

# The Criminalisation of Harmful and Offensive Communications in Australia<sup>1</sup>

## INTRODUCTION

- 1.1 In Australia, as elsewhere, digital technology has had a profound impact on many aspects of our lives. Nowhere is this more evident than in our ability to connect with each other via Information and Communication Technologies (“ICTs”). Australians are generally regarded as rapid adopters of technology. In a population of almost 25 million people,<sup>2</sup> there are over 19 million mobile phone accounts,<sup>3</sup> and approximately 15 million active Facebook accounts.<sup>4</sup>
- 1.2 Although this increased connectivity has many benefits, it has also facilitated conduct that may broadly be described as “harassment”; that is, “a pattern of behaviour or course of conduct pursued by an individual designed to intimidate and distress another individual”.<sup>5</sup> In addition, the ease with which material may be published online, or shared via social networks, also raises the question of how to regulate communications which may not be harassing, but are contrary to community standards of decency.
- 1.3 The use of technology in this context is not new. Long before the internet, silent telephone calls were a common form of harassment. However, digital technology is now so ubiquitous, with an increasingly large part of our social interactions occurring online, that it has provided new ways of harassing, and also helped to overcome traditional obstacles to offending.
- 1.4 The scale of harassment and offensive communications online can be difficult to ascertain. Like many online offences, harassing or offensive communications are likely to be underreported. Where reported, a number of possible offences may apply to the same conduct, and the same offending may be recorded under different categories. Further, a considerable amount of the debate surrounding online harassment is concerned with conduct between children; so-called “cyberbullying”. Nonetheless, it is generally accepted that online harassment and offensive communications are of growing concern in Australia, and the federal government recently appointed an eSafety commissioner who is responsible for promoting online safety.<sup>6</sup>

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<sup>2</sup> Australian Bureau of Statistics, Australian Demographic Statistics, March 2018, accessible at <http://www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0>.

<sup>3</sup> Statista, Number of mobile phone users in Australia from 2011 to 2019 (in millions), accessible at <https://www.statista.com/statistics/274677/forecast-of-mobile-phone-users-in-australia/>.

<sup>4</sup> David Cowling, ‘Social Media Statistics Australia – July 2018’, SocialMediaNews, 1 August 2018, accessible at <https://www.socialmedianews.com.au/social-media-statistics-australia-july-2018/>.

<sup>5</sup> Australian Law Reform Commission, Serious invasions of privacy in the digital era, Discussion Paper 80 (2014) p. 211.

<sup>6</sup> <https://www.esafety.gov.au>.

- 1.5 Before the advent of digital technology and ICTs transformed the way in which we communicate, the criminalisation of speech in Australia was relatively limited. Speech which was harmful in itself, such as incitement or threats to kill, was criminalised, and where words placed a person in fear of imminent harm it could be prosecuted as an assault. There were also offences restricting the use of offensive or indecent speech in public. Broader restrictions on speech related to classification of films, recordings, and publications, and placed restrictions on the publication, advertising or display of such material. Because of jurisdictional limitations, the role of the Commonwealth was relatively limited; restricted, for example, to postal communications.
- 1.6 As the communication landscape changed rapidly from the mid-1990s onwards, legislatures and law enforcement agencies were faced with new or modified forms of offending; so-called “cyberstalking”, “cyberbullying”, “upskirting” and “revenge porn” are just a few examples. The challenges are magnified in a federal system such as Australia, with separate state, territory and federal jurisdictions.
- 1.7 In general, the first response was to try to apply existing offences to this new conduct. Where this was not possible or was ineffective, existing laws could be amended. For example, the Commonwealth offence of menacing, harassing, or causing offence, which originally applied to postal communications, was adapted to the online environment and has for prosecutors proved to be a useful general harassment provision. Finally, in some circumstances it was necessary to create a new offence specifically to address online offending.
- 1.8 As a result, and as set out below, Australian reform in this area has been largely reactive and fragmented. Australia is not alone in this regard. The pace of change in the digital environment is such that any legislature is faced with developing responses to an emerging problem in less than ideal conditions. In many cases these are not purely online offences. Rather, communications may form part of a broader pattern of offending. They may also reflect complex behaviours that are not well-understood at the time. Often the rationales for reform are multi-faceted.
- 1.9 As in other similar jurisdictions, the criminalisation of harmful communications in Australia may broadly be divided into two categories. First, are those communications which are seen as harmful in their own right such as threats to kill, incitement, stalking and harassment. These may be conceived of as offences against the person, and have become more and more significant as the use of ICTs and social media have increasingly moved these offences from the offline to the online environment.
- 1.10 The second category of offence is where the communication is harmful to notions of public decency. In Australia, such content is typically regulated by laws concerned with the classification of material for public viewing and consumption. However, the democratic nature of the internet is such that systems designed to restrict the availability of obscene films, recordings or publications may not be appropriate to control distribution by individuals.
- 1.11 Before moving to consider these various offence types, it is useful to provide some background to the Australian legislative context. Australia has nine independent

legislatures; six states,<sup>7</sup> two territories,<sup>8</sup> and the federal “Commonwealth” government. Although criminal law is primarily a state or territory matter, the Commonwealth government’s power to legislate in relation to telecommunication networks and broadcasting has given it a greatly increased presence in the area of cybercrime generally, and harmful communications in particular.<sup>9</sup>

- 1.12 In addition, the Commonwealth may also rely on various heads of power in regulating material distributed in Australia. Of particular significance is the so-called “external affairs” power; that is, where the legislation is necessary to give effect to the federal government’s international obligations.<sup>10</sup> So, for example, this may provide the Commonwealth with jurisdiction to legislate in relation to discrimination as Australia is a party to both the *International Convention on the Elimination of All Forms of Racial Discrimination* and the *International Covenant on Civil and Political Rights*. In this context it may be noted that although Australia has ratified the Council of Europe Convention on Cybercrime,<sup>11</sup> it has neither signed nor ratified the Additional Protocol to that Convention, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems.<sup>12</sup>
- 1.13 In broad terms, where there is a conflict between state/territory legislation and the Commonwealth, the Commonwealth legislation prevails.<sup>13</sup> However, it is not always the case that the Commonwealth legislation will “cover the field”, and state and territory legislation may operate in conjunction with federal laws. Classification laws, for example, are based on complementary legislation between the Commonwealth, states and territories. To further complicate matters, federal offences are generally prosecuted in state/territory courts, and may be prosecuted by state/territory agencies. Therefore, a person may be charged with both federal and state offences in the one proceeding, the matter being heard in a state/territory court.
- 1.14 A broad distinction is drawn between indictable offences, which are more serious and subject to higher penalties, and summary offences which are typically heard before magistrates. However, many indictable offences are triable summarily, and are then subject to the lower penalties which may be imposed by courts of summary jurisdiction.
- 1.15 In addition to internal jurisdictional challenges, like all countries Australia is confronted by the fact that offensive or harmful communications may originate from outside the country. It is beyond the scope of this paper to consider issues of extraterritoriality in general, other than to note that they may be a relevant consideration in the enactment of domestic legislation. For example, in the state of Victoria the offence of stalking was interpreted as applying extraterritorially in relation to a Melbourne man who used

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<sup>7</sup> New South Wales, Queensland, South Australia, Tasmania, Victoria, Western Australia.

<sup>8</sup> The Australian Capital Territory (‘ACT’) and the Northern Territory.

<sup>9</sup> *Australian Constitution* s. 51(v): ‘postal, telegraphic, telephonic, and other like services’.

<sup>10</sup> *Australian Constitution* s. 51(xxxix).

<sup>11</sup> Convention on Cybercrime, opened for signature 23 November 2001, ETS No 185 (entered into force 1 July 2004).

<sup>12</sup> Additional Protocol to the Convention on Cybercrime, Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed through Computer Systems, opened for signature 28 January 2003, ETS No 189 (entered into force 1 March 2006).

<sup>13</sup> *Australian Constitution* s. 109.

email to stalk an actress in Canada.<sup>14</sup> The matter was subsequently put beyond doubt by legislative amendment.<sup>15</sup>

- 1.16 Another important feature of the Australian legal landscape is that, unlike many similar jurisdictions, Australia does not have a constitutionally protected Charter or Bill of Rights. Of particular relevance in this context is the right to freedom of speech. Australia has no constitutionally protected freedom of speech other than a limited implied right to political expression.<sup>16</sup> Although some jurisdictions, notably the ACT and Victoria, have Charters of Human Rights,<sup>17</sup> they do not allow the courts to strike down legislation as in some other jurisdictions. This is not to say that such rights will be restricted lightly. Freedom of speech is an important value in Australian society and its restriction or modification will generally require clear parliamentary intention. However, the absence of constitutional protection does provide legislatures with a level of flexibility to enact offences that would likely be subject to challenge in other jurisdictions.
- 1.17 The following summary does not purport to be exhaustive. Although there are some common themes, each jurisdiction also has criminal provisions which are idiosyncratic and not particularly illuminating of broader trends. This paper aims to give a broad overview of the offences that may apply to offensive or harmful communications online.

## OFFENCES AGAINST THE PERSON

- 1.18 The internet and related technologies are, in essence, means of communication. The largely unfiltered nature of online communications means that any offences seeking to regulate such conduct potentially encompass a broad range of speech, and an equally broad range of impacts. Online communications may cause irritation and annoyance at one end of the spectrum, to fear and psychological harm at the other. Some communications have resulted in people taking their own lives. For legislators, the appropriate response must have sufficient flexibility to encompass a range of communications, while being limited in such a way that the provisions do not unduly restrict freedom of expression.
- 1.19 In Australia, there has been no national response to these challenges. Reform has largely been reactive and has occurred within the state or territory context, albeit with some important contributions from the Commonwealth. The discussion below begins with communications that are criminal in themselves, such as threats to kill and incitement, and limited examples where encouragement to engage in conduct is criminal. This is followed by the offence of stalking, which was one of the early provisions in Australia to be specifically modified to incorporate online conduct. There is then the offence of harassment, which is found at federal level and is an important component of the response to online harassment. Hate speech, encompassing racial and other forms of vilification, is subject to a range of responses throughout Australia.

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<sup>14</sup> *DPP v Sutcliffe* [2001] VSC 43.

<sup>15</sup> S. 21A(7) *Crimes Act 1958* (Vic).

<sup>16</sup> *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520.

<sup>17</sup> *Human Rights Act 2004* (ACT) and *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Most recently, there have been both federal and state responses to one of the newest forms of harassment, image-based abuse.

## Threats

- 1.20 Some communications are unlawful in themselves. For example, in some jurisdictions there are offences that criminalise the making of threats, such as threats to kill or cause serious injury.<sup>18</sup> At Commonwealth level, there are specific offences relating to using a carriage service to make a threat or a hoax threat.<sup>19</sup> Similarly, inciting others to commit a criminal offence may also be unlawful.<sup>20</sup> Existing offences such as blackmail may also apply to communications, and some jurisdictions have provisions relating to specific threats such as bomb hoaxes.<sup>21</sup>
- 1.21 Such offences, although typically pre-dating the internet, are generally not limited to the offline environment. That is, where expressed in technologically neutral language, they may equally apply to online or offline threats.
- 1.22 Challenges may arise in proving the requisite mental state. For example, where it is necessary to prove that the accused intended or was reckless that the victim would believe that the threat would be carried out, this may be more difficult to establish where the threat is made remotely. In the past, similar issues have arisen in relation to silent telephone calls and the offence of common assault, where there is the requirement of fear of imminent harm.<sup>22</sup> It may therefore be argued that where the threat is made at a distance there was no intention or recklessness that the victim would believe it would be carried out.
- 1.23 Challenges may also arise where technologically specific language is used. For example, more specific offences, such as documents containing threats,<sup>23</sup> or written threats to murder<sup>24</sup> may require the courts to interpret whether an online post is a document/writing within the terms of the legislation.

## Encouragement offences

- 1.24 The act of encouraging criminal activity is addressed, if at all, by existing offences such as incitement, or counselling or procuring a criminal offence. Such offences are typically technologically neutral, and may be applied to online communications. One challenge that may be present in such cases is that of extraterritoriality; for example, where the communications are sent from outside the jurisdiction. Such cases may nonetheless be prosecuted if the legislation provides that the offender may be located anywhere, as long as the encouraged offence was to occur within the jurisdiction.<sup>25</sup>
- 1.25 The need for new or modified encouragement offences may arise in circumstances where the definition of encouragement is expanded beyond conventional offences

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<sup>18</sup> See, for example, ss. 30 and 31 *Crimes Act 1900* (ACT), s. 166 *Criminal Code* (NT), s. 19 *Criminal Law Consolidation Act 1935* (SA), ss. 20 and 21 *Crimes Act 1958* (Vic), s. 338B *Criminal Code Act 1913* (WA).

<sup>19</sup> Ss. 474.15 and 474.16 *Criminal Code Act 1995* (Cth).

<sup>20</sup> S. 47 *Criminal Code 2002* (ACT), s. 43BI *Criminal Code* (NT), s. 553 *Criminal Code Act 1913* (WA).

<sup>21</sup> S. 321A *Criminal Code Act 1899* (Qld).

<sup>22</sup> *R v Ireland; R v Burstow* [1998] AC 147.

<sup>23</sup> S. 31 *Crimes Act 1900* (NSW).

<sup>24</sup> S. 162 *Criminal Code Act 1924* (Tas).

<sup>25</sup> See, for example, s. 321G *Crimes Act 1958* (Vic).

such as incitement. This may be seen as necessary in order to criminalise a broader range of encouraging conduct, and to allow intervention at an earlier stage. Examples of where this has arisen in Australia are two categories of offence which fall outside this discussion; terrorism offences and the sexual grooming of children.

- 1.26 In Australia, outside of these categories, there are relatively few examples of specific encouragement offences. One that is found in a number of jurisdictions is inciting or encouraging suicide.<sup>26</sup> This offence is unusual in that it criminalises the encouragement of conduct which is not itself a crime. Such offences are primarily concerned with the dangers associated with euthanasia, and related issues such as where the conduct is part of a suicide pact. These concerns pre-date modern communications, and state and territory provisions do not typically address online encouragement specifically.
- 1.27 In contrast, there is a federal offence which was enacted specifically to address concerns around the potential for online networks to be used to incite or encourage suicide. Under the Commonwealth Criminal Code, it is an offence to use a carriage service to access, transmit, make available, publish or otherwise distribute suicide related material.<sup>27</sup> There is also an accompanying preparatory offence where a person is in possession, produces, supplies, or obtains suicide related material with the intention that it be used in the commission of the principal offence.<sup>28</sup>
- 1.28 Suicide related material is material that directly or indirectly counsels or incites committing or attempting to commit suicide, promotes a particular method of committing suicide, or provides instruction on a particular method of committing suicide.<sup>29</sup> The scope of the offence is restricted by the fact that it requires proof of intention that the material be used (by the accused or another person) for the purpose of counselling or inciting suicide or attempted suicide, promoting a particular method of committing suicide or providing instruction on that method, or that the material be used to commit suicide.<sup>30</sup>
- 1.29 These offences were enacted as complementary to amendments to the Customs Regulations which prohibited the physical importation and exportation of documents or devices which could be used to commit suicide, or which encouraged or provided instruction in relation to committing suicide.<sup>31</sup> They were specifically aimed at the use of the internet, email, and other forms of electronic communications.<sup>32</sup> In order to avoid making the offences overly broad, in addition to the requirement of intention, the legislation makes clear that it is not an offence to use a carriage service to engage in

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<sup>26</sup> S. 17 Crimes Act 1900 (ACT), s. 31C Crimes Act 1900 (NSW), S. 13A(7) *Criminal Law Consolidation Act 1935* (SA), s. 288 Criminal Code Act 1913 (WA).

<sup>27</sup> S. 474.29A *Criminal Code Act 1995* (Cth). Maximum penalty, 1,000 Penalty Units (\$210,000).

<sup>28</sup> S. 474.29B *Criminal Code Act 1995* (Cth). Maximum penalty, 1,000 Penalty Units (\$210,000).

<sup>29</sup> Ss. 474.29A and 474.29B *Criminal Code Act 1995* (Cth).

<sup>30</sup> Ss. 474.29A and 474.29B *Criminal Code Act 1995* (Cth).

<sup>31</sup> Parliament of Australia, *Criminal Code Amendment (Suicide Related Material Offences) Bill 2005*, Explanatory Memorandum.

<sup>32</sup> Parliament of Australia, *Criminal Code Amendment (Suicide Related Material Offences) Bill 2005*, Explanatory Memorandum.

public debate around euthanasia and suicide or to advocate for law reform in relation to these issues.<sup>33</sup>

- 1.30 As noted above, the offence is restricted to the use of a carriage service as this forms the basis for federal jurisdiction. Although state offences may also apply to this conduct, it is likely that the Commonwealth offence would be most appropriate for online encouragement of suicide.

## Stalking

- 1.31 In general terms, “stalking” may be described as “a course of conduct in which one individual inflicts on another repeated unwanted intrusions and communications, to such an extent that the victim fears for his or her safety”.<sup>34</sup> As in other jurisdictions, the enactment of specific stalking offences in Australia was in response to a gap in the law which pre-dated modern communications. The new offence was seen as necessary to address conduct, such as repeated following of or communication with the victim, which did not fall within existing threat or assault provisions, but could cause considerable fear and anxiety in the victim.
- 1.32 The advent of these laws in Australia in the early to mid-1990s typically coincided with the increasing availability of internet access and the use of digital technology. In Australia, the first specific stalking offence was enacted in Queensland in 1993. Pre-dating the modern internet, it did not make specific provision for so-called “cyberstalking”; that is, the use of digital technology to engage in stalking behaviour.<sup>35</sup> It was, however, written in language that was sufficiently broad to encompass electronic communications; for example, “telephoning or otherwise contacting another person”.<sup>36</sup> One year later, the equivalent Victorian provision referred to “telephoning, sending electronic messages to, or otherwise contacting” another person.<sup>37</sup>
- 1.33 Anti-stalking provisions are now found in all Australian states and territories.<sup>38</sup> For the purposes of this discussion, we will focus on section 21A of the *Crimes Act 1958* (Vic) being one of the most comprehensive provisions in terms of incorporating modern technologies. Although there is no specific anti-stalking offence under federal law, we will see that the federal offence of using a carriage service to menace, harass, or cause offence provides an important component of the regulation of such conduct.
- 1.34 Whether online or offline, such offences provide a number of challenges in drafting. They potentially apply to a very broad range of conduct, which may not in itself be criminal. In general, legislatures have tried to strike a balance by defining the conduct requirement in broad terms, but then offsetting the potential breadth of the offence by requiring a subjective fault element such as intention or recklessness. However, because some offenders may not intend to cause distress or harm, and may be acting

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<sup>33</sup> S. 474.29A(3)(4) *Criminal Code Act 1995* (Cth).

<sup>34</sup> R. Purcell, M. Pathé and P.E. Mullen, ‘Stalking: Defining and Prosecuting a New Category of Offending’ (2004) 27 *International Journal of Law and Psychiatry* 157, 157.

<sup>35</sup> S. 3 *Criminal Law Amendment Act 1993* (Qld).

<sup>36</sup> S. 3 *Criminal Law Amendment Act 1993* (Qld).

<sup>37</sup> *Crimes (Amendment Act) 1994* (Vic).

<sup>38</sup> S. 35 *Crimes Act 1900* (ACT); s. 13 *Crimes (Domestic and Personal Violence) Act 2007* (NSW); s. 189 *Criminal Code 1983* (NT); ch. 33A *Criminal Code Act 1899* (Qld); s. 19AA *Criminal Law Consolidation Act 1935* (SA); s. 192 *Criminal Code Act 1924* (Tas); S. 21A *Crimes Act 1958* (Vic); ch. XXXIIIB *Criminal Code Act 1913* (WA).

under the deluded belief that their attention is wanted, some jurisdictions also incorporate an objective element. Another limitation may be that the conduct had an impact on the victim; for example, that he or she was placed in fear. Some jurisdictions also provide for specific defences to ensure the provisions do not interfere with legitimate activities.<sup>39</sup>

- 1.35 Under the Victorian provision, it is an offence to stalk another person, where “stalk” means to engage in a course of conduct “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”. The Act provides an extensive, but not exhaustive, list of conduct that may constitute stalking, and includes the catch-all provision “acting in any other way that could reasonably be expected (i) to cause physical or mental harm to the victim, including self-harm; or (ii) to arouse apprehension or fear in the victim for his or her own safety or that of any other person”.<sup>40</sup> The breadth of this definition is offset by requiring proof of intention; however the defendant is deemed to have the necessary intention if he or she either knew or, in all the circumstances, “ought to have understood” that engaging in a course of conduct of that kind would be likely to cause harm or arouse apprehension or fear. The Victorian provision only requires proof of harm, apprehension or fear where the objective fault element is relied upon.
- 1.36 Stalking will commonly involve the sending of unsolicited and unwanted communications, either alone or in combination with other conduct. This may be via a range of platforms including text messages, emails, and social media.<sup>41</sup> The content may be offensive or threatening in itself, or the nature and/or volume of messages may form a component of stalking behaviour. Offenders may co-opt third parties to harass or intimidate the victim, or may publish personal or offensive material about the victim.
- 1.37 In general, such conduct will fall within the offence of stalking. For example, in *Wilson v R*<sup>42</sup> the defendant was convicted of stalking after obtaining photographs of two young women from their social networking sites. He then posted the photographs on pornographic websites, in close proximity to pornographic images of women who looked like the victims. The defendant posted comments which identified the women by name, and this had the effect that a person searching online for the victims’ names would be directed to the pornographic websites.
- 1.38 In another example, a 28-year-old Victorian man was convicted of stalking a 12-year-old boy and his family. The offences included offline conduct whereby the defendant would approach the boy and attend locations where he would be present. In addition, he maintained a website that contained photographs of the young boy, some taken covertly, accompanied by text describing the defendant’s sexual interest in the boy and in paedophilia more generally.<sup>43</sup>

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<sup>39</sup> See, for example, s. 21A(4) *Crimes Act 1958 (Vic)*. Also see *R v Conde* [2015] QCA 063.

<sup>40</sup> S. 21A(2) *Crimes Act 1958 (Vic)*.

<sup>41</sup> See, for example, *R v Henderson* [2009] ACTCA 20, *R v Vaughan* [2011] QCA 224, *Duncan v R* [2011] VSCA 351, *Conomy v Maden* [2015] WASC 179, *R v Maxwell* [2018] QCA 017.

<sup>42</sup> [2012] VSCA 40.

<sup>43</sup> *R v Vose* (1999) 109 A Crim R 489.



1.39 Although an inclusive definition of “conduct” is capable of applying to electronic communications, most jurisdictions now incorporate electronic communications within the definition of stalking.<sup>44</sup> The inclusion of online conduct in the offence of stalking was put beyond doubt in Victoria in 2003 by amendments to the definition of “course of conduct” which were specifically intended to address the increasing use of technology in stalking:

Concern has been expressed that the rapid development of technology, particularly the internet, has provided new ways for stalkers to locate, contact and potentially harm their victims and that section 21A(2) may not adequately cover these situations. The amendment in this clause makes it clear that if on-line stalking conduct forms part of a course of conduct, it may constitute the offence of stalking.<sup>45</sup>

1.40 The amendments inserted a number of forms of cyberstalking into the definition of “course of conduct”, including targeting the victim’s computer and monitoring electronic communications. However, the two that are most relevant to this discussion are:

“(b) contacting the victim or any other person by post, telephone, fax, text message, e-mail or other electronic communication or by any other means whatsoever;

(ba) publishing on the Internet or by an e-mail or other electronic communication to any person a statement or other material

(i) relating to the victim or any other person; or

(ii) purporting to relate to, or to originate from, the victim or any other person;”

1.41 Other than these reforms, there has been relatively little discussion around reform of stalking laws to address online communications. It appears that the offences are generally working as intended, and reforms have related to the scope of the offence and its application to specific contexts, such as bullying. One deficiency in state and territory legislation is a lack of provisions which deal with less serious forms of harassment; conduct which while criminal, is not as serious as stalking. It is in this context that Commonwealth law has assumed particular significance.

## Harassment

1.42 Prior to the enactment of specific anti-stalking offences, Australian jurisdictions did not typically criminalise harassment. As noted above, the inability of existing offences to effectively address such conduct was one of the reasons for the enactment of specific anti-stalking provisions. Even after stalking was criminalised, Australian states and territories did not criminalise “harassment” as such, making the stalking provisions the primary offences to be used in such cases. They are, however, typically serious offences, and are accordingly more limited in their scope. It is therefore arguable that there is a gap in the law for a lower-level harassment offence which encompasses

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<sup>44</sup> S. 35 *Crimes Act 1900 (ACT)*, s. 189 *Criminal Code (NT)*, s. 359B *Criminal Code 1899 (Qld)*, s. 19AA *Criminal Law Consolidation Act 1935 (SA)*, s. 192 *Criminal Code Act 1924 (Tas)*.

<sup>45</sup> Explanatory Memorandum, *Crimes (Stalking) Bill 2003 (Vic)*.

conduct that is not sufficiently serious to be prosecuted as stalking, or which otherwise falls outside such provisions.

- 1.43 Filling this gap in the law, to some extent, is the federal offence of using a carriage service to menace, harass, or cause offence. Under this provision, it is an offence for a person to use a carriage service “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.”<sup>46</sup>
- 1.44 Although there is no federal anti-stalking provision, the Commonwealth has long criminalised the use of the postal and telecommunications services in ways that may be described as menacing, harassing, or offensive. This provision was introduced as part of a suite of telecommunication offences,<sup>47</sup> and in fact replaced an existing offence relating to improper use of telecommunications.<sup>48</sup> According to the Explanatory Memorandum to the Act, the provision was drafted so as to be consistent with the equivalent offence of using a postal or similar service to menace, harass, or cause offence.<sup>49</sup> It was also broadened by removing the requirement that a person be menaced, harassed, or offended. Rather, the section adopts an objective test of whether reasonable persons would be offended. “This allows community standards and common sense to be imported into a decision on whether the conduct is in fact menacing, harassing or offensive.”<sup>50</sup>
- 1.45 Importantly for this discussion, the reforms were also specifically aimed at including online content, which had been excluded from the previous provision. The section encompasses both the use of the carriage service, as well as the content of any communication, as potentially being criminal. The distinction between the method of use of the carriage service and the content, was to allow for the fact that in some cases repeated use may be menacing or harassing, even if the actual content is not.<sup>51</sup>
- 1.46 It may immediately be noted that the provision groups together as equivalently serious three distinct concepts: “menacing”, “harassing”, and “offensive”. These terms are not defined and are to be given their ordinary meanings. For example, it has been observed that the ordinary meaning of “menacing” is “uttering or holding out threats” while “harassing” connotes “troubling or vexing by repeated attacks.”<sup>52</sup> They are also to be considered separately, so that even where conduct may not be regarded as menacing, it may nonetheless be harassing. For example, repeated telephone calls without offensive or menacing content.
- 1.47 One of the difficulties associated with this provision is the meaning of the word “offensive”. Although an ordinary word, it is capable of applying to a range of conduct depending on the scope and purpose of the provision. This issue was considered by

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<sup>46</sup> S. 474.17 Criminal Code Act 1995 (Cth).

<sup>47</sup> *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No. 2) 2002* (Cth).

<sup>48</sup> S. 85ZE *Crimes Act 1914* (Cth) (repealed).

<sup>49</sup> S. 474.12 *Criminal Code Act 1995* (Cth).

<sup>50</sup> Australia, House of Representatives, *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No 2) 2004*, Explanatory Memorandum.

<sup>51</sup> Australia, House of Representatives, *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No 2) 2004*, Explanatory Memorandum.

<sup>52</sup> *Monis v R; Droudis v R* [2013] HCA 4 at [154] (Hayne J) citing the *Oxford English Dictionary*, 2nd ed (1989).

the High Court of Australia in relation to the equivalent offence of using a postal or similar service to menace, harass, or cause offence.<sup>53</sup> The case concerned letters which had been sent to the parents and relatives of soldiers killed in Afghanistan. Although making comments critical of the war, they also contained statements which were derogatory and disparaging of the deceased soldiers and their role in the conflict. The primary issue to be determined by the High Court was whether the provision was inconsistent with the implied right of political communication, an issue on which the court was evenly divided.

- 1.48 Relevant to the question of whether the provision was an impermissible restriction on the implied freedom, was the meaning of “offensive”. As the word was not defined in the Act, it was to be given its ordinary meaning, interpreted according to the subject matter and context of the provision. Of particular relevance to this interpretation was that the offence was a criminal provision, carrying a significant maximum penalty of two years’ imprisonment. The word “offensive” was used in conjunction with “menace” and “harass”, and treated as of equal severity, suggesting that:

what is offensive will have a quality at least as serious in effect upon a person as the other words convey. The words "menacing" and "harassing" imply a serious potential effect upon an addressee, one which causes apprehension, if not a fear, for that person's safety. For consistency, to be "offensive", a communication must be likely to have a serious effect upon the emotional well-being of an addressee.<sup>54</sup>

- 1.49 The provision may also criminalise private communications.<sup>55</sup> In addition, in the case of telecommunication offences (but not postal offences), section 473.4 sets out factors to be taken into account in determining whether reasonable persons would regard a particular use of a carriage service as being, in all the circumstances, offensive. These include:

- (a) “the standards of morality, decency and propriety generally accepted by reasonable adults; and
- (b) the literary, artistic or educational merit (if any) of the material; and
- (c) the general character of the material (including whether it is of a medical, legal or scientific character).”

- 1.50 It was noted that these are some of the factors relevant to classification under the *Classification (Publications, Films and Computer Games) Act 1995 (Cth)*.<sup>56</sup>

- 1.51 Accordingly, for the purposes of this case, all members of the court adopted the interpretation given to the word “offensive” by Chief Justice Bathurst in the NSW Court of Criminal Appeal: that the use must be calculated or likely to arouse “significant anger, significant resentment, outrage, disgust, or hatred in the mind of a reasonable

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<sup>53</sup> S. 471.12 *Criminal Code Act 1995 (Cth)*. *Monis v R; Droudis v R* [2013] HCA 4.

<sup>54</sup> *Monis v R; Droudis v R* [2013] HCA 4, [305] (Crennan, Kiefel, Bell JJ) (footnotes omitted).

<sup>55</sup> *Monis v R; Droudis v R* [2013] HCA 4, [305] (Crennan, Kiefel, Bell JJ).

<sup>56</sup> Australia, House of Representatives, Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No 2) 2004, Explanatory Memorandum at 14, cited in *Monis v R; Droudis v R* [2013] HCA 4, fn 243 (Crennan, Kiefel and Bell JJ).

person in all the circumstances”.<sup>57</sup> Therefore, “it is not sufficient if the use would only hurt or wound the feelings of the recipient, in the mind of a reasonable person”.<sup>58</sup>

- 1.52 The provision contains no fault element, and so the default fault elements must be applied under the Criminal Code. The result of this is that the prosecution must prove that the accused intentionally used the carriage service, and in doing so intended or knew that it was offensive, or was reckless; that is, “aware of a substantial risk that the use was offensive and, having regard to all the circumstances known to the accused, it was unjustifiable to take that risk”.<sup>59</sup>
- 1.53 Because the offence combines notions of menace and harassment alongside offence, it is of potentially broad application and has been successfully used in a number of online contexts. For example, threatening messages posted on Facebook pages after the ending of a relationship<sup>60</sup> and the sending of menacing emails.<sup>61</sup> It has also been used to prosecute conduct which may be described as “trolling”. For example, in *R v Hampson*<sup>62</sup> the defendant was convicted and sentenced to imprisonment after he posted messages on two Facebook tribute pages established to commemorate the deaths of 12 year old Elliott Fletcher, who had been stabbed and killed at his school, and eight year old Trinity Bates who had been abducted from her home and murdered. Adopting a pseudonym, the defendant posted grossly offensive comments mocking the deaths of the two children, including morphed images depicting Elliot Fletcher’s head in a wood-chipper and Trinity Bates’ face superimposed on a pornographic image.
- 1.54 The provision has also been applied in the context of unauthorised filming of sexual activity. In *R v McDonald and DeBlaquiere*,<sup>63</sup> McDonald and the complainant engaged in consensual sexual activity which, unbeknown to the complainant, was being recorded and live-streamed via webcam to McDonald’s friends, including DeBlaquiere. The complainant was unaware that she was being filmed, and only became aware of the fact when she later received a message from McDonald informing her of what had happened.
- 1.55 As noted above, it is not only the content of the communication that must be offensive, it can also include its use. In this case, the court held that the covert use of the carriage service without the knowledge of the complainant may be seen as part of the use of the carriage service.<sup>64</sup> Similarly, whether the content of the video was offensive within the terms of the section also depended on the circumstances. Although images of sex between consenting adults are not inherently offensive, when looked at in context of the complainant being unaware she was being recorded, the triumphant gestures by McDonald to those watching, were such that it was “open for reasonable persons to consider to be offensive in all the circumstances”.<sup>65</sup> This may be contrasted with the elements of “menacing” or “harassing” as these presumably require the

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<sup>57</sup> *Monis v The Queen* (2011) 256 FLR 28, 39.

<sup>58</sup> *Monis v The Queen* (2011) 256 FLR 28, 39.

<sup>59</sup> *Monis v R; Droudis v R* [2013] HCA 4, [157] (Hayne J).

<sup>60</sup> *Agostino v Cleaves* [2010] ACTSC 19.

<sup>61</sup> *R v Ogawa* [2009] QCA 307.

<sup>62</sup> [2011] QCA 132.

<sup>63</sup> [2013] ACTSC 122.

<sup>64</sup> [2013] ACTSC 122, [107].

<sup>65</sup> [2013] ACTSC 122, [113].

complainant to be aware of the conduct. “It is difficult to see how surreptitious use could be harassing or menacing, at least, perhaps, until it is known and that may bring other matters to play.”<sup>66</sup>

- 1.56 In a response to concerns in relation to image-based abuse (discussed below), the federal government recently amended these provisions in relation to “private sexual material”.<sup>67</sup> “Private sexual material” is defined as material depicting a person who is “18 years of age or older and who is engaged in, or appears to be engaged in, a sexual pose or sexual activity (whether or not in the presence of other persons)...in circumstances that reasonable persons would regard as giving rise to an expectation of privacy”.<sup>68</sup> It also includes material that focuses on the sexual organs, anal region or female breasts of a person over 18 where the depiction is in circumstances that reasonable persons would regard as giving rise to an expectation of privacy.<sup>69</sup>
- 1.57 Where a person is charged with an offence under section 474.17 and the particular use of the carriage service involves private sexual material, then in deciding whether that use is offensive, the court must consider whether the subject or subjects of the material consented to the use of that material.<sup>70</sup> The legislation also introduced two aggravated offences. The first is where a person commits an offence under section 474.17 using private sexual material.<sup>71</sup> The second “special” aggravating offence, is where the offence under section 474.17 uses private sexual material, and prior to the commission of that offence the accused was subject to three or more civil penalty orders in relation to breaches of the *Enhancing Online Safety Act 2015* (Cth).<sup>72</sup>

## Hate Speech

- 1.58 No area illustrates the challenges of a federal system, and the patchwork of responses that may result, than the regulation of what may broadly be described as “hate speech”. This term may be used to include communications that are directed at inciting violence, harassment, or even serious offence, based on particular characteristics including race, gender, religion, and sexual orientation. As discussed in more detail below, in Australia such conduct is generally unlawful under anti-discrimination legislation. While this may give rise to other means of redress, it is not necessarily criminal. A majority of jurisdictions also criminalise hate speech specifically. In those jurisdictions where it is not specifically criminalised, such conduct may fall within other offences, such as using a carriage service to menace, harass, or cause offence.<sup>73</sup>
- 1.59 In Australia, protections against discriminatory speech first arose in the late 1980s/early 1990s,<sup>74</sup> prior to the advent of the modern internet. Although ICTs and

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<sup>66</sup> [2013] ACTSC 122, [110].

<sup>67</sup> *Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Act 2018*.

<sup>68</sup> S. 473.1 *Criminal Code Act 1995* (Cth).

<sup>69</sup> S. 473.1 *Criminal Code Act 1995* (Cth).

<sup>70</sup> S. 473.4 *Criminal Code Act 1995* (Cth).

<sup>71</sup> S. 474.17A(1) *Criminal Code Act 1995* (Cth). Maximum Penalty 5 years’ imprisonment.

<sup>72</sup> S. 474.17A(4) *Criminal Code Act 1995* (Cth).

<sup>73</sup> See p. 10.

<sup>74</sup> Commonwealth of Australia, *Freedom of Speech in Australia*, (Parliamentary Joint Committee on Human Rights, Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)), Report, 28 February 2017 [2.8].

social media have a large role to play in the dissemination of such material, where debate has occurred it has generally not been around this issue. Most debates have revolved around the scope of the prohibition, with some arguing that if phrased too broadly it unjustifiably chills freedom of expression. On the other hand, it has been argued in some jurisdictions that the criminal provisions are too restrictive, and are ineffective in bringing successful prosecutions.<sup>75</sup> Broadly speaking, Australian jurisdictions fall into one of four categories: (a) no specific provision, (b) vilification is unlawful but not criminalised, (c) vilification is unlawful and also a summary offence, and (d) vilification is unlawful and an indictable offence.

### No specific provision

1.60 The Northern Territory is the only Australian jurisdiction that does not specifically prohibit racial or other forms of vilification.<sup>76</sup> Territorians may make complaints under the federal *Racial Discrimination Act* (discussed below), or such conduct may be prosecuted under the federal offence of menace, harass, or cause offence.<sup>77</sup> In 2016, specific concerns were raised in the Territory over a video game which purportedly encouraged players to kill indigenous Australians,<sup>78</sup> and the Northern Territory government is currently debating whether to amend its laws in this regard.<sup>79</sup>

### Unlawful but not criminal

1.61 In some jurisdictions, vilification is unlawful but is not specifically criminalised. For example, section 18C of the *Racial Discrimination Act 1975* (Cth) provides that it is unlawful for a person “to do an act, otherwise than in private, if: (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.” Complaints in relation to alleged breaches of this section may be made to the Australian Human Rights Commission. The provision is limited to racial vilification, and there is no specific criminal offence concerned with hate speech under federal law. In fact, the *Racial Hatred Bill 1994* (Cth) which introduced these provisions was amended to remove provisions which would have inserted offences concerned with hate speech into the *Crimes Act 1914* (Cth).<sup>80</sup> There is, however, the ability to prosecute such conduct under the federal offence of menace, harass, or cause offence.<sup>81</sup>

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<sup>75</sup> Commonwealth of Australia, *Freedom of Speech in Australia*, (Parliamentary Joint Committee on Human Rights, Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)), Report, 28 February 2017 [2.139]

<sup>76</sup> *Anti-discrimination Act 1996* (NT).

<sup>77</sup> See p. [1.42].

<sup>78</sup> ABC News, ‘Survival Island 3: Game that purportedly calls for players to kill Aboriginal people prompts outrage’, 16 January 2016, accessible at [www.abc.net.au/news/2016-01-16/racist-survival-island-3-game-taken-down-from-appstores/7092782](http://www.abc.net.au/news/2016-01-16/racist-survival-island-3-game-taken-down-from-appstores/7092782)

<sup>79</sup> Northern Territory Government, *Modernisation of the Anti-Discrimination Act*, Discussion Paper, Department of the Attorney General and Justice, September 2017.

<sup>80</sup> Commonwealth of Australia, *Freedom of Speech in Australia*, (Parliamentary Joint Committee on Human Rights, Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)), Report, 28 February 2017, [2.11]

<sup>81</sup> See p.[1.42].

- 1.62 A number of exceptions are set out in section 18D, including artistic works, a genuine academic or scientific purpose, “or any other genuine purpose in the public interest”. Conduct is deemed not to be private if, amongst other things, it “causes words, sounds, images or writing to be communicated to the public”.<sup>82</sup> For example, the Act has been held to apply to a website containing material denying the holocaust.<sup>83</sup>
- 1.63 There has been ongoing debate about the appropriate scope of this legislation, particularly after a prominent journalist was found to have breached the provisions of the Act.<sup>84</sup> The debate has focussed on the scope of the prohibition, with some arguing that the terms “offend, insult or humiliate” are too broad and unjustifiably restrict freedom of expression. Others have argued that the provision strikes an appropriate balance, particularly as courts have interpreted the provisions more restrictively than their ordinary meaning would suggest; that is, the conduct must have “profound and serious effects, not to be likened to mere slights”.<sup>85</sup>
- 1.64 These issues were recently canvassed before a Parliamentary Joint Committee, and a number of views were expressed in relation to possible reforms to section 18C. However, no preferred position was put forward by the committee<sup>86</sup> and in June this year the most recent attempts to amend the provision were defeated.<sup>87</sup>
- 1.65 Although the federal provision is concerned only with racial vilification, equivalent provisions in Queensland and Tasmania may prohibit vilification/inciting hatred on the basis of factors including race, disability, sexual orientation or religion. They do not, however, criminalise such conduct.<sup>88</sup>

#### Unlawful and a summary offence

- 1.66 The second category of provisions is those where, in addition to vilification being unlawful, serious vilification is a relatively minor (summary) offence. For example, in Victoria both religious and racial vilification are unlawful,<sup>89</sup> and serious vilification is a summary offence.<sup>90</sup> Serious vilification is where the accused intentionally engages in conduct that he or she knows is likely to incite hatred towards a person or class of persons, or threatens, or incites others to threaten, harm to that person or class of persons or property. It also extends to knowingly engaging in conduct with the “intention of inciting serious contempt for, or revulsion or severe ridicule of, that other person or class of persons”. Importantly for our purposes, the Act specifies that “engage in conduct” includes “use of the internet or e-mail to publish or transmit

<sup>82</sup> S. 18C(2)(a) *Racial Discrimination Act 1975* (Cth).

<sup>83</sup> *Jones v Toben* (2009) 255 ALR 238.

<sup>84</sup> *Eatock v Bolt* [2011] FCA 1103.

<sup>85</sup> *Eatock v Bolt* [2011] FCA 1103 [268] citing *Creek v Cairns Post Pty Ltd* [2001] FCA 1007, [16].

<sup>86</sup> Commonwealth of Australia, *Freedom of Speech in Australia*, (Parliamentary Joint Committee on Human Rights, Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)), Report, 28 February 2017, [2.139].

<sup>87</sup> Human Rights Legislation Amendment Act 2017.

<sup>88</sup> S. 124A *Anti-Discrimination Act 1991* (Qld); s. 19 *Anti-discrimination Act 1998* (Tas). In Tasmania, criminalisation was specifically recommended against by the Tasmania Law Reform Institute, *Racial Vilification and Racially Motivated Offences*, Final Report No. 14, April 2011.

<sup>89</sup> Part 2, Div 1, *Racial and Religious Tolerance Act 2001* (Vic).

<sup>90</sup> Ss. 24 and 25 *Racial and Religious Tolerance Act 2001* (Vic). Maximum penalty 6 months' imprisonment.

statements or other material". Similar provisions are also found in the ACT<sup>91</sup> and South Australia.<sup>92</sup>

### Unlawful and an indictable offence

- 1.67 Until recently, vilification based on race, sexual identity, and HIV/AIDS status in NSW was unlawful<sup>93</sup> and various forms of serious vilification were summary offences.<sup>94</sup> In fact, the *Anti-Discrimination (Racial Vilification) Amendment Bill 1989* (NSW) was apparently the first law in the world to criminalise the incitement of hatred, serious contempt, or severe ridicule on the basis of race or membership in a group by threatening harm or inciting others to threaten harm.<sup>95</sup>
- 1.68 However, the NSW Parliament recently passed legislation that repealed these offences, and inserted a new, more serious offence into the NSW Crimes Act of publicly threatening or inciting violence on grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status.<sup>96</sup> The offence requires that the accused intentionally or recklessly threatened or incited violence towards another person or group of persons on one of the specified grounds.<sup>97</sup> The relevant conduct must be a "public act", which is defined to include "any form of communication (including speaking, writing, displaying notices, playing of recorded material, broadcasting and communicating through social media and other electronic methods) to the public".<sup>98</sup> In addition to concerns that there had been no prosecutions under the previous laws, some of the justifications for the new provision were to provide consistency across different forms of vilification, to broaden the forms of vilification which are prohibited, and to increase the penalty for the offence.<sup>99</sup>
- 1.69 Western Australia has, for some years, punished racial harassment under its Criminal Code. Although racial and sexual harassment in specific contexts such as work and education are unlawful in that state,<sup>100</sup> unlike most other jurisdictions there is no general provision dealing with racial or other forms of vilification. However, racist harassment and incitement to racial hatred are criminal offences under the Western Australian Criminal Code.<sup>101</sup> For example, the offence of conduct intending to incite racial animosity or racial harassment prohibits "any conduct, otherwise than in private, by which the person intends to create, promote or increase animosity towards, or harassment of, a racial group, or a person as a member of a racial group, is guilty of a crime and is liable to imprisonment for 14 years".<sup>102</sup> There are also the lesser offences

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<sup>91</sup> Vilification is unlawful under s.67A *Discrimination Act 1991*, while serious vilification is a summary offence under s. 750 *Criminal Code* (ACT). Maximum penalty is 50 Penalty Units (\$1,000). Examples of conduct occurring other than in private include 'writing a publically viewable post on social media'.

<sup>92</sup> S. 4 *Racial Vilification Act 1996* (SA). Maximum penalty 3 years' imprisonment.

<sup>93</sup> *Anti-Discrimination 1977* (NSW).

<sup>94</sup> Maximum penalty 6 months' imprisonment.

<sup>95</sup> Standing Committee on Law and Justice, *Racial Vilification in New South Wales*, Legislative Council, 2013 [2.30].

<sup>96</sup> S. 93Z *Crimes Act 1900* (NSW). Maximum penalty 3 years' imprisonment.

<sup>97</sup> Maximum Penalty 3 years' imprisonment.

<sup>98</sup> S 93Z(5).

<sup>99</sup> Mr Mark Speakman (Attorney-General), *Crimes Amendment (Publicly Threatening and Inciting Violence) Bill 2018*, Second Reading Speech, Legislative Assembly, NSW Parliament.

<sup>100</sup> Pt II, Div 4 and Pt III, Div 3A *Equal Opportunity Act 1984* (WA).

<sup>101</sup> Ch. XI *Criminal Code Act 1913* (WA).

<sup>102</sup> S. 77.



of conduct likely to incite racial animosity or harassment<sup>103</sup> conduct intended to racially harass<sup>104</sup> and conduct likely to racially harass.<sup>105</sup> These offences must occur “other than in private”, which is defined to include “any form of communication with the public or a section of the public”.<sup>106</sup> There are also related provisions criminalising the possession of material with intent to harass, or where the material is likely to incite racial animosity or harassment.<sup>107</sup> A number of defences are provided for in relation to artistic, scientific, academic or other public interests.<sup>108</sup>

- 1.70 It can therefore be seen that the majority of Australian jurisdictions criminalise various types of vilification, most as summary offences, although two as indictable offences. Very little debate surrounds the issue of vilification online,<sup>109</sup> it simply forms the backdrop to the broader debates around the appropriate scope of the provision and protection of freedom of expression. As noted above, there is a general view that these offences have not been effective in prosecuting such conduct. A 2013 report suggested that, at that time, Western Australia was the only jurisdiction to have successfully prosecuted racial vilification.<sup>110</sup> One reason for this may be that the consent of the Attorney General/Director of Public Prosecutions is usually required to commence such prosecutions.<sup>111</sup>

### Image-based abuse

- 1.71 The incorporation of audio and video recording capabilities in modern communication devices has greatly facilitated the taking and distribution of “intimate images”. While such conduct commonly occurs consensually, such images may easily be disseminated without consent for the purposes of harassment or humiliation; colloquially known as “revenge porn”. Such conduct may cause many of the same harms associated with other forms of harassment, including severe emotional harm. Such conduct appears to disproportionately involve female victims, and may be characterised as a form of sexual violence.<sup>112</sup> It may also be seen as a gross invasion of privacy.
- 1.72 In Australia, there are limited means of redress in such cases. Although a statutory action for privacy has been recommended,<sup>113</sup> there is currently no tort of privacy recognised in Australia,<sup>114</sup> although an action in equity for breach of confidence may

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<sup>103</sup> S. 78. Maximum penalty 5 years' imprisonment.

<sup>104</sup> S. 80A. Maximum penalty 5 years' imprisonment.

<sup>105</sup> S. 80B. Maximum penalty 3 years' imprisonment.

<sup>106</sup> S. 80E(2).

<sup>107</sup> Ss. 79, 80, 80C and 80D.

<sup>108</sup> S. 80G.

<sup>109</sup> See, for example, Standing Committee on Law and Justice, *Racial Vilification in New South Wales*, Legislative Council, 2013 [4.40].

<sup>110</sup> Standing Committee on Law and Justice, *Racial Vilification in New South Wales*, Legislative Council, 2013 [2.85].

<sup>111</sup> See, for example, s. 80H *Criminal Code Act 1913* (WA).

<sup>112</sup> A. Powell, 'Configuring consent: Emerging technologies, unauthorized sexual images and sexual assault' (2010) 43(1) *Australian & New Zealand Journal of Criminology* 76, 80-1, 84.

<sup>113</sup> Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* (ALRC Report no. 108, 2008), recommendation 74.

<sup>114</sup> *ABC v Lenah Game Meats* [2001] HCA 63; *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479. Although see *Grosse v Purvis* [2003] QDC 151 and *Doe v Australian Broadcasting Corporation* [2007] VCC 281.

be successful in such cases.<sup>115</sup> Even if a civil cause of action was available, many victims do not have the financial means to bring such actions, and the legal process is likely to exacerbate the sense of humiliation associated with the unauthorised distribution.

- 1.73 In terms of criminal offences, stalking offences might apply but can be limited by the need for there to be a “course of conduct”. It might also be difficult to prove the necessary mental state, particularly where it requires an intention to cause harm. Voyeurism or similar provisions concerned with unauthorised surveillance may not apply as the initial recording of the images is often consensual. As noted above, the federal offence of menace, harass or cause offence may apply, or offences which criminalise the publication of indecent material. However, this may involve debates as to whether the particular image is “indecent”.
- 1.74 Accordingly, a number of Australian jurisdictions have now enacted offences which criminalise the distribution of “invasive” or “intimate” images without consent. These have been enacted in the ACT,<sup>116</sup> New South Wales,<sup>117</sup> South Australia<sup>118</sup> and Victoria.<sup>119</sup> Most recently, the Queensland Parliament is considering legislation that would criminalise the non-consensual sharing of intimate images.<sup>120</sup>
- 1.75 In addition, the federal government has recently passed amendments to the *Enhancing Online Safety Act 2015* to introduce a civil penalty regime that prohibits posting, or threatening to post, an intimate image without consent on a social media service, relevant electronic service or a designated internet service.<sup>121</sup>
- 1.76 Looking at the Victorian provision by way of example, it is an offence for a person to intentionally distribute an intimate image of another person to a person other than the person depicted, where the distribution of the image is contrary to community standards of acceptable conduct.<sup>122</sup> An example of the offence which is provided in the legislation is where a person posts a photograph of another person engaged in sexual activity, on a social media website without that person’s express or implied consent. The offence is a summary offence, with a maximum penalty of 2 years’ imprisonment.<sup>123</sup>

### Intimate image

- 1.77 The Victorian provision defines an “intimate image” to be “a moving or still image that depicts—

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<sup>115</sup> *Giller v Procopets* [2008] VSCA 236; *Wilson v Ferguson* [2015] WASC 15.

<sup>116</sup> Part 3A *Crimes Act 1900* (ACT).

<sup>117</sup> Div 15C *Crimes Act 1900* (NSW).

<sup>118</sup> S. 26C *Summary Offences Act 1953* (SA).

<sup>119</sup> S. 41DA *Summary Offences Act 1966* (Vic).

<sup>120</sup> *Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill 2018*

<sup>121</sup> *Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Act 2018* (Cth). Also see Australian Government, ‘Summary of the consultation workshops relating to a civil penalty regime for non-consensual sharing of intimate images’, Department of Communications and the Arts, accessible at <https://www.communications.gov.au/documents/summary-consultation-workshops-relating-civil-penalty-regime-non-consensual-sharing-intimate-images>.

<sup>122</sup> S. 41DA *Summary Offences Act 1966* (Vic).

<sup>123</sup> S. 41DA(2) *Summary Offences Act 1966* (Vic).

- (a) a person engaged in sexual activity; or
- (b) a person in a manner or context that is sexual; or
- (c) the genital or anal region of a person or, in the case of a female, the breasts".<sup>124</sup>

1.78 It therefore applies to a range of intimate situations. Given the sexual or intimate nature of the conduct, there is no additional requirement that there be a reasonable expectation of privacy. This is in contrast to some other jurisdictions which require the image to depict the relevant conduct in circumstances where a reasonable person would reasonably expect to be afforded privacy.<sup>125</sup>

1.79 As the provision applies to both moving and still images it appears broad enough to encompass a range of media, including Skype and other streaming devices which may be used to distribute the images as they occur.

### Distribute

1.80 "Distribute" is defined very broadly to include various forms of distribution. For example, "distribute" under the Victorian provision includes "publish, exhibit, communicate, send, supply or transmit to any other person, whether to a particular person or not" and "make available for access by any other person, whether by a particular person or not".<sup>126</sup> Importantly, distribution may be by any person, not just the person who was involved in the making of the initial image.

1.81 Some jurisdictions make specific reference to distribution "electronically, digitally or in any other way",<sup>127</sup> while others exclude "distribution by a person solely in the person's capacity as an internet service provider, internet content host or a carriage service provider".<sup>128</sup>

1.82 In addition to distribution being an offence, it is also an offence to threaten to distribute an intimate image.<sup>129</sup>

### Community Standards

1.83 There is clearly the potential for offences of this nature to be overly broad. Consequently, some form of restriction will typically be placed on the conduct which is criminalised. In Victoria, the distribution must be contrary to community standards of acceptable conduct. In determining this issue, regard may be had to:

- (a) the nature and content of the image;
- (b) the circumstances in which the image was captured;

<sup>124</sup> S. 40 *Summary Offences Act 1966* (Vic).

<sup>125</sup> S. 91N *Crimes Act 1900* (NSW), s. 26A *Summary Offences Act 1953* (SA).

<sup>126</sup> S. 40 *Summary Offences Act 1966* (Vic). Also see s. 72B *Crimes Act 1900* (ACT), s. 91N *Crimes Act 1900* (NSW), s. 26A *Summary Offences Act 1953* (SA).

<sup>127</sup> S. 72B *Crimes Act 1900* (ACT), s. 91N *Crimes Act 1900* (NSW).

<sup>128</sup> S. 72B *Crimes Act 1900* (ACT), s. 26A *Summary Offences Act 1953* (SA).

<sup>129</sup> S. 72E *Crimes Act 1900* (ACT); s. 91R *Crimes Act 1900* (NSW), s. 26DA *Summary Offences Act 1953* (SA), s. 41DB *Summary Offences Act 1966* (Vic).

- (c) the circumstances in which the image was distributed;
- (d) the age, intellectual capacity, vulnerability or other relevant circumstances of a person depicted in the image; and
- (e) the degree to which the distribution of the image affects the privacy of a person depicted in the image.<sup>130</sup>

### Consent

1.84 These offences are particularly aimed at circumstances where the initial recording or distribution of the image was consensual, but the subsequent distribution was not. Consequently, it is an element of the offence that the person depicted did not consent to the distribution.<sup>131</sup> For example, in Victoria, it is not an offence where the person depicted is over 18, and had expressly or impliedly consented, or could reasonably be considered to have expressly or impliedly consented to both the distribution of the image *and* the manner in which it was distributed.<sup>132</sup> So, for example, the person might give consent for another person to be shown an image, but not for the image to be posted on social media.

### Harm

1.85 Although an analogy may be drawn with offences against the person, in contrast to offences such as stalking there is no need to prove that harm was caused as a result of the distribution.<sup>133</sup> Accordingly, it is not necessary to show that the accused intended to cause harm. This is particularly significant where distribution of the image may be by a person unknown to the victim.

### Defences

1.86 In order to ensure that such offences are not overly broad, and in particular do not unduly restrict freedom of speech, some jurisdictions make provision for specific defences where the conduct is necessary; for example, for legal, medical, scientific or educational purposes.<sup>134</sup> In Victoria, such concerns are addressed by the requirement that the distribution must be contrary to community standards in order to be an offence.

### Intimate/humiliating images

1.87 Two other modern phenomena are also relevant in this context. The first is the perversely termed “happy slapping”; that is, the visual recording of criminal acts “ranging from basic intimidation, robbery and beating to rape and murder”.<sup>135</sup> The second is so-called “up-skirting”; that is, images taken surreptitiously up a woman’s skirt. While the conduct itself is not necessarily a form of communication, the images

<sup>130</sup> S. 40 *Crimes Act* 1958 (Vic).

<sup>131</sup> S. 72C *Crimes Act* 1900 (ACT), s. 91Q *Crimes Act* 1900 (NSW), s. 26C(1) *Summary Offences Act* 1953 (SA).

<sup>132</sup> S. 41DA(3) *Summary Offences Act* 1966 (Vic).

<sup>133</sup> S. 72D *Crimes Act* 1900 (ACT), s. 91Q *Crimes Act* 1900 (NSW), s. 26C *Summary Offences Act* 1953 (SA), s. 41DA *Summary Offences Act* 1966 (Vic).

<sup>134</sup> S. 72G *Crimes Act* 1900 (ACT), s. 91T *Crimes Act* 1900 (NSW), s. 26C(2) *Summary Offences Act* 1953 (SA).

<sup>135</sup> M. Ball, ‘Documenting acts of cruelty: The practice of violent criminals making visual records of their crimes’ (2012) 25 *Visual Anthropology* 421.

captured may be distributed and so fall within the terms of this discussion. Such conduct may be prosecuted under general provisions concerned with malicious or offensive communications. Alternatively, specific offences may be enacted, as in the state of South Australia which has enacted offences concerned with humiliating and degrading filming.

- 1.88 Under this provision, it is an offence to engage in humiliating or degrading filming, or distribute an image of humiliating or degrading filming knowing or having reason to believe that the person does not consent to the distribution of the image.<sup>136</sup> “Humiliating or degrading filming” is defined to mean “filming images of another person while the other person is being subjected to, or compelled to engage in, a humiliating or degrading act” where the person does not consent to the act or the filming.<sup>137</sup> A “humiliating or degrading act” is an assault or other act of violence or “an act that reasonable adult members of the community would consider to be humiliating or degrading to such a person (but does not include an act that reasonable adult members of the community would consider to cause only minor or moderate embarrassment)”.<sup>138</sup>
- 1.89 In relation to upskirting, specific offences were enacted in some jurisdictions after a spate of incidents involving such conduct,<sup>139</sup> and concern that existing offences might not be suitable in all cases. Victoria, for example, enacted summary offences relating to observing or visually capturing the genital or anal region.<sup>140</sup> Importantly, in this context, it is also an offence to distribute such images.<sup>141</sup>

## OBSCENITY AND INDECENCY

- 1.90 Independent of the question of whether they are harassing, some online communications may be so offensive that they offend community standards of what is to be tolerated in a liberal democratic society. Such communications may, in limited instances, be prosecuted under provisions which aim to restrict the availability of objectionable material.
- 1.91 As noted above, as a liberal society and one that generally values freedom of expression, Australia has relatively few provisions of this nature. This is distinct from provisions concerned with material which is not only obscene but also harmful. For example, all Australian jurisdictions have extensive provisions criminalising the possession and distribution of child exploitation material.
- 1.92 Aside from the Commonwealth offence of using a carriage service to menace, harass, or cause offence, discussed above, there are few examples of offences which criminalise objectionable material as such. Material which is contrary to community values, including material that is “obscene” or “indecent”, is primarily criminalised (if at all) under Australia’s classification regime. In order to understand this, it is necessary to say something briefly about the classification system in Australia.

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<sup>136</sup> S. 26B *Summary Offences Act 1953* (SA). Maximum penalty 1 year’s imprisonment.

<sup>137</sup> S. 26A *Summary Offences Act 1953* (SA).

<sup>138</sup> S. 26A *Summary Offences Act 1953* (SA).

<sup>139</sup> C. Evans and K. Nguyen, ‘Second man arrested for upskirt pics’, *The Age*, 23 January 2007.

<sup>140</sup> SS. 41A and 41B *Summary Offences Act 1966* (Vic).

<sup>141</sup> S. 41D *Summary Offences Act 1966* (Vic).

- 1.93 Concerns about material which offends community standards clearly pre-date the internet, and Australia has had some form of classification system in place for films and publications for over a century. Due to the federal nature of the Australian system, there is some complexity around responsibility for classification laws. While the Commonwealth has jurisdiction over telecommunications networks and broadcasting, as well as laws concerned with the importation of material into Australia, the states and territories have jurisdiction over material produced and distributed within their respective jurisdictions. Ongoing concerns around the classification system have typically centred on how to have a nationally consistent classification system which also respects the rights of states. Although this is primarily concerned with film and literature classification which is largely outside the scope of this discussion, offences related to obscene speech are sometimes contained in these legislative instruments.
- 1.94 The current classification system is based on national classification standards found in Commonwealth legislation and administered by the Classification Board.<sup>142</sup> These are concerned with the display, advertising, and distribution of films, publications, and computer games. However, each state and territory has enacted complementary enforcement legislation.<sup>143</sup> In addition, the Commonwealth has responsibility for the regulation of broadcasting services including television, radio, and online content, administered by the Australian Communications and Media Authority (“ACMA”).<sup>144</sup> In terms of online content, this includes a regime for take-down notices and filtering based, in part, on the national classification scheme.<sup>145</sup> It does not, however, contain offences relating to offensive content transmitted by individuals on the internet.
- 1.95 Although the classification of objectionable material is a national scheme, it primarily relates to content providers which are outside the scope of this paper. Because the state and territory legislation is complementary but not uniform, variations exist in the enforcement of these laws in different jurisdictions. However, the majority of states and territories do not criminalise offensive online communications as such. Two exceptions are Victoria and South Australia.
- 1.96 For example, in Victoria it is an offence to use an “on-line information service” to publish, transmit, or make available “objectionable material”.<sup>146</sup> This offence does not require proof that the person knew or was reckless as to the material being objectionable. Rather, it is a defence if the accused can prove that they believed on reasonable grounds that the material was not objectionable.<sup>147</sup> (Different provisions apply to providers of online information services).<sup>148</sup>

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<sup>142</sup> *Classification (Publications, Films and Computer Games) Act 1995* (Cth).

<sup>143</sup> *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (ACT); *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW); *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NT); *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Qld); *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (SA); *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas); *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Vic); *Classification (Publications, Films and Computer Games) Enforcement Act 1996* (WA).

<sup>144</sup> *Broadcasting Services Act 1992* (Cth).

<sup>145</sup> <https://www.communications.gov.au/policy/policy-listing/online-content-regulation>.

<sup>146</sup> S. 57(1) *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Vic). Maximum penalty, two years’ imprisonment.

<sup>147</sup> S. 57(2).

<sup>148</sup> S. 57(3).

1.97 Objectionable material is defined under the act by reference to publications, films, and computer games. The meaning of “publication” is defined very broadly as “any written or pictorial matter”,<sup>149</sup> and takes in a range of offensive materials including material that:

- (a) “describes, depicts, expresses or otherwise deals with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in a manner that is likely to cause offence to a reasonable adult; or
- (b) lacks serious literary, artistic, political, educational or scientific value and describes, depicts, expresses or otherwise deals with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in a manner that a reasonable adult would generally regard as unsuitable for minors; or
- (c) promotes, incites or instructs in matters of crime or violence”.

1.98 Similarly, under section 75C of the equivalent South Australian legislation, it is an offence to use an on-line service to make available or supply objectionable material to another person, knowing or being reckless to it being objectionable material.<sup>150</sup> “Objectionable material” under this provision is defined by reference to the classification system,<sup>151</sup> unlike the Victorian provision which defines it more broadly. Terms such as “on-line service” and “internet content” are defined by reference to the Commonwealth Broadcasting Act.<sup>152</sup>

1.99 To add to the complexity, in Queensland it is an offence under the Criminal Code to knowingly distribute obscene material, including computer generated images.<sup>153</sup> Similarly, in New South Wales it is an offence to publish indecent articles.<sup>154</sup> “Article” is defined broadly and includes “any thing ... that contains matter to be read or looked at”, but excludes films, publications and computers games that are classified under the Commonwealth Act.<sup>155</sup>

1.100 The majority of cases concerned with these offences relate to transmission of child exploitation material. There are few reported cases dealing with objectionable material more broadly, although the Victorian provision has been used on at least one occasion to secure a conviction in relation to an objectionable Facebook page.<sup>156</sup> Similarly, the New South Wales provision has been used to prosecute a man who published indecent photographs of his girlfriend on his Facebook page following their break-up.<sup>157</sup>

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<sup>149</sup> S. 3.

<sup>150</sup> Maximum penalty, \$10,000.

<sup>151</sup> S. 75A.

<sup>152</sup> S. 75A.

<sup>153</sup> S. 228 *Criminal Code Act 1899* (Qld). Maximum penalty, 2 years' imprisonment.

<sup>154</sup> S. 578C *Crimes Act 1900* (NSW). Maximum penalty, 12 months' imprisonment.

<sup>155</sup> S. 578C(1).

<sup>156</sup> Elise Snashall-Woodhams, 'Facebook sex-rate page co-creator avoids prison', Bendigo Advertiser, 19 December 2012 <https://www.bendigoadvertiser.com.au/story/1194669/facebook-sex-rate-page-co-creator-avoids-prison/>.

<sup>157</sup> *Usmanov v R* [2012] NSWDC 290.

## Offensive behaviour

- 1.101 Historically, the use of offensive language or indecent behaviour could be punished if committed in public. Such offences are primarily concerned with public order, and may be found in a number of jurisdictions. However, the limitation of such offences in a modern context is that they are typically limited to a “public place”.
- 1.102 For example, in South Australia it is an offence to, in a public place, behave in a disorderly or offensive manner, or to use offensive language.<sup>158</sup> Although “public place” is defined broadly, the language of the definition is clearly aimed at physical rather than virtual spaces.<sup>159</sup> This may raise questions of interpretation as to whether, for example, an online social media platform that is not restricted is a “public place”. Certainly, the offences developed in the context of offline rather than virtual public places, and it may be preferable for laws to be more carefully targeted at offensive online communications, rather than trying to apply these offences in a context for which they were not intended.
- 1.103 Similar concerns may arise in the context of offences that criminalise indecent acts “in the presence of” another. Although such offences commonly apply to indecency involving children, some are not so limited. For example, in the ACT it is an offence to commit an act of indecency “on, or in the presence of, another person”.<sup>160</sup> Although clearly applicable to physical presence, it may be argued that such provisions could extend to “virtual presence”, such as where an offender engages in indecent conduct via webcam. However, it has been held that the Victorian offence of committing an act of indecency “with or in the presence of” a child under 16 does not extend to “indecent acts committed over or by means of a telephone or a computer or other such mode of communication”.<sup>161</sup> In contrast, a Tasmanian provision which referred to an indecent act “with, or directed at”, a person under 17 years of age was held to apply to the sending of pornographic emails.<sup>162</sup>

## CONCLUSION

- 1.104 It can be said that laws criminalising harmful and offensive communications in Australia are fragmented, and have largely been enacted reactively in response to specific events. This is not entirely surprising in a federal system, and reflects the rights of individual states and territories to criminalise conduct as they see fit. Despite the fragmented nature of the provisions, in terms of harassment and stalking these are largely covered by state and territory offences, with the important contribution of the Commonwealth offence of using a carriage service to menace, harass, or cause offence. Specific offences relating to image-based abuse have been enacted in a minority of states and territories at this stage, together with recent amendments to federal offences. However, it seems likely that similar offences will be enacted by the remaining jurisdictions in the future given the clear gap in existing provisions.

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<sup>158</sup> S. 7 *Summary Offences Act* 1953. Also see the offence of using indecent language in a public place; s. 22 *Summary Offences Act* 1953.

<sup>159</sup> S. 4.

<sup>160</sup> S. 60 *Crimes Act* 1900 (ACT). Maximum penalty, 7 years' imprisonment.

<sup>161</sup> *Savage v R* (2010) 29 VR 229, 240.

<sup>162</sup> *Tasmania v Baker* (2006) 15 Tas R 409.



- 1.105 The role of classification and other laws in relation to objectionable material is limited, with only some jurisdictions criminalising such conduct. Where available, this appears to be more commonly used to prosecute harassing type conduct. The prosecution of racial and other forms of vilification is perhaps the most fragmented. While most jurisdictions criminalise such conduct, there is variation in the forms of vilification, and the general view appears to be that successful prosecutions are rare.
- 1.106 While it is clear that modern forms of communication have provided the impetus for many of the reforms in this area, overall the application of these provisions to electronic communications appears to have worked well. While some provisions have been specifically drafted or modified to address online offending, there has generally been limited discussion around the form of communication, and greater focus on the nature of the offence itself, whether online or offline.