where they will attract abuse, including through sharing by others
- Use of the structure of the courts to cause mental harm and financial cost, for instance by stalling proceedings through unwinnable appeals or forcing adjournments.

Given the high evidentiary standards associated with criminal proceedings, many cases of this kind of behaviour seem unlikely to meet the standard for the laying of criminal charges.

In light of both of these sets of concerns, it is not clear why the draft Bill does not include three other recommendations made by the TLRI in its report on bullying:

- Amending the definition of stalking in the *Justices Act 1959* (Tas) to allow restraint orders—which require lower evidentiary standards, and which also are less damaging to the alleged offender, than criminal proceedings/conviction—to be used against bullying, whether or not the Criminal Code is changed as well.
- Development of a second-tier civil law response aimed at addressing ongoing or persistent behaviour that has a severe and/or continuing effect on the victim through a mediated and restorative justice response, for instance through:

¹² http://www.utas.edu.au/_data/assets/pdf_file/0011/789698/Bullying_FR_A4_Print.pdf

¹³ https://justice.nt.gov.au/_data/assets/pdf_file/0009/596637/ntlrc-report-44-bullying-august-2018.pdf

¹⁴ <https://www.legislation.tas.gov.au/view/html/inforce/current/act-2005-061#JS2@EN>

¹⁵ <https://www.abc.net.au/news/2014-08-21/australian-first-sexting-laws-to-be-introduced-in-victoria/5686166> ; <https://www.theguardian.com/australia-news/2017/may/11/teenagers-put-on-victorian-sex-offender-register-over-sexting-to-be-given-right-to-appeal>

¹⁶ See Engender Equality’s submission to this consultation process.

- Expressly incorporating a mediation procedure into the restraint order process under Part XA of the *Justices Act 1959* (Tas)
- Extending the functions of the Tasmanian Anti-Discrimination Commissioner.¹⁷
- Establishment of a duty on the part of employers to prevent bullying, for instance through the *Work Health and Safety Act 2012* (Tas).

All of these measures would provide avenues for more moderated responses that would be likely to address the vulnerabilities both of young people and of people experiencing forms of bullying not easily captured by the *Criminal Code*.

Finally, members of TasCOSS' multicultural community have noted that the grounds for some of the elements covered by the proposed definition of stalking and bullying, in particular "extreme humiliation" can vary from culture to culture, and that the intensity of the victim's experience of emotional states, for instance of humiliation, can be culturally mediated as well. As a consequence, cultural contexts must be taken into account in assessing what can "reasonably be expected" to cause physical or mental harm or humiliation, and the degree of harm/humiliation experienced. In fact, the word "extreme" may set a standard that is both too high and too vague to be useful.

Recommendations

To ensure that these amendments do not result in children and other vulnerable people from being drawn into the legal system:

- Before finalising changes to the *Criminal Code*, seek a more detailed analysis of the impact of criminalisation of bullying behaviour and of the breach of civil orders such as restraint orders on young people in Victoria. According to Victorian Legal Aid, it is difficult to assess the impact on young people of changes to the definition of stalking under the Brodie's Law changes to the *Crimes Act 1958* (Vic) because there has been no creation of a separate offense of bullying, making it difficult to tell what charges have been laid; more detailed analysis will be necessary to fully understand the impact of the changes.
- In line with the CCYP's recommendations to the TLRI review, use a restorative justice approach wherever possible when dealing with bullying between children/young people, including in relation to issues such as breach of civil orders such as restraint orders.¹⁸ The Northern Territory Law Review Committee, for instance, has recommended that "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 be charged with the offence of bullying. The laying of criminal charges should occur only as a last resort."¹⁹ Similarly, the NTLRC has suggested counselling for people with mental illness.²⁰

¹⁷ http://www.utas.edu.au/_data/assets/pdf_file/0011/789698/Bullying_FR_A4_Print.pdf

¹⁸ http://www.utas.edu.au/_data/assets/pdf_file/0011/789698/Bullying_FR_A4_Print.pdf

¹⁹ https://justice.nt.gov.au/_data/assets/pdf_file/0009/596637/ntlrc-report-44-bullying-august-2018.pdf

²⁰ https://justice.nt.gov.au/_data/assets/pdf_file/0009/596637/ntlrc-report-44-bullying-august-2018.pdf

To address bullying behaviours that do not meet criminal evidentiary standards in a therapeutic justice/less adversarial context:

- At a minimum, amend the definition of stalking in the *Justices Act 1959* (Tas) to allow restraint orders to be used against bullying.