

An essay on the culpability of supporters and 'Likers' in instances of cyber bullying

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I. Introduction

The recent death of Charlotte Dawson, a victim of prolonged and public cyber-bullying, led to calls for tougher criminal legislation in Australia. Cyber-bullying involves threatening, abusive and/or bullying content ("harmful content") facilitated by electronic communication.¹ This conduct is often repeated and can cause physical, emotional or psychological harm.² Currently, there is no explicit cyber-bullying offence in state or Commonwealth legislation. However, these acts are primarily covered under harassment and stalking offences.³

These laws currently focus upon the acts of users who *create* harmful content. However, a stakeholder not covered are those who contribute to the offensive nature of any public material by 'liking' or posting 'comments' of support via social media.⁴ These acts of sharing and promoting content are fundamental features of all social media networks.⁵ In instances of public cyber-bullying, it is both the creator's *content* and the contributor's *support* that aggravates its impact on the victim.⁶

This essay argues that the regulation of contributors to cyber-bullying via social media, as opposed to merely creators, is an appropriate response to the calls for tougher legislation. It will analyse how current laws are insufficient in regulating this behaviour, and why the actions of these stakeholders are harmful enough to justify criminal intervention.

II. Gaps in the Current legislation

In Australia, there is no explicit cyber-bullying offence. However, a combination of state and Commonwealth legislation has provided avenues to punish instances of cyber-bullying.⁷ In short, the legislation provides an avenue to prosecute cyber-bullying that amounts to threats to kill, cause serious harm or otherwise menace.⁸

Problematically, it appears that these piecemeal offences will not cover secondary contributors who aggravate this abusive material by 'liking' or positively 'commenting' on harmful content.

The principal issue is that merely supporting content is unlikely to satisfy the *actus reus* component of each offence used to cover cyber-bullying. The most general offence, common assault,⁹ requires the victim to apprehend immediate unlawful violence as a result of a threat. It appears that convictions of supporters are unlikely under common assault because the "like" or support would not readily amount to a threat itself. Even though a threat can amount to assault even if the fear of violence is not *from the accused* (in other words, it can be a threat that they will be harmed by another),¹⁰ it is difficult to conceptualise the "like" as a threat itself as opposed to a form of support or validation. Even if this support alone could amount to a threat of some kind, the vagueness of such violence that is supposedly threatened is unlikely to be sufficiently imminent to warrant assault.¹¹

Alternatively, the Commonwealth *Criminal Code*¹² could cover social media cyber-bullying under ss 474.15 and 474.17.¹³ These involve the use of a carriage service to make threats,¹⁴ and menace, harass or cause offence to others.¹⁵ Section 474.15 may regard those who 'threat to kill the second person'¹⁶ as perpetrators. Section 474.17 punishes those who contribute in a manner objectively deemed 'menacing, harassing or offensive' as perpetrators.¹⁷

Proceedings under these sections have been primarily oriented around personal communication that fits these elements.¹⁸ One case that did involve public communication was *Police v Ravshan Usmanov*¹⁹ where the perpetrator posted inappropriate photographs of his ex-girlfriend and then sent them to a friend. However, the conviction in this scenario related to the publisher of

this material, not those who promoted it. One of the potential bars to conviction is the nature of the “network effect”: the offensive or threatening message is produced by a single person, and is compounded by the *combined* promotion of other users. To convict someone who “likes” content on social media websites, it is necessary to show that this individual act constituted a “threat” to kill or harm²⁰ or was objectively “menacing, harassing or offensive.”²¹ This is problematic because the threat itself is made through the original content posted, but is validated and aggravated by others. These supporting acts on their own would ordinarily not constitute a threat itself, and as such fall outside the scope of the provision.

III. Harms of these actions and criminalisation

If these supporting acts are not criminalised under current laws, the issue then turns as to whether they should be criminalised. In short, any potential reform should focus on activities that support instances of cyber-bullying (such as by liking harmful content) where that original threat or harassment is unlawful. As a matter of intuitive principle, it would be incongruous to punish acts of support where they affirm content that is not considered criminal.²² Rather, justification for criminalising these acts of support can be found in the fact that they facilitate and exacerbate the act and harms of cyber-bullying that the law seeks to regulate.

A Aggravating the Harm of Cyber-bullying

Social studies on bully behaviour have outlined a dichotomy of bullying types.²³ First of all, there are bullies who are socially marginalised and unpopular with their peer groups. Alternatively, there are bullies who integrate with society to a reasonable degree. Their acts of bullying are often characterised by greater exposure and an audience who accept or support their acts to varying degrees. Rodkin and Fischer²⁴ in particular explain that there is a spectrum of audience types, ranging from passive observers who watch and do not intervene, those who actively support or condone the bullying and those who try and prevent it.

Those who support cyber-bullying by “liking” or posting comments are clearly part of the group who create this pernicious culture of bullying. The danger of this is that it leads to a power imbalance between bully and victim, which traditionally has been seen as a requirement for bullying to occur.²⁵ In these cases, the power imbalance stems from the bully’s ability to leverage existing social connections and hence be supported in their acts. The suggestion that in cyberspace, the ‘audience of bystanders is indistinct’²⁶ no longer holds true when these same bystanders can not only make their presence known by liking a page, but also show that they support it. As a result, this support exacerbates, and to some degree facilitates the bullying and harassment that the criminal law has aimed to regulate through both traditional and online media. This then is the primary reason that the criminal law should regulate “supporters” of cyber-bullying.

B Extension to Supporters

Given that supporting harmful content facilitates and exacerbates the harms suffered by victims, a further issue arises as to whether it is appropriate to punish these supporters. A superficial analogy can be drawn here with the principles of accessory liability, where the criminal law punishes those who do not commit a crime themselves yet still encourage and support its commission.²⁷ However, a key difference in this situation is that these supporters are not assisting during or before the commission of a crime, but rather are aggravating its impact after its commission.

In spite of this, these supporters should be liable for this harm for two reasons. First of all, the nature of cyber-bullying is different from most other offences in terms of its temporal aspect. The gravamen of these offences is the making of the threat, which by their nature are published on a social media website for a relatively long period of time. Even if the material is reported and subsequently removed, Facebook recognises that “a majority of reports” of abusive material may take up to 72 hours before they are processed and appropriate action is taken.²⁸ This is radically different from the most other offences, in particular verbal assault, where a threat is made at a single point in time. As a result, the continued existence of this material without being voluntarily deleted by its creator represents an ongoing threat and offence. On this analysis, a more ready analogy to aiding and abetting laws can be drawn because a supporting act is no longer a form of post facto approval but rather occurs during the act itself.

Second of all, under our proposal only acts supporting already criminal comments would be punishable on their own. Since this standard is already high,²⁹ as a result these supporting acts are more reprehensible. At first glance this logic appears circular; it is indeed fallacious to argue that *supporting* a criminal act (in this case, cyber-bullying) should necessarily be criminal because the original act is too. However, the severe nature of these comments makes any supporters more culpable. By way of comparison, cyber-bullying content prosecuted under the Commonwealth provisions include sending and requesting inappropriate photos from a 14 year old child³⁰ and graphic death threats via telephone.³¹ If the original content posted on a public social media forum is comparably severe, it becomes less likely that any support is inadvertent. It becomes obvious to any observer that this is no longer a case of mere mockery or well justified criticism, but rather a more sinister example. In light of recent high profile cases of severe cyber-bullying (such as that of Charlotte Dawson), it is also clearer to these supporters that this material has real life implications beyond their mere threatening or harassing content.

In short, these supporting acts should be criminalised because not only do they encourage the commission of these cyber-bullying offences to some degree, but the culpability of these supporters is heightened by the very nature of this material.

IV. Conclusion

To return to our original example of Charlotte Dawson: 18 months before her tragic death, Dawson was hospitalised in late August 2012 for an attempted suicide.³² She claimed that it was the “relentless” amounts of abuse sent via Twitter that ultimately led her to try and take her own life.³³ In this regard, cyber-bullying through social media is unique because of the ability of others to show their support for an abusive comment and in effect condone and validate the threatening nature of this content. In light of tragic incidents like the death of Charlotte Dawson, it appears that the criminal law can no longer ignore the contributions of others who empower bullies and exacerbate the same harm that it attempts to punish.

¹ Matthew Keeley et al, *Research on youth exposure to, and management of, cyber-bullying incidents in Australia: Part B – Cyber-bullying incidents involving Australian minors, the nature of the incidents and how they are currently being dealt with* (Social Policy Research Centre, 2014) 24.

² Natasha R. Manuel, ‘Cyber-bullying: Its recent emergence and needed legislation to protect adolescent victims’ (2011) 13 *Loyola Journal of Public Interest Law* 248.

³ Des Butler, Sally Kift and Marilyn Campbell, ‘Cyber-bullying In Schools and the Law: Is There an Effective Means of Addressing the Power Imbalance?’ (2009) 16(1) *Murdoch University Electronic Journal of Law* 84, 89.

⁴ The actual terminology for this support largely depends on the functionality of each social media site. By way of this example, this would include Facebook’s ‘Like’ mechanism and the ‘Comment’ function used in a supporting manner (see *Facebook*, <<http://www.facebook.com>>), Twitter’s ‘Retweet’ function, especially when that ‘Retweet’ is appended with supporting comments (see *Twitter*, <<https://twitter.com>>), Instagram’s ‘Like’ function (see *Instagram*, <<https://instagram.com>>) and Reddit’s ‘Upvote’ feature (see *Reddit*, <<http://www.reddit.com>>).

⁵ Andreas M. Kaplan and Michael Haenlein, ‘Users of the world, unite! The challenges and opportunities of social media’ (2010) 53 *Business Horizons* 59, 63.

⁶ Sally Kift, Marilyn Campbell and Des Butler, ‘Cyber-bullying in Social Networking Sites and Blogs: Legal Issues for Young People and Schools’ (2010) 20(2) *Journal of Law, Information and Science* 96.

⁷ For an in depth analysis of these laws and their limitations with respect to the creators of this content, see Des Butler, Sally Kift and Marilyn Campbell, ‘Cyber-bullying In Schools and the Law: Is There an Effective Means of Addressing the Power Imbalance?’ (2009) 16(1) *Murdoch University Electronic Journal of Law* 84, 89.

⁸ See *Criminal Code 1995* (Cth), ss 474.15, 474.17; *Crimes Act 1900* (ACT) s 26; *Crimes Act 1900* (NSW) s 61; *Criminal Code 1983* (NT) ss 187(b), 188; *Criminal Code 1899* (Qld) ss 245, 335; *Criminal Law Consolidation Act 1935* (SA) s 20; *Criminal Code Act 1924* (Tas) ss 182(1), 184; *Crimes Act 1958* (Vic) s

31; *Criminal Code 1913* (WA) s 222, 313.

⁹ *Crimes Act 1900* (ACT) s 26; *Crimes Act 1900* (NSW) s 61; *Criminal Code 1983* (NT) ss 187(b), 188; *Criminal Code 1899* (Qld) ss 245, 335; *Criminal Law Consolidation Act 1935* (SA) s 20; *Criminal Code Act 1924* (Tas) ss 182(1), 184; *Crimes Act 1958* (Vic) s 31; *Criminal Code 1913* (WA) s 222, 313.

¹⁰ *MacPherson v Beath* (1975) 12 SASR 174, 177 (Bray CJ).

¹¹ *R v Knight* (1988) 35 A Crim R 314.

¹² *Criminal Code 1995* (Cth).

¹³ *Ibid* ss 474.15, 474.17.

¹⁴ *Ibid* s 474.15(1)(a).

¹⁵ *Ibid* s 474.17(1)(b).

¹⁶ *Ibid* s 474.15(1)(a).

¹⁷ *Ibid* s 474.17(1)(b).

¹⁸ See, eg, *Smart v Clarke* [2014] WASC 104 (26 March 2014), *R v Draunikau* [2012] ACTSC 133 (2 August 2012), *R v Hooper; Ex parte DPP* (Cth) [2008] QCA 308.

¹⁹ [2011] NSWLC 40.

²⁰ *Criminal Code 1995* (Cth) s 474.15.

²¹ *Ibid* s 474.17.

²² This analysis then is contingent on whether the criminal law adequately covers instances of cyber-bullying. However, this is beyond the scope of this paper. For a further discussion of the efficacy and scope of these laws in punishing the creators of abusive content, see Butler, Kift and Campbell, above n 7.

²³ Thomas W. Farmer et al., ‘Peer Relations of Bullies, Bully-Victims, and victims: The Two Social Worlds of Bullying in Second-Grade Classrooms’ (2010) 110 *Elementary School Journal* 364, 366.

²⁴ Philip C. Rodkin and Karla Fischer, ‘Cyber-bullying from psychological and legal perspectives’ (2012) 77 *Missouri Law Review* 619, 632.

²⁵ Dan Olweus and Judy Dunn (ed), *Bullying at School: What we know and what we can do* (Blackwell Publishing, first published in 1993, 2004 ed) 9-10.

²⁶ Rodkin and Fischer, above n 28, 626.

²⁷ *R v Phan* [2001] NSWCCA 29, [69] (Wood CJ at CL).

²⁸ Facebook, *Reporting Guide* <https://fbcdn-dragon-a.akamaihd.net/hphotos-ak-prn1/t39.2178-6/851563_293317947467769_1320502878_n.png>.

²⁹ The *Criminal Code 1995* (Cth) in particular requires either a threat to kill or seriously injure (s 474.15) or a comment that is objectively “menacing, harassing or threatening (s 474.17(1)(b)).

³⁰ *Rodriguez v The Queen* [2013] VSCA 216 (20 August 2013).

³¹ *Smart v Clarke* [2014] WASC 104 (26 March 2014).

³² ‘Charlotte Dawson: How the cyber trolls beat me’, *Herald Sun* (online), September 3 2012 <<http://www.heraldsun.com.au/news/charlotte-dawson-how-the-cyber-trolls-beat-me/story-fnbk7kwa-1226463900647>>.

³³ *Ibid*; Jonathan Moran and Ros Reines, ‘Charlotte Dawson Reveals how Twitter trolls sent her into a spiral of depression’, *The Sunday Times* (online), September 1 2012

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<<http://www.perthnow.com.au/news/charlotte-dawson-reveals-how-twitter-trolls-sent-her-into-spiral-of-depression/story-e6frg12c1226463091491?nk=0b67d0e1a48b977b7b5a3a239cd82295>>.