

Research on youth exposure to, and management of, cyberbullying incidents in Australia

Part C:

An evidence-based assessment of deterrents to youth cyberbullying

Appendix A: Literature review – International responses to youth cyberbullying and current Australian legal context

Prepared for:

Australian Government Department of Communications

June 2014

Barbara Spears, Matthew Keeley, Tony Daly, Carmel Taddeo, Ilan Katz, Teresa Swirski, Philippa Collin, Shona Bates

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ISSN: 1446-4179
ISBN: 978-1-925218-03-9 (online)
SPRC Report 12/2014

The Social Policy Research Centre is based in the Faculty of Arts and Social Sciences at UNSW Australia. This report is an output of the [Youth exposure to and management of cyberbullying incidents in Australia project](#), funded by the Australian Government Department of Communications.

Spears, B., Taddeo, C., Swirski, T., Keeley, M., [Katz, I.](#), Collin, P., Daly, T., & [Bates, S.](#) (2014). *Research on youth exposure to, and management of, cyberbullying incidents in Australia: Part C—An evidence-based assessment of deterrents to youth cyberbullying - Appendix A (SPRC Report 12/2014)*. Sydney: Social Policy Research Centre, UNSW Australia.



Australian Government
Department of Communications

This research has been prepared for the Department of Communications.

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If you would like additional information on the report, please contact:

Manager, Cyber Safety Programs

Department of Communications

GPO Box 2154

Canberra ACT 2601, Australia

Phone: 1800 254 649 (free call) or 02 6271 1000 (international +61 2 6271 1000)

Email: enquiries@communications.gov.au

Research Team

Contact for follow up shona.bates@unsw.edu.au or ilan.katz@unsw.edu.au.

Social Policy Research Centre

Professor Ilan Katz (Chief Investigator), Matthew Keeley (Deputy Chief Investigator), Shona Bates, Melissa Wong

University of South Australia

Barbara Spears, Carmel Taddeo, Tony Daly

University of Western Sydney

Teresa Swirski, Philippa Collin

Young and Well Cooperative Research Centre

The Young and Well Cooperative Research Centre (Young and Well CRC), through Dr Michelle Blanchard, provided in kind support to this research by helping the research team engage with young people and those who care for them in the project, as well as providing access to its participant organisations through a workshop held ahead of the Young and Well CRC's Connect 2014 Conference and through the promotion of surveys.

National Children and Youth Law Centre

Marianne Dakhoul, Kelly Tallon, Ahram Choi

Acknowledgements

We would like to thank Julie Hodgkinson and the team at the Department of Communications for their support, direction and contribution to this research as well as the generous support of the Australian College of Educators, Australian Council of State School Organisations, Independent Education Union of Australia, Independent Education Union of South Australia and Parents Victoria.

We would like to sincerely thank the participating stakeholders including leaders, teachers, and parents/carers who participated in this research. We would like to particularly acknowledge the important contributions from the young people who took the time to be involved in the study. Special thanks to Project Rockit (Lucy Thomas and Rosie Thomas) for their ideas and involvement in promoting the campaign to young people. Thank you also to the technical team led by Frederick Michna (involving Ajay Ranipeta, Kim Johnson and Brad Santos) who contributed to the development of the online youth survey, videos and postcards of the crowdsourcing campaign. We also appreciate the Urban Research Centre at the University of Western Sydney for allowing us to utilise their Social Volunteer Portal

We appreciate the much valued contribution and insights from Dr Colette Langos.

Abbreviations

CER	Civil Enforcement Regime
SPRC	Social Policy Research Centre
UniSA	University of South Australia
UWS	University of Western Sydney

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1 Introduction

This literature review was designed to contribute to the evidence-base to determine if a new, simplified cyberbullying offence or a new civil enforcement regime were introduced, how such an offence or regime could be implemented, in conjunction with the existing criminal offences, to have the greatest material deterrence effect. It has drawn upon intersecting domains related to understanding the construct of cyberbullying, as embedded within the literatures of aggression and bullying; and the law as employed in international and Australian settings. This literature review supports the Part C Report: *An evidence-based assessment of deterrents to youth cyberbullying*.

As set out in the discussion paper for public consultation on *Enhancing Online Safety for Children* (Australian Government Department of Communications, 2014: p 1): the Australian Government is committed to implementing a range of measures to improve the online safety of children in Australia, some of which include:

- The establishment of a Children's e-Safety Commissioner
- Developing an effective complaints system, backed by legislation, to get harmful material down fast from large social media sites, and
- Examining existing Commonwealth legislation to determine whether to create a new, simplified cyber-bullying offence.

This review will contribute to the evidence base to determine, if a new, simplified cyberbullying offence or a new civil enforcement regime were introduced, how such an offence or regime could be implemented, in conjunction with the existing criminal offences, to have the greatest material deterrent effect. Specifically this review explores:

- The background and current issues related to the definition of aggression, bullying and cyberbullying, in order to position the findings from Part C of this research
- The effects of traditional and cyberbullying
- The law and cyberbullying
- Deterrence
- Alternative approaches
- Approaches taken by international jurisdictions where similar offences or regimes have been implemented
- The Australian legal context including State and Territory criminal laws
- Relevant laws governing education
- Children as rights-holders: Children's civil law agency
- Children's criminal responsibility
- Young people, police and youth offender options
- Sentencing young offenders under Commonwealth criminal law

- The role of parents
- Adolescent development, and
- Industry responses (social network sites)

2 Definition of cyberbullying

As articulated in the discussion paper for public consultation on *Enhancing Online Safety for Children* (Australian Government Department of Communications, 2014), a recent study into cyberbullying in Australia defined cyber-bullying according to that contained in the *Megan Meier Cyberbullying Prevention Act Sec 881(a)* (US) as:

... any communication, with the intent to coerce, intimidate, harass or cause substantial emotional distress to a person, using electronic means to support severe, repeated and hostile behaviour.

They further reported that:

Cyber-bullying can occur in a variety of ways, through a range of digital devices and mediums, most commonly smartphones and social media sites. On social media sites cyber-bullying can be content-driven, such as posting embarrassing or harmful photos, videos, or rumours relating to an individual. These are often exacerbated by other social media features (such as 'comments', 'shares' and 'likes') which serve to actively promote and spread the harmful content at a rapid rate, and to a wide audience. (Srivastava et al., 2013, p 3)

Smith et al. (2008a) proposed one of the most commonly used definitions in research to date, that cyberbullying is an:

... aggressive, intentional act, carried out by a group or individual, using electronic forms of contact, repeatedly and over time, against a victim who cannot easily defend him or herself (p 376).

Early definitions reflected the more text-based technologies in use at the time, e.g. Willard (2003, cited in Shariff, 2008) referred to cyberbullying as '[on-line] speech that is defamatory, constitutes bullying, harassment or discrimination, discloses personal information or contains offensive, vulgar or defamatory comments'.

Patchin and Hinduja (2006) also suggested it is 'wilful and repeated harm inflicted through the medium of electronic text'. Current definitions refer to activities related to social network and social media platforms. Spears et al. (2008; 2009) noted that as new technologies emerge, and devices and platforms converge, that the definition will have to be continually revised.

Over the past decade, however, awareness of cyberbullying, accompanied by international research, publications and popular media, has increased dramatically (Smith et al., 2013b). Much of what is known has emerged predominantly in the psychological domain, from a 30 year exploration of what is now called 'traditional' or 'offline' bullying.

2.1 Bullying

Bullying is known to be a sub-set of aggressive behaviour where a deliberate intent to harm is a fundamental concept, but where two additional distinct, characteristics elevate it beyond mere aggression: the imbalance of power between the parties, and some recognition that this behaviour is repeated and ongoing over time (Olweus, 1978; 1993; 1999).

Whilst globally, there is no agreed definition of bullying, there is consensus that the elements of deliberate intent to harm, power differential, and repetition over time, must be present for any act to be deemed to be an act of bullying, as distinct from an act of aggression or conflict. From this perspective, bullying is not accidental, but is a proactive form of aggression: deliberate, concerned with the misuse and abuse of power, and ongoing over time.

The Australian Research Alliance for Australian Youth (ARACY) has prepared a report on defining school bullying for the Australian Government Department of Education (Hemphill et al., 2014).

Its express purpose has been to define bullying conceptually for Australian researchers and the academic community, so that any new research undertaken should employ the same definition, thereby providing some consistency in prevalence findings and ultimately intervention/prevention strategies. Inconsistencies in defining and measuring bullying to date have meant that prevalence rates are unreliable and inconsistent across studies (see Part A Report).

After a series of peer review processes and roundtables with leading experts, the following definition of bullying has been proposed, which captures an overarching cultural statement, supported by detail of the behaviours:

Bullying is a systematic abuse of power in a relationship formed at school characterised by:

- 1) Aggressive acts directed (by one or more individuals) toward victims that a reasonable person would avoid
- 2) Acts which usually occur repeatedly over a period of time, and
- 3) Acts in which there is an actual or perceived power imbalance between perpetrators and victims, with victims often being unable to defend themselves effectively from perpetrators.

The operationalising of a technical definition, whereby accurate measurement can occur, remains the next step, but this conceptual definition provides a first basis from which to work.

As stated in the ARACY report (Hemphill et al., 2014: p 18):

This definition provides specificity and enables consistency around a number of conceptual issues:

- It establishes bullying as a systematic abuse of power
- It clarifies that school-based bullying applies to relationships formed at school
- It establishes the perspective of the 'reasonable person' as the mechanism for determining intentionality
- It retains the criteria of repetition but with flexibility that allows for different patterns of bullying identified as part of cyber-bullying, and
- It notes the importance of actual and perceived power imbalances.

2.2 Cyberbullying

Although the definition of school bullying has some relevance to cyberbullying, there are a number of areas where there is ongoing debate around their application to cyberbullying, particularly the core definitional issues of repetition and power imbalance. Cyberbullying research has largely indicated that it reflects these core issues (Langos, 2012, Menesini et al., 2013).

The notion of repetition in cyberbullying, however, has been much debated; it is becoming clear that repetition in this sphere has different meanings. Anyone can forward or upload widely to others in a single act, and the material can remain visible or reappear once it has left the control of any individual. Images and texts can spiral out of control, 'snowball-like', due to the technology involved. For this reason, the notion of repetition in cyberbullying is not as compelling at the protagonist level, but is certainly so from the victim's perspective.

Power imbalance is also under examination, with technical ability and anonymity being the key online possibilities where power abuse could be evident.

Smith et al. (2013b) also note that some studies which do not include notions of repetition or power imbalance online, can only measure cyber-aggression or cyber-abuse, as it is not clear that there is a bullying dimension without these core constructs present.

These definitions of cyberbullying noted above are typical of the divergence of what is in use globally, highlighting the issues associated with trying to define cyberbullying:

- It is not a single construct
- It is in constant change/flux according to the technologies available at any given time and behaviours associated with them
- Is not readily or easily ascribed, and
- It often has culturally specific understandings that are linked with its foundations in behaviours such as bullying and aggression.

A clear, workable and theoretically derived definition of both bullying and cyberbullying is needed to determine prevalence, inform prevention and intervention strategies and inform broader policy and legal sanctions and initiatives.

Langos (2012), when reviewing the definition of cyberbullying from a legal perspective, posited that the three core elements of bullying need to be retained, but with some refinement in the online context, i.e. repetition, and that there was a need to also include direct and indirect aspects in the definition of cyberbullying. This goes back to understanding of the different subtypes and forms of aggression.

Spears et al. (2008; 2009) had previously noted that cyberbullying behaviours reflected social and relational bullying, and also involved both overt and covert behaviours (2009: p 193):

Deliberately stalking or overtly abusing someone over social networking sites or e-mail, when the individual does not try to conceal their identity or remain hidden, are deliberate, aggressive acts designed to intimidate and to exercise power over another by their very presence in cyberspace.

Covert cyberbullying reflects indirect, social, and relational behaviours resulting in exclusion, isolation, and the manipulation of friendships and relationships. These are evident when: rumours or images are spread from phone to phone without the targeted person knowing; anonymous derogatory websites are set up; or strangers intimidate from the security of anonymity.

Overt cyberbullying, such as deliberately taking intimate or other photographs, then using them to cause suffering to the victim, are explicit, deliberate acts that use technology to cause harm.

Langos (2012) suggests the following descriptive definition (p 288) arguing that it captures all the elements required for the behaviours to be cyberbullying:

‘Cyberbullying’ involves the use of ICTs to carry out a series of acts as in the case of direct cyberbullying, or an act as in the case of indirect cyberbullying, intended to harm another (the victim) who cannot easily defend him or herself.

‘Direct cyberbullying’ involves a perpetrator repeatedly directing unwanted electronic communications to a victim who cannot easily defend him or herself with the intent to harm the victim.

‘Indirect cyberbullying’ involves directing a single or repeated unwanted electronic communications to a victim who cannot easily defend him or herself with the intent to harm the victim.

‘An intention to harm’ is established where a reasonable person, adopting the position of the victim and having regard to all the circumstances, would regard the series of acts or an act as acts or an act intended to harm to the victim.

'Electronic communication' includes (but is not limited to) any transfer of signs signals, writing, images, sounds, data transferred whole or in part by wire, radio, a photo electronic or photo optical system, including electronic mail, Internet communications, instant messages, and facsimile communications.

'Harm' refers to emotional harm.

Menesini et al. (2013) considered the definition of cyberbullying across several European countries, in light of research from media literature, which stressed new criteria which are specific to the online environment: anonymity, where the identity of the bully is unknown and publicity (sic), as distinct from private exchanges. This fuels the argument for cyberbullying being considered a different form of bullying, rather than an extension of traditional bullying into the online setting.

However, overall, the results suggested that cyberbullying can be defined under the broad banner of bullying, due to the strong response regarding intent and power imbalance, and the 'lack of unique and specific characteristics of cyberspace in the definition'. Repetition was again raised as being problematic and needing to be considered in terms of private or public online contexts, as well as taking into account the direct/indirect or overt/covert nature of the attack.

What was immediately apparent in this study, however, was the cultural context of bullying and cyberbullying, highlighting that care should be exercised in relation to how cyberbullying is defined. This has implications for those who migrate to other countries and the need for ongoing education campaigns. For example:

- Swedish young people often used the term *mobbing* or *nätmobbing*.
- The best label for cyberbullying in Spain was *acoso* (harassment).
- In Italy, it was *bullismo virtuale* (virtual bullying) and other terms involving electronic bullying, internet or on-line bullying (*bullismoelettronico*).
- In Estonia, the more specific term cyberbullying did not emerge so clearly from the focus group interviews although there were terms that referred to the cyber context (*internetis kiusamine; mobiiltelefonidega kiusamine; tekstisõnumitega kiusamine*); these three terms are respectively the Estonian translation of: internet bullying, bullying via cell-phone, and text-bullying.

What is clear is that the lack of a unified definition impacts on reliability and validity of determining prevalence, and such inconsistencies lead to difficulties in determining cross-study comparisons. Implications for Australian young people, given its multi-cultural make-up, are that greater consideration needs to be given to how we define cyberbullying for research purposes, but also how it is used in everyday situations with different cultural contexts. This is an area which needs investigation.

3 Effects of traditional bullying and cyberbullying

Davies and Lee (2008) noted that whilst cyberbullying is an international problem occurring across boundaries and jurisdictions at times, it is, in effect, something that needs to be tackled at a national scale, as each country has its own unique legal system.

Campbell and Završnik (2013) commended the changes in societies' understanding and non-acceptance of bullying as a right of passage and a normal part of childhood which is 'character building'. These changes have come about as the consequences of bullying have come to be understood: that all parties are detrimentally impacted by this behaviour, not only those who are targeted (Kaltiala-Heino et al., 1999; 2000).

There is much research which articulates the impacts of bullying in psychological terms, psychosocial relationships, and wellbeing for the bullies, victims and witnesses (e.g. Fekkes et al., 2006; Kim et al., 2006; Arseneault et al., 2006; 2008; Reijntjs et al., 2010). Victims of cyberbullying have been found to have lower self-esteem, higher levels of depression and experience significant life challenges (Ybarra et al., 2006; 2007).

Cyberbullying, however, has been shown to have greater impacts than traditional bullying on mental health generally, and a large Australian study (Campbell et al., 2012) found that 'cybervictims' reported significantly more social difficulties, higher anxiety levels and depression than traditional victims. In addition, victims of both online and offline bullying had similar levels to those only cyberbullied: suggesting the power of cyber victimisation to impact over and above traditional victimisation. Potentially, the effects of cyberbullying are more severe because wider audiences can be reached through the Internet and material can be stored online, resulting in victims reliving denigrating experiences more often.

Most recently, van Geel et al. (2014) in their meta-analysis of peer victimisation, cyberbullying and suicide in adolescents and youth, clarified the relationship between these concerns, finding a positive relationship between peer victimization and suicidal ideation among 284,375 youths, and a positive relationship between peer victimisation and suicide attempts among 70,102 youths. Furthermore, this meta-analysis demonstrated that peer victimization is related to suicidal ideation for older as well as younger children, boys as well as girls, and victims as well as bully-victims. Whereas previous studies demonstrated that the relationship between cyber victimisation and suicidal ideation is similar to that of traditional victimisation, the present meta-analysis suggests that cyberbullying is even more strongly related to suicidal ideation.

4 The law and cyberbullying

After the school shootings in the US in the late 1990s, there was a call in some states to enact legislation to make cyberbullying either a crime or a misdemeanour (Snakenborg et al., 2011).

Campbell et al. (2010) noted that the law serves many functions: as punishment and retribution; as a deterrent; as a vehicle for compensation; as a means to establish a social norm; and to inform policy. Chan (2009) suggested that in relation to cyberbullying, criminal laws could be either remedial, retributive, or used as a deterrent for young people; however, one of the issues with criminal laws is that the term bullying is often absent – let alone cyberbullying specifically. This has also been the case until recently in other countries: e.g. the UK (Marczak & Coyne, 2010), Canada (Stanton & Beran, 2009) and Australia (Campbell et al., 2008).

4.1 Deterrence

According to the Oxford Dictionary of Law, deterrence is:

The theory of punishment in which the punishment (a penalty imposed on a defendant duly convicted of a crime by an authorised court, declared in its sentence) is aimed at deterring the criminal from repeating his offences or deterring others from committing similar acts. (Martin & Singleton, 1997: p 371).

The idea that changing the law can change negative behaviours is demonstrated, for example, in the extensive empirical literature on the effects of bans on corporal punishment in Sweden in 1979 and in many other countries around the world in subsequent decades. Research has shown that in countries where corporal punishment has been made illegal there have been significant changes in parenting behaviours and subsequent positive outcomes for children (Durrant, 1996)

Robinson and Darley (2004) questioned the notion of whether criminal law can actually deter behaviours, citing the behavioural sciences path of influence from doctrine to behavioural response. That is, the 'transmission of influence faces so many hurdles, and is so unlikely to clear them all, that it will be the unusual instance in which the doctrine can actually influence conduct' (p 174). Robinson and Darley argue that for criminal law to have a deterrent effect, three components must be met:

- Does the potential offender know, directly or indirectly and understand the implications for him, of the law that is meant to influence him?
- If he does know, will he bring such conduct to bear on his choices at the moment of making his choices?
- If he does know the rule and is able to be influenced by his choices, is his perception of his choices such that he is likely to choose compliance with the law

rather than commission of the criminal offence? That is, do the perceived costs of non-compliance outweigh the perceived benefits of the criminal action?

Robinson and Darley found that 'people rarely knew the criminal law rules, even when those rules were formulated under the express assumption that they will influence conduct ... and that they had little knowledge of the magnitude of the penalties which were relevant' (p 176). They also found that people presumed the law to be as they thought it to be, and so 'when a legal rule deviates from a community's shared understanding of that rule there is a greater burden to make that law known' (p 177). This has implications for any education or social media campaign in relation to potential changes to laws in relation to cyberbullying.

Regarding the second element above, making choices, offenders have been found to be more risk seeking than risk avoidant, and as a group are more impulsive than average for young people (Robinson & Darley, 2004: p 178). Desire for revenge or retaliation, or sudden rages, will also impact on an offender's ability to see the consequences of their own conduct. These temporary mind states are likely to drive out rational considerations of punishment. When combined with adolescence, a known time of changing brain development, heightened risk taking, and diminished responsibility, there are again issues for consideration concerning the likely impact a law would have on young people's behaviours generally.

Understanding the cost-benefit equation is also important, as is the perceived rate of punishment for an offence, rather than the actual, which accounts for the deterrent effect (Robinson & Darley, 2004: p 184).

Paul et al. (2012a) noted that young people are unlikely to be impacted by a legal approach due to:

- The nature of their impulsivity
- Their belief that they are unlikely to be caught because of their anonymity
- Superior understanding of technology as compared with adults generally
- Their lack of awareness of any laws.

Using the law as a social norm to reflect the morals and values of any society is altruistic; such laws are evoked to support the view of what is right and wrong in terms of behaviours within that society. For example, in 1979¹ the Swedish Parliament passed legislation banning physical punishment of children, in commemoration of the United Nations Year of the Child. Finland was the first country to follow suit, passing an anti-smacking law in 1984; and Norway in 1987 (Harrold-Claesson, 2001). Having these laws determines symbolically what the society wants for its citizens. Whether or not they are enforced is another issue, not

¹ http://www.barnasrett.no/Artikler/smacking_and_the_law.htm

within the scope of this document; however, that they exist serves to remind us that laws can and do set the tone for the way a society should act towards its children.

It is evident from this research that simply having a law as a deterrent is not sufficient for changing behaviours. Having a law which outlines that cyberbullying is not acceptable in our society is admirable, but it would need the majority of young people to ascribe to the social consensus.

4.2 An alternative approach

The literature identifies other ways of modifying behaviour to ensure deterrence from cyberbullying. Drawing upon the expertise of social marketers who aim to change negative social behaviours, such as binge drinking or problem eating, might provide some insight into possible alternative approaches to deterring cyberbullying through understanding decision-making processes employed.

As explained by Fry et al. (2014), modelling young people's decision-making processes through the use of the Model of Goal Directed Behaviour (MGDB) is one such approach. The MGDB (Perugini & Bagozzi, 2001) extends the theory of planned behaviour (TPB), described by Ajzen (2005), to gain a better understanding of the cognitive and affective decision-making processes which young people undergo. The MGDB incorporates constructs from affective and motivational theoretical areas to better explain behaviour in pursuit of a goal, thus giving it greater potential explanatory power (Perugini & Bagozzi, 2001; Perugini & Connor, 2000; Richetin et al., 2008).

The MGDB captures decision-making behaviour prior to intention formation. Specifically, MGDB distinguishes goal desires from intentions and considers the interplay between them (Perugini & Connor, 2000). Perugini and Bagozzi (2001) propose that desire performs the motivational functions that form the basis of decision-making, reflecting 'personal motivation to perform an action or to achieve a goal' (p71). Intentions reflect how hard people are willing to try to enact that behaviour and are assumed to indicate factors that influence behaviour (Ajzen, 2005). Punitive methods do not change behaviours, so theoretical approaches such as this need investigation.

According to Lenhart (2007) cyberbullying is often a quick and easy solution that can satisfy a number of needs: asserting power, gaining status; acting out aggressive fantasies; retaliating after being bullied; gaining attention; looking cool and tough; and satisfying jealousy, all of which can be accomplished with a low chance of being caught (Kowlaski et al., 2008). Other motivations include 'fun' and to relieve boredom (e.g. Cross et al., 2009). Older youth suggest that it is a way of negotiating and navigating their relationships (Spears et al., 2009), especially with regard to popularity and sexuality (Guerra et al., 2011). The MGDB might be one way of establishing motivation and decision-making in relation to these needs.

5 International legal approaches to dealing with cyberbullying

The following outline of what is occurring internationally is derived from literature searches of published and grey material, and has predominantly been provided through personal connections of one of the authors. To that extent, where it has been a personal communication, via email, it is stated as such.

5.1 The United Kingdom

There is a legal requirement in the UK for all schools to have an anti-bullying policy, with the *School Standards and Framework Act 1998 (UK)* placing a specific duty upon all state schools to combat bullying and have anti-bullying procedures in place (Marczak & Coyne, 2010).

In addition, Marczak (pers com, April 2014) reports that:

UK schools have the power to regulate the conduct of students outside of school grounds, such as the journey to and from school, or cyberbullying occurring out of school but affecting life in school (*Education and Inspections Act 2006 England*). Disciplinary action taken in response to cyberbullying includes existing penalties used for traditional bullying (*Department for Education, 2011*). There are similar obligations placed upon independent schools through the *Education (Independent Schools Standards) Regulations 2003*.

Whilst there is no specific law that makes cyberbullying illegal and no legal definition of cyberbullying within UK law criminal and civil law, there are, however, a number of existing criminal and civil laws that can be applied to cases of cyberbullying in terms of harassing, menacing and threatening communications. They include the *Protection from Harassment Act 1997 [England, Wales, Scotland]*, *Malicious Communications Act 1988 [England and Wales]*, *Communications Act 2003 [UK]*, *Defamation Act 2013 [England, Wales, Scotland]*.

According to Marczak, (pers com, 12 April 2014), the age of criminal responsibility starts at 10 years old, and secondary school students could therefore face prosecution charges for cyberbullying through these various Acts.

Marczak reports that two perpetrators of online bullying have been sentenced by English courts using *the Protection from Harassment Act, 1997*. This states that:

(1) A person must not pursue a course of conduct – (a) which amounts to harassment of another, and (b) which he knows or ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.

(2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other (Protection from Harassment Act of 1997, c 40, §§ 2–3).

Marczak (unpublished PhD thesis, April 2014, pers com) clarified that:

A course of conduct is fundamental to take this claim using this statute and requires not only at least two incidents of harassment, but also proof that the perpetrator knew or should have known that his behaviour could be classed as harassment. Although the statute does not have a definition of harassment, which leaves the court to decide if this is the case on a case by case basis, it clarifies that it “includes causing harm or distress” (*Protection from Harassment Act of 1997, c 40, §§ 2–3, part Your Rights*). An individual who is found guilty under this statute can receive a verdict of imprisonment for up to six months and/or a fine. In addition the perpetrator can face the possibility of a civil suit (*Protection from Harassment Act of 1997, c. 40, §§ 2–3*).

The following excerpts/incidents are provided (with permission, April 2014) from Marczak’s unpublished PhD thesis:

18 year old Keeley Houghton² was the first person charged in England for an online bullying incident, and was sentenced to three months in a young offender’s institution, after being prosecuted under an anti-harassment statute for posting an abusive message on her 14 year old victim’s Facebook profile (Burgess, 2009). The Worcester Crown Court was the first court in England to impose a criminal penalty on a cyberbully.

A second case that was brought to English courts involved a 17 years-old perpetrator who set up a fake Bebo account and using a fake personality on an online character he created and called Callum, hoaxed his friend to fall in love (Daily Mail, 2008; Allman, 2009). It transpired that getting revenge on his friend for previously embarrassing him by drawing humiliating pictures of him was the perpetrator’s motivation (Patel, 2011). Using Callum’s personality the perpetrator initiated and maintained an online relationship pretending to fall in love with the victim (Patel, 2011). This process lasted three months after which time the victim learnt about the deception and attempted to commit suicide by medication overdose. The perpetrator was brought before the Brighton Youth Crown Court for harassment and pleaded guilty. He was then sentenced to a 12-month referral order and a fine of £250 to pay to the victim (Patel, 2011). A referral order is ‘a unique sentence directly involving the local community, by means of the volunteer youth offender panel members, in holding the young offender to account for their actions, where a young person is before a court charged with a criminal offence for the first time and pleads guilty’ (Ministry of Justice, 2012: p7).

Marczak also reports on the following Acts: (pers com, unpublished PhD thesis, with permission, April, 2014)

² See <http://www.news.com.au/national/keeley-houghton-jailed-for-facebook-death-threat/story-e6frfkp9-1225765382616>

Communications Act 2003

This Act stipulates that an inappropriate use of public electronic communication networks has occurred when an individual “sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene, or menacing character; or causes any such message or matter to be so sent” (*Communications Act 2003, c.21, §127*). The *Communications Act 2003* can also be used if an individual “for the purpose of causing annoyance, inconvenience or needless anxiety to another, sends by means of a public electronic communications network, a message that he knows to be false; causes such a message to be sent; or persistently makes use of a public electronic communications network (*Communications Act 2003, c.21, §127*). An individual who is found guilty under this statute can receive a maximum verdict of imprisonment of six months and/ or a fine (*Communications Act 2003, c.21, §127*).

Malicious Communications Act 1988

This statute can be used for:

(1) Any person who sends to another person – (a) a letter or other article which conveys – (i) a message which is indecent or grossly offensive; (ii) a threat; or (iii) information which is false and known or believed to be false by the sender; or (b) any other article which is, in whole or part, of an indecent or grossly offensive nature – is guilty of an offence if his purpose, or one of his purposes, in sending it is that it should, so far as failing within paragraph (a) or (b) above, cause distress or anxiety to the recipient or to any other person to whom he intends that it or its contents or nature should be communicated. (*Malicious Communications Act, 1988, c.27, § 1*)

An individual who is found guilty under this statute can receive a fine (*Malicious Communications Act, 1988, c.27, § 1*). This act may be difficult to apply in cases when it is not clear that the perpetrator’s aim was to cause anxiety or distress (Patel, 2011). It is also worth noting that in comparison to the other acts the punishment under this statute seems relatively low and Patel (2011) suggests that it therefore may reduce the deterrent effect of this statute.

In March 2014, an amendment to the criminal justice bill that aims to combat sexual harassment and verbal abuse on the internet or via mobile phones in England and Wales, was tabled in UK House of Commons. Under the *Malicious Communications Act 1988*, it would be an offence to send communications with intent to cause distress or anxiety, as an either-way offence. The amendment would allow for greater penalties of up to two years in prison and extend the period of time made available to authorities attempting to build difficult cases against offenders from 6 to 12 months.

Public Order Act 1986

This statute can be used when an individual:

(a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or (b) displays any writing, sign or other visible representation which is threatening, abusive or insulting, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby (Public Order Act, 1986, c.64, §5).

Again the punishment when convicted under this statute is limited to fine (*Public Order Act, 1986, c.64, §5*). The *Public Order Act 1986* and the *Malicious Communication Act 1998* focus less on the impact of the behaviour for the victim and more on the intentions of the perpetrator (Patel, 2011).

To close, Marczak notes:

As it can be seen from the information above the pre-existing laws can be used in England to prosecute individuals for cyberbullying. Some of these acts focus more on the perpetrator's intentions whilst other on the outcomes of cyberbullying for cyber-victims. This gives the prosecutors the flexibility to convict individuals who harm others without putting the emphasis on the number of incidents they engaged in or the type of harm caused to the victim (*Public Order Act, 1986, c.64, §6*).

It would seem that these Acts are appropriate and effective for tackling serious forms of cyberbullying, particularly when combined with prevention strategies. However, Marczak and Coyne (2010) earlier recommended against creating a specific criminal law for cyberbullying, as it may criminalise immature young people who may be unaware of the impact of their actions (see Campbell et al., 2008). This immaturity, combined with impulsivity and failure to recognise laws per se (Robinson & Darley, 2004), warrants close attention in terms of any consideration of changing existing laws or introducing new ones.

The UK House of Commons (2014) also commissioned a report from the Culture, Media and Sports Committee into online safety. The report concluded that some of the more severe incidents of online bullying are being brought before the courts and that much online bullying and abuse is covered by existing laws. However, these laws require clarification and improved guidance on interpretation, and more needs to be done to highlight the current advice and educational resources available to both parents and teachers. The report further states that social media providers should offer well-promoted and easy-to-use options for reporting harmful content and communications. Published in March 2014, this report is awaiting a response from the Government.

In December 2012 the Crown Prosecution Service issued specific guidelines explaining how cases of cyberbullying will be assessed under the current legislation. The Introduction states:

These guidelines set out the approach that prosecutors should take when making decisions in relation to cases where it is alleged that criminal offences have been committed by the sending of a communication via social media. The guidelines are designed to give clear advice to prosecutors who

have been asked either for a charging decision or for early advice to the police, as well as in reviewing those cases which have been charged by the police. Adherence to these guidelines will ensure that there is a consistency of approach across the CPS.

Most recently the *Defamation Act 2013* also came into force on 1st January 2014.

5.2 The United States

Hinduja and Patchin (2014) compiled a record of state bullying and cyberbullying laws in the United States (see Figure 1 below).

State Cyberbullying Laws

A Brief Review of State Cyberbullying Laws and Policies



Sameer Hinduja, Ph.D. and Justin W. Patchin, Ph.D.

February 2014

	Bullying law	Include "cyberbullying":	Include electronic harassment	Criminal sanction	School sanction	Requires School Policy	Include off campus behaviors?²
Alabama	YES	NO	YES	NO	NO	YES	NO
Alaska	YES	NO	NO	YES	YES	YES	NO
Arizona	YES	NO	YES	NO	YES	YES	NO
Arkansas	YES	YES	YES	YES	YES	YES	YES
California	YES	YES	YES	NO	YES	YES	YES
Colorado	YES³	NO	YES	proposed	YES	YES	NO
Connecticut	YES	YES	YES	NO	YES	YES	YES
Delaware	YES	NO	YES	NO	YES	YES	NO
Florida	YES	YES	YES	NO	YES	YES	YES
Georgia	YES	proposed	YES	NO	YES	YES	proposed
Hawaii	YES	YES	YES	proposed	YES	YES	NO
Idaho	YES	NO	YES	YES	YES	YES	NO
Illinois	YES	proposed	YES	NO	YES	YES	NO
Indiana	YES	NO	YES	NO	YES	YES	NO
Iowa	YES	NO	YES	YES	YES	YES	NO
Kansas	YES	YES	YES	NO	YES	YES	NO

Figure 1 US State cyberbullying laws

They found that 49 states had a bullying law and that 19 of those included cyberbullying specifically, with cyberbullying laws proposed in four states. There were 48 states that included some form of harassment and 14 states had criminal sanctions for bullying or cyberbullying, with five states having criminal sanctions proposed. In terms of school-level requirements, 44 states had school sanctions, 49 required a specific school policy and 12 states included off-campus behaviour in their laws, with two proposed.

There were no bullying laws, however, at the federal level, although there was a Bill introduced into US Congress in 2009, the *Megan Meier Cyberbullying Prevention Act* (see www.govtrack.us/congress/bills/111/hr1966/text) which is still under review 5 years later.

The Act proposes, among other things, that Chapter 41 of Title 18 of the United States Code is amended by including the following definition into Section 881(a), whereby cyberbullying is:

any communication, with the intent to coerce, intimidate, harass or cause substantial emotional distress to a person, using electronic means to support severe, repeated and hostile behaviour.

A person who commits an offence under this Act shall be fined, or imprisoned for up to two years, or both. Note: this was the definition used in the *Enhancing Online Safety for Children* Discussion Paper (Australian Government Department of Communications, 2014: p 3).

Of particular interest is Patchin's revelation (pers com, March, 2014) that, whilst there are laws in these States, 'one thing we do not have, and I am not aware of anything that anyone else has, is a study of the impact [his emphasis] of legislative changes on cyberbullying behaviours. Many States here in the US have passed new laws, but none that we are aware of has been evaluated'. Clearly, ensuring that there is some evaluation component to assess the impact of any new legislation would seem relevant and of import, particularly when dealing with minors.

The following blog: <http://cyberbullying.us/deterring-bullying/> 'Deterring teen bullying: Dos and Don'ts' by Justin Patchin, Professor of Criminal Justice in the Department of Political Science at the University of Wisconsin-Eau Claire (Feb 14 2014), reflects on the ineffectiveness of using the law as a deterrent with adolescents, whose brain development is inadequate for sophisticated, rational decision making and makes the following observations:

New laws that clarify and support the roles of educators in responding to bullying are helpful, but those that seek to further criminalize are not likely to be effective at preventing the behaviors [sic]. Those who were dissuaded before will still be, but the added threat of increased legal punishment isn't likely to prevent additional people from participating.

The problem is that most teens (and many adults for that matter) simply don't stop to consider the possible costs prior to participating in a behavior [sic] (especially possible criminal consequences). They are usually absorbed in the moment and aren't thinking about what could happen if they are caught. Plus, the odds are that they won't be caught (or significantly punished).

The following website <http://cyberbullying.us/cyberbullying-laws/> articulates the laws which are enacted across the States, with further information.

Kueny and Zirkel (2012) conducted a comparative analysis of state legislation for school anti-bullying laws, based on the key components of definition, policy, notice, reporting, investigation, and consequences, finding wide variations between the states in all components. They found that the research evidence-base for the development of these laws varied substantially and that, generally, they did not meet reasonable levels of professional, evidence-based standards. Despite prior research showing that comprehensive anti-bullying programs were the most effective approach, only 10 of the then 42 states with anti-bullying legislation required a

prevention program, with few, if any, providing appropriate funding to those programs (Kueny & Zirkel, 2012).

It would seem then, that legislation without support for education campaigns and resources in school settings, which extend to the broader community, is counterproductive.

Professor Elizabeth Englander, Director, Massachusetts Aggression Reduction Centre, Bridgewater State University (Pers com, March 2014) stated that:

In Massachusetts, the most helpful element of the law has been the requirement that schools conduct training with all adults in the school and that they provide anti-bullying and anti-cyberbullying education to all students in K–12. Those are the elements which had the most impact.

Willard (2014) further notes that:

Bullying will never be effectively addressed by focusing on bullying incidents alone ~ making rules against bullying and punishing “the bully.” Bullying is grounded in the quality of interpersonal relationships. To reduce bullying and to limit its harmful effects requires focusing on the quality of relationships within the school community.

However, as a lawyer, she notes that the risks of school liability for failing to effectively address harassment or for inappropriately restricting free speech have significantly increased in the recent years. At the same time, however, she reports that schools are generally complying with state bullying prevention statutes and following common bullying prevention guidelines, and that school staff think what they are doing is effective (Willard, 2014: p 2).

However, the statutory definition of bullying does not exist per se but does ‘exist’ 49 different times, where each state has defined the term differently. This is a significant issue for determining actual prevalence. Further to this, some large scale surveys have only asked about ‘hurtful acts’. Under the general consensus of bullying definitions, this does not adequately capture the core elements which distinguish bullying from other conflicts.

Willard further notes that most of the statutory definitions, however, are based on Federal case law, which includes the Supreme Court cases of *Davis v. Monroe* (discriminatory harassment) and *Tinker v Des Moines* (free speech), as well as a key Circuit Court case, *Saxe v. State College* (school antibullying policy).

The statutory definition is the most objective, focuses on the harmful impact, and is the standard schools are required to enforce: “Pervasive or persistent hurtful acts directed at another student that have caused, or can reasonably be forecast to cause distress resulting in a significant interference with the ability of the student to receive an education or participate in school activities” (Willard, 2014: p 6).

Willard further suggests (2014: p 6) that 'Imbalance of power' is demonstrated based on objective 'evidence of the harmful impact', rather than trying to sort out the relative strength of various student characteristics. If a situation is pervasive or persistent and causing distress, and the targeted student is unable to get this to stop, there is an 'imbalance of power'.

In terms of effectiveness of statutes as a deterrence factor, Willard notes (2014: p 10) that there is:

no evidence that if schools are in compliance with these statutes this will achieve a reduction in bullying. Note that these kinds of statutory provisions have been in place from at least 2005 and there has been no reduction in student reports of someone being hurtful to them at school.

Willard (2014) outlines the various civil rights laws and cases, including an examination of Tort law, and statutory and policy provisions highlight how bullying relates to these. Noting that while 36 states included some form of restriction against cyberbullying, the definitions for this also widely varied. Willard further reports that only thirteen states have added language that specifically allows for school disciplinary intervention if a student's off-campus speech has caused a hostile environment at school for another student. Willard adds:

It is unadvisable to provide a separate definition for cyberbullying. Cyberbullying is simply bullying using digital means. The focus should remain on the hurtful acts, by whatever means, and the resulting harmful impact. (2014: p 48)

Again, the definitional issues raise concerns as to how the law would identify and deal with behaviours across a spectrum. In our terms, a hurtful act is not bullying.

5.3 Canada

According to PrevNet, Canada's authority on research and resources for bullying prevention (<http://www.prevnet.ca/bullying/cyber-bullying/legal-consequences>), cyberbullying can be dealt with under civil and criminal law, depending upon the situation.

Under civil law, there are three approaches to cyberbullying:

1. A cyberbully may be engaged in defamation
2. The person cyberbullying may be creating an unsafe environment by making the target feel that she or he cannot go to school without facing violence, teasing or exclusion.
3. A person is responsible for any consequences that he or she might reasonably have guessed would happen.

In the last approach, 'a person who is cyberbullying who suggests that a depressed student should kill herself would be liable if the student actually did kill herself, as

long as the person who was cyberbullying had reason to believe it was a likely result'.

Under Criminal Law there are two approaches:

1. Harassment is a crime under the Criminal Code
2. Defamatory libel is a crime under the Criminal Code.

However, several provinces and territories have laws specifically dealing with online and offline bullying. Citing <http://mediasmarts.ca/background/cyberbullying-law-fact-sheet> the following Provinces' approaches are outlined (See PrevNet.ca).

Ontario

The Education Act now includes a specific definition of "bullying". "Bullying" means aggressive and typically repeated behaviour by a pupil where,

- a) the behaviour is intended by the pupil to have the effect of, or the pupil ought to know that the behaviour would be likely to have the effect of,
 - (i) causing harm, fear or distress to another individual, including physical, psychological, social or academic harm, harm to the individual's reputation or harm to the individual's property, or
 - (ii) creating a negative environment at a school for another individual, and
- b) the behaviour occurs in a context where there is a real or perceived power imbalance between the pupil and the individual based on factors such as size, strength, age, intelligence, peer group power, economic status, social status, religion, ethnic origin, sexual orientation, family circumstances, gender, gender identity, gender expression, race, disability or the receipt of special education.

The amended Act also requires schools to provide "instruction on bullying prevention during the school year for every pupil," "remedial programs designed to assist victims of bullying" and "professional development programs that are designed to educate teachers in schools within its jurisdiction about bullying and strategies for dealing with bullying." Each school board is also required to "establish a bullying prevention plan for bullying in schools within the board's jurisdiction."

Quebec

An Act to prevent and stop bullying and violence in schools modifies the Education Act and the Act Respecting Private Education. It defines bullying as "any behaviour, speech, actions or gestures, including cyberbullying,

expressed directly or indirectly, in particular through social media, having the aim of injuring, hurting, oppressing or ostracising an individual". School boards are required to create anti-bullying plans and all school staff must take part in the plan.

Alberta

The Education Act was revised in 2012 to define bullying as "repeated and hostile or demeaning behaviour by an individual in the school community where the behaviour is intended to cause harm, fear or distress to one or more other individuals in the school community, including psychological harm or harm to an individual's reputation." The Act requires students to "refrain from, report and not tolerate bullying or bullying behaviour directed toward others in the school, whether or not it occurs within the school building, during the school day or by electronic means," while school boards must "establish, implement and maintain a policy respecting the board's obligation under subsection (1)(d) to provide a welcoming, caring, respectful and safe learning environment that includes the establishment of a code of conduct for students that addresses bullying behaviour."

Alberta's law is notable because it requires students to report cyberbullying if they witness it, with penalties including suspension and expulsion possible for those who do not.

New Brunswick

Section 1 of the Education Act includes both online and offline bullying in its definition of "serious misconduct." Students are also guaranteed a "positive learning and working environment" free from "bullying, cyberbullying, harassment and other forms of disruptive or non-tolerated behaviour or misconduct, including behaviour or misconduct that occurs outside school hours and off the school grounds to the extent the behaviour or misconduct affects the school environment." Principals are required to develop a positive learning and working environment plan and to report any incident of serious misconduct to the superintendent of the school district. Each school also must have a Parent School Support Committee that advises the principal on how to promote respectful behaviour and prevent misconduct, helps to develop policies on how to prevent disrespectful behaviour or misconduct and how to support both those students who have participated in disrespectful behaviour and those who have been affected by it.

Current proposal:

Bill C-13: *Protecting Canadians from Online Crime Act* is currently before the Parliament, and makes it a crime to distribute intimate images online without the consent of the person who is the subject of the photo. This relates to non-consensual sexting here. In particular Section 162.1 (1) states:

Everyone who knowingly publishes, distributes, transmits, sells, makes available or advertises an intimate image of a person knowing that the person depicted in the image did not give their consent to that conduct, or being reckless as to whether or not that person gave their consent to that conduct is guilty:

- Of an indictable offence and liable to imprisonment for a term of not more than five years or
- Of an offence punishable on summary conviction.

And further ascribes:

... in addition to any other punishment that may be imposed for that offence ...may make, subject to the conditions or exemptions that the court directs, an order prohibiting the offender from using the Internet or other digital network, unless the offender does so in accordance with conditions set by the court.

Accompanying this Bill is a new public awareness campaign against cyberbullying, which includes television and online ads and a website aimed at educating teenagers and their parents about the criminal consequences of online bullying and sending intimate images. A second phase will target youth by encouraging them to stop cyberbullying before it gets out of hand.

Critics of this Bill, however, note that only 4 pages in total are linked with cyberbullying, and the rest deals with other aspects of online activity and there are concerns about the power it gives to police to gather information.

What is of interest here is that it is the amendments to the Education Acts that have been used rather than criminal law provisions, and the associated requirement for some school sectors to provide instruction on bullying for each child during the school year. One sector mandates reporting by witnesses to cyberbullying, with penalties of expulsion and suspension for failing to do so.

5.4 Europe

5.4.1 European Union

Lievens (2012, p10) noted the following indicators of the importance of addressing cyberbullying, in the Council of Europe documents:

- The Recommendation on empowering children in the new information and communications environment (Council of Europe, 2006),
- The Declaration on protecting the dignity, security and privacy of children on the Internet (Council of Europe, 2008),
- The Recommendation on measures to protect children against harmful content and behaviour and to promote their active participation in the new information and communications environment (Council of Europe, 2009), and

- The Recommendation on the protection of human rights in social networks (Council of Europe, 2012).

The *European Convention on Human Rights*, one of the cornerstones of human rights protection in Europe, also provides guarantees with regard to the freedom of expression (Article 10) and the right to privacy (Article 8).

5.4.2 Belgium

According to Lievens, (2012, p11):

in relation to the national situation in Belgium ‘harassment by electronic communication means’ is criminalised. However, different elements must be present in order for this to be applicable.

- First, the harassment must be done by electronic means; this includes the Internet and SNS.
- Second, the perpetrator must have the intention to harass, and
- Third, the harassment must be done vis-à-vis a ‘correspondent’.

Lievens further reports:

The Criminal Code also contains a number of provisions that may be applicable to bullying in social networks. ... Article 422 bis of the Criminal Code may be applied to bullying.

This article punishes persons who menace an individual, while they knew or should have known that through their behaviour they would seriously disturb the peace of that individual. Moreover, the article specifies that if the targeted individual is particularly vulnerable because of a.o. age the punishment is doubled.

Lievens sums up by noting that whilst a number of existing legislative provisions can be applicable to cases of cyberbullying on social networking sites (SNS) in Belgium, ‘most are formulated in a technology-neutral manner, which implies that they may be applied in a SNS environment’. Lievens adds (2012: p 12) ‘There is thus no need for new legislation to address this issue’.

In discussing the liability of minors, Lievens notes:

The *Youth Protection Act of 1965* states that minors cannot be put on a par with adults with regard to the degree of liability and the consequences of their actions (Preamble, para. 4).

- However, if a minor commits an ‘act that is described as a crime’ they should be made aware of the consequences of that offence.

- As a result, the Youth Protection Act does impose, instead of the punishments of the Criminal Code, other measures, including supervision, education, disciplinary measures, guidance, advice or support.
- Measures can be imposed on parents or on the minors themselves.
- The age of the minor in question is taken into account;
 - Different measures will be imposed before and after the age of 12 years (article 37).
 - If possible, the judge may give preference to victim offender mediation (article 37bis).

Further to this: Lieven notes:

- From the moment that they are able to discern the scope of their actions, minors may be held civilly liable.
- This will be assessed on a case-by-case basis but judges have held that this may be *as early as the age of seven*

It can be added that parents and teachers may in certain circumstances be held liable for the acts of their children or pupils.

- For parents as well as teachers an assumption of liability has been included in article 1384 of the Civil Code.
- This means that, in order not to be held liable, the parents and teachers in question must prove that they did not commit a mistake in raising or supervising the child.

In terms of self-regulation, or a role for co-regulation with government, Lievens describes three recent collaborations but challenges the concrete outcomes of them, in turn suggesting that some government co-regulation might be needed to move them beyond aspirational principles, into some more accountable action:

Safer social networking principles for the EU

In February 2009, a self-regulatory charter titled 'Safer Social Networking Principles for the EU' (SSNPs) following a public consultation on online social networking by the European Commission (European Commission, 2008). The pan-European principles have been developed by SNS providers in cooperation with the Commission and a number of NGOs "to provide good practice recommendations for the providers of social networking and other user interactive sites, to enhance the safety of children and young people using their services" (European Social Networking Task Force, 2009). In order to achieve this goal one of the core elements of the SSNPs is **multi-stakeholder collaboration** (including SNS providers, parents, teachers and other carers, governments and public bodies, police and other law enforcement bodies, civil society and users themselves).

The seven principles that were put forward are the following:

- Principle 1: Raise awareness of safety education messages and acceptable use policies to users, parents, teachers and carers in a prominent, clear and age-appropriate manner

- Principle 2: Work toward ensuring that services are age-appropriate for the intended audience
- Principle 3: Empower users through tools and technology
- Principle 4: Provide easy-to-use mechanisms to report conduct or content that violates the Terms of Service
- Principle 5: Respond to notifications of illegal content or conduct
- Principle 6: Enable and encourage users to employ a safe approach to personal information and privacy
- Principle 7: Assess the means for reviewing illegal or prohibited content/conduct.

Two evaluations have demonstrated poor performances on the part of SNSs to respond to complaints quickly if at all:

- February 2010: only 9 out of 22 sites responded to complaints submitted by minors asking for help
- September 2011: only 17 out of 23 services responded to complaints or reports, 34 sometimes taking up to 10 days to do so.

CEO Coalition

- December 2011, 28 companies voluntarily formed the Coalition to make the Internet a better place for kids and published a Statement of purpose
- Focuses on 5 concrete action points:
 - Simple and robust reporting tools for users
 - Age appropriate privacy settings
 - Wider use of content classification
 - Wider availability and use of parental controls
 - Effective takedown of child abuse material

It is noted here that take-down of child abuse material is an action point, but it does not extend to questionable and hurtful material as would be used in cases of cyberbullying.

ICT Coalition for a Safer Internet for Children and Young People

- January 2012 another industry initiative was launched.
- 25 companies, including Facebook and Google, issued the Principles for the Safer Use of Connected Devices and Online Services by Children and Young People in the EU. Their focus is on
 - Content
 - Parental controls
 - Dealing with abuse/misuse
 - Child sexual abuse content or illegal contact
 - Privacy and control
 - Education and awareness

Finally, Lievens calls for a **comprehensive strategy to accompany existing laws**, so that young people are empowered:

- Increase awareness of young users of the fact that certain behaviour may have serious consequences (such as the applicability of criminal law);
- Provide young users with tools that enable them to report harmful behaviour;
- Educate parents, teachers as well as other actors, such as law enforcement and judges, on cyberbullying and sexting practices and their possible legal impact;
- Require SNS providers to take these issues seriously, invest in safety and respond to reports of cyberbullying and sexting in a suitable manner without delay; and
- Evaluate all measures that are taken regularly and critically, on the basis of up-to-date sociological, technical and legal research.

5.4.3 Germany

Dr Catarina Katzer (Pers Com 14/4/14) provided the following information:

...in the last weeks there are lots of news [sic] in Germany concerning creating new laws: last Friday our Minister of Justice, Germany, made clear that he will enact a penal law against commercial trade of nude photography (also adults) which embarrasses the victims. ...And the ministers of justice in the different Bundesländer in Germany want to discuss in June a law against Cyberbullying.

The following Press release (translated) accompanied this communication:

Dusseldorf

What happens on the Internet is not only virtual, but – for example, victims of bullying – very real. This would have consequences for the criminal law, says NRW Minister of Justice Kutschaty

Hate on the Internet: NRW Minister of Justice wants to have a Clause against cyberbullying – Ruhr Nachrichten –

North Rhine-Westphalia's Minister of Justice Thomas Kutschaty (SPD) calls for a cyberbullying paragraphs in German criminal law in order to help victims quickly.

Cyber crime is growing rapidly and the laws need to be modified, Kutschaty said in Dusseldorf. The most pressing is the need for action to protect young people against the excesses of social networks.

“Every day, people are victims of insults, defamation and exposure positions”, Kutschaty said. “The psychological damage of these acts is immense.” An independent criminal offense for cyberbullying was necessary so that victims could report the crime quickly. One of the biggest risks for teenagers.

Kutschaty urged the new government to also initiate an international convention against cybercrime. As envisaged in the black-red coalition agreement bringing the code to the Internet age is not sufficient, he criticized. The anonymity of the network facilitated crimes. "What is happening in the network, is not only virtual. It is quite real for the victims", the minister stressed.

5.4.4 Italy

Professor Ersilia Menesini: Dipartimento di Scienze della Formazione e Psicologia, Firenze (Pers Com 24/3/14) provided the following information:

Europe DG Justice on December 2013 organized a forum on fundamental rights for children where they included also bullying and cyberbullying.

As of 2003 all but six member countries of the OECD had taken initiatives to deal with bullying and violence in schools, whereby schools are required to have anti-bullying policies in place. While there is no EU legal framework regarding violence in schools, in several Member States there are laws that may be used to deal with specific forms of bullying.

Obtaining data about bullying as a form of violence against and among children is a difficult task due to a variety of definitions and the reluctance of children to speak out. This also makes comparisons problematic. Evidence is also lacking to explain what happens after bullying has been reported.

Noting the cultural and social differences in Europe which lead to a variety of practices and solutions, where institutions and supporting legal frameworks differ, impacting on the way schools approach and report on the issue of cyberbullying, a forum on the Rights of the Child explored the role of child protection can prevent and respond to bullying and cyberbullying across Europe.

From the Background Paper for Session 3: The Role of Child Protection Systems in Protecting Children from Bullying and Cyberbullying:

- "Bullying is a form of violence against children and is in violation of Article 19 of the UN Convention on the Rights of the Child (UNCRC)".
- "Article 19 UNCRC defines violence against children as "all forms of physical or mental violence, injury and abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse". As States parties to the Convention, EU Member States are obliged to take "all appropriate legislative, administrative, social and educational measures to protect the child from all forms of violence".
- "The UN Committee on the Rights of the Child's (UNCRC) General Comment No 135 noted that violence, harassment and bullying are unacceptable in any context and violate a range of human rights. Securing and promoting children's fundamental rights to respect for their human dignity and physical and psychological integrity, through the

prevention of all forms of violence, is essential for promoting the full set of rights in the Convention.

- According to the UNCRC General Comment No 16 all children have the right to accessible high-quality education free from violence, harassment and bullying. Schools should provide a supportive learning environment where all students feel safe. The UNCRC stresses that "children do not lose their human rights by virtue of passing through the school gates".
- "The 2006 World Report on violence against children is a crucial reference for policy makers, civil society and other stakeholders working on violence against children. It presents a detailed picture of the nature, extent and causes of violence against children in a variety of settings, including violence in schools, and proposes recommendations for action to prevent and respond to it".
- The EU is committed to promoting and supporting the realisation of children's rights in line with the UNCRC. In the context of the Daphne III Programme and its predecessors the Commission has co-financed a large number of projects aiming to protect children from violence. Children as victims of bullying at school are one of the priority areas under the 2013 Daphne III call for action grants, closed on 30 October 2013.
- Protecting children from exposure to harmful content online and empowering them to deal with risks such as cyberbullying is part of the Commission's 2012 Strategy for a Better Internet for Children. Safer Internet Centres have been instrumental in raising awareness on online risks, including cyberbullying, among children, parents and teachers.

In addition, alternative European Campaign/education approaches were highlighted:

- The Big March <http://deletecyberbullying.eu/the-big-march/> : a virtual, peaceful online demonstration against cyberbullying where young people create a personalised avatar of themselves, and eventually join masses of other citizens across the EU in marching across some of the most well-known websites on 11 June 2014.
- An Italian committee on communication approved a new code for providers to protect children on internet use.

5.4.5 Netherlands

Professor Simone van der Hof; Center for Law in the Information Society, Leiden University (Pers Com, 20/3/14) provided the following information:

The Dutch government is planning to have legislation on bullying in which they intend to include an obligation for schools to deal with bullying problems by, e.g., having effective anti-bullying programs in place. Currently, a review is being done on what would constitute effective anti-bullying programs.

In a paper exploring adolescents and cybercrime, van der Hof and Koops (2011) argued that:

Public policy with respect to adolescent behaviour and online risks is tilting towards more control. These developments in cybercrime policy that focus on criminal law as a policy instrument disturb the balance between the freedom of adolescents to develop into responsible and independent adults and controlling online risks. Other, more promising avenues, such as encouraging digital literacy of citizens and protecting those children who are particularly vulnerable, should rather be at the forefront of public policy. (2011: p 2)

In discussing the culture of control they write:

A major social trend is the rise of risk governance as an overarching paradigm for regulation in the risk society. Increasingly, policy problems are framed in terms of risks and the challenges of measuring, assessing, and controlling these risks. Combined with risk aversion, society tends to transform itself into a “safety state” in which safety—the real or perceived absence of danger—is an overarching value that trumps all other considerations.

....noting that ‘criminal law is a primary policy instrument with high levels of incarceration’. (van der Hof & Koops, 2011: p 5)

Also noted is the ‘tension [which] exists between the culture of control and the emphasis put on the values of individuality and personal freedom in Western society’ suggesting that adolescents are at the centre of that tension, and particularly so when online, highlighting the fact that adolescents naturally take risks, experiment and seek and cross boundaries as a normal part of development (van der Hof & Koops 2011: p 17).

5.4.6 Portugal

João Sebastião, University Institute of Lisbon, Center for the Resesarch and Studies in Sociology (Pers Comm, 19/3/14) provided the following information.

In Portugal there are no specific legal actions against bullying/school violence outside the general law about children and youth whom are immutable till 16 years old.

Till 16 they are under the guardianship of minors’ law which has the possibility of enclosing violent children in closed youth centers.

Inside schools there is (also because the guardianship of minors’ law is of universal application) the Students’ Code of Behaviour, which is applied to all the non-criminal situations (in discipline, low intensity violence, etc.)

5.4.7 Ireland

Dr Conor McGuckin, School of Education, Trinity College, Dublin (Pers Com 26/4/14) provided the following information from a report: *Cyberbullying and the Law* undertaken by himself and Dr Noel Purdy, Stranmillis University College, Belfast, for the Standing Conference on Teacher Education, North and South.

In addition, the National Anti-Bullying Coalition (NABC) has produced a document explicitly examining the role of cyberbullying and the Law in the Republic of Ireland (Quirke, 2014.):

Children's Rights and the Role of the School

The right to an education free from harassment is enshrined in the *United Nations Convention on the Rights of the Child* (1989) and bully/victim problems directly affects this right, with cyberbullying emerging as the latest challenge.

Two articles in the Constitution of Ireland are also of relevance when discussing bully/victim problems.

- Article 42.1–2 guarantees the right to an education for Irish children: regardless of where the child is educated.. “the State,... as common guardian of the common good....requires the child receive ...a certain minimum education, moral, intellectual and social” (p7).
- Article 40 is also relevant as it deals with the personal rights of the citizen, including the right to a good name (p7).

In terms of the management of bully/victim problems in schools, legislation was introduced in Northern Ireland in 2003, requiring all schools to have a stand-alone anti-bullying policy.

Under the *Education Act 1998*, whilst there are no specific, explicit provisions to deal with bully/victim problems, there are sections such as: appeals/grievances; and suspension/exclusion.

Most recently the *Education (Welfare) (Amendment) (No.2) Bill 2012* in the Republic of Ireland makes it the responsibility of the Board of Management of a school to record incidents of bullying, to implement anti-bullying procedures and to respond in writing to the parents/guardians within five working days, outlining the response taken by the school.

There is no specific law dealing with school-related cyberbullying in the Republic of Ireland, but there are a number of criminal law and education law provisions and guidelines given to schools which implicitly include these behaviours (p7).

Criminal Law

There is no legislation, which expressly deals with the issue of cyberbullying.

However, under criminal law, (*Republic of Ireland*) the *Criminal Damage Act 1991* is pertinent. Section 2 relates to damaging property, Section 3 concerns the threat to damage, and Section 5 relates to computer access and use of data.

In addition, the *Non-Fatal Offences Against a Person Act 1997*, relates to bully/victim problems: such as assault, serious harm; threats to kill or cause serious harm; coercion, and harassment. Where a victim is bullied over their phone this may constitute an offence under this Act.

Purdy & McGuckin, (2013, p6) noted that there are three key pieces of legislation which may provide protection from cyberbullying

1. Protection from Harassment (Northern Ireland) Order, 1997
2. Malicious Communications (Northern Ireland) Order 1988
3. The Communications Regulations (Amendment) Act 2007 (Quirke, 2014)

There is currently, to the best knowledge, no comprehensive published resource concerning cyberbullying in Northern Ireland, apart from two briefs from the Northern Ireland Anti-bullying Forum.

Providers

Quirke (2014) reports that requests can be made to Irish websites by the Gardaí (State police force of the Republic of Ireland), for information relating to cyberbullying, and notes that those outside of this jurisdiction do not have the same legal obligations to give this information, making it more difficult to track the online bullying occurring.

Anyone subjected to cyberbullying should keep all evidence.

Civil Law

A student may bring a case for assault if the cyberbullying places the student in reasonable apprehension of immediate violence. Intentional infliction of emotional distress may also be actionable in cases of cyberbullying.

Conclusion

There are legal avenues available, even though there is not specific legislation relating to cyberbullying. The *Non-Fatal Offences Against the Person Act 1997* can be used for physical threats, violence and harassment. The Tort of negligence can also be employed if it can be shown that the school breached its duty of care whilst at school.

Both reports call for an urgent response from government to that the legal and policy frameworks surrounding cyber/bullying be urgently addressed.

5.5 New Zealand

A recent report into bullying in New Zealand schools (Green et al., 2013) examined the views of teachers and senior management with regard to school bullying, and was one of the first New Zealand studies to look specifically at cyberbullying. The findings highlighted a number of key issues. There was a general perception that bullying begins very early in a child's school life and there was a lack of consensus regarding whether national guidelines should be introduced. It was apparent that cyberbullying was reported infrequently, despite previous research with students that demonstrated that it is a significant problem, and there was some tension regarding who is responsible for addressing cyberbullying. There was a need for up-to-date training and professional development, particularly with regard to cyberbullying, and despite the availability of whole school approaches to bullying prevention, relatively few schools were using these resources.

The New Zealand Government introduced the *Harmful Digital Communications Bill* in November 2013, with the aim of mitigating individual harm caused by digital communications and providing victims of with a form of redress. The Bill was referred to the Justice and Electoral Select Committee for consideration, submissions were made during February 2014, and the Committee's report is due by 3 June 2014. The Bill paves the way to amend and clarify existing legislation regarding digital communications, create new criminal offences to deal with the most serious acts, and create a new civil enforcement regime to deal effectively and quickly with harmful digital communications. In establishing the offence of causing harm by posting a digital communication, the Bill provides that a person found to have committed this offence is liable to imprisonment for up to 3 months, or a fine not exceeding NZ\$2,000. Within the civil enforcement regime, individuals may make initial complaints about harmful digital communications to an Approved Agency. This Agency may then investigate the complaint, resolving it through negotiation, mediation, and persuasion. If a complaint cannot be resolved, individuals may make an application to the District Court. These individuals could include the person who has allegedly suffered harm, a parent or guardian, a school principal, the Police, or the Chief Coroner. The Bill also creates a new offence of failing to comply with a court order and offences dealing with most serious forms of harmful digital communications. However, a spokesperson for New Zealand district court judges warned that the planned changes to law, in allowing victims to approach district courts directly, may result in a high number of 'merit-less' cases, leading an estimated annual increase in workload of 75 days (Davison, 2014). There is no specific mention of an information and education campaign to accompany the introduction and implementation of the new legislation.

6 Australian legal context

6.1 The UN Convention on the Rights of the Child

The United Nations General Assembly adopted the *UN Convention on the Rights of the Child* (UNCRC) in November 1989 (General Assembly resolution 44/25 of 20 November 1989). The UNCRC entered into force on 2 September 1990 and Australia ratified the UNCRC in December 1990.

By ratifying the UNCRC, the Commonwealth Government committed to implement its specific standards and measures over time and 'as a matter of international law each person under the age of 18 became entitled to all of the rights set out under the UNCRC' (Tobin, 2012).

The UNCRC enshrines in international law that children have the same fundamental human rights as adults, while also having the right to special care and assistance due to their vulnerability (UNCRC). Although Australia has ratified the UNCRC, successive governments have resisted incorporating its principles directly into domestic law. In its First Periodic Report to the Committee on the Rights of the Child, the Commonwealth Government stated:

Australia does not propose to implement [the UNCRC] by enacting the Convention as domestic law. The general approach taken in Australia to human rights and other conventions is to ensure that domestic legislation, policies and practice comply with the Convention prior to ratification. (Bryant, 2003).

Tobin (2012) notes that the United Nations' Committee on the Rights of the Child has identified four articles in the UNCRC that are fundamental to a child rights-based approach or analysis (p 43). Two of these are especially relevant to a consideration of Australia's current and future legal responses to cyberbullying incidents involving Australian minors.

The first requires that in the case of actions and decisions affecting an individual child, it is the best interests of that individual child which must be taken into account (Article 3). The second requires that a child capable of forming a view on his or her best interests must be able to give it freely and it must be taken into account (Article 12).

Other articles of the UNCRC considered to be particularly relevant for this research include:

- Article 13: the right to freedom of expression (subject to certain restrictions such as respect of the rights or reputations of others).
- Article 15: the right to freedom of association (subject to certain restrictions such as the protection of the rights and freedom of others).

- Article 16: (1) “No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation”; and (2) “The child has the right to the protection of the law against such interference or attacks”.
- Article 17: the right of access to information. States Parties shall also “encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her wellbeing, bearing in mind”, *inter-alia*, the provisions of Article 13...
- Article 19: “States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse... maltreatment or exploitation, including sexual abuse...”
- Article 28: (2) “States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child’s human dignity and in conformity with the present Convention.”
- Article 29: (1) “States Parties agree that the education of the child shall be directed to:... (b) The development of respect for human rights and fundamental freedoms...; (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin”.
- Article 37: (b) “The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time”.
- Article 39: “States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse... any other form of... degrading treatment or punishment... Such recovery and reintegration shall take place in an environment which fosters the health, self respect and dignity of the child”.
- Article 40: (3) “States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law, and, in particular:... (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected”; and (4) “A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; ...education...programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their wellbeing and proportionate both to their circumstances and the offence.”

The Law Council of Australia notes that identifying such rights at the outset helps to identify the different interests involved in relation to cyberbullying, and to resolve in a principled manner the tensions, which arise when seeking to determine the most appropriate policy responses. They note that such rights carry a different resonance depending on whether the child involved is a victim, perpetrator or bystander to

cyberbullying, and that balancing these interests should occur in a manner that ensures that any limitations placed on individuals' rights are necessary, reasonable and proportionate (Law Council of Australia, 2014).

6.2 Children as rights-holders: Children's civil law agency

In Australia, lawyers are encouraged to represent children who are competent to provide instructions without a litigation guardian when circumstances permit. Criminal matters, for example, do not involve a litigation guardian. Many complaints-based, administrative law causes of action do not require a child complainant to have a litigation guardian. Alternatively; family, care and protection and other civil law matters may provide for or in some cases require a child to have a litigation guardian (Blackman, 2002).

Australian parliaments and the courts increasingly recognise the right of Australian children to be represented, with the assistance of lawyers, in a range of jurisdictions. This development is consistent with Article 12 of the UNCRC that requires children able to formulate views to be given the opportunity to participate in legal processes which affect them. As a result, the position in Australia would appear to be that other than in circumstances where a litigation guardian is required, a young person of sufficient maturity who is capable of understanding the nature and effect of a solicitor client relationship can instruct lawyers to commence proceedings on their behalf or indeed can commence proceedings in their own right (Blackman, 2002: p 10).

Blackman (2002) describes the meaning of capacity to provide instructions:

It does not mean that the lawyer has to agree with the child or young person's instructions. Neither does it mean that the child or young person has the legal knowledge to provide instructions on every aspect of legal procedure or substantive law. It does mean that the child and young person is able to present his or her views as a considered response to the facts and circumstances of the case, with an understanding of the consequences of what will happen when the lawyer acts on those views (p 71–2).

Clearly, younger children may have difficulty understanding and participating in legal processes due to their immaturity and may be incompetent to provide instructions to a lawyer or to commence proceedings in their own right (Ross, 2008). Importantly, however, Blackman (2002) maintains that most representation of competent children and young people in civil and administrative jurisdictions can, and should be, undertaken as a direct representative of the child (Blackman, 2002: p 260). This proposition has relevance for current proposals for an administrative law-based takedown mechanism and/or civil enforcement regime to respond to the cyberbullying of minors, suggesting that children of sufficient competence should be permitted to initiate contact with those mechanisms directly in their own right or with appropriate representation where appropriate.

Blackman alludes to two possible legal avenues for students experiencing bullying in or around schools. The first, the criminal law is discussed below. Importantly Blackman acknowledges the emerging role of civil law as a response to harmful bullying. This would include legal action against teachers and schools for failing to protect children and young people and would involve claims for breach of both tortious and contractual duties of care. Blackman also alludes to actions against the bully, specifically noting a high number of applications made in the Victorian Children's Court asking for intervention orders against children in relation to bullying (Blackman, 2002: p 252).

In the course of this research only one reported case relating to a crimes compensation scheme and an application made by a minor for schoolyard bullying was found: *BVB v Victims of Crime Assistance Tribunal [2010] VSC 57* (5 March 2010). That case involved an appeal to the Supreme Court of Victoria; it is likely that schemes in Victoria and other jurisdictions have dealt with applications about the bullying of a minor, which have not been reported.

Other possible civil law actions against either teachers, schools or bullies include discrimination complaints, 'WorkCover' complaints, defamation notices and actions, assault and intentional infliction of psychiatric injury (Butler & Matthews, 2008: pp 44–53);

Under the *Broadcasting Services Act 1992* (Cth), the Australian Communications and Media Authority (ACMA) has the regulatory responsibility for a hotline where Australian residents and businesses are able to make complaints to the ACMA about content they consider to be offensive and may be prohibited. The research team was unable to identify any data disclosing the number of cyberbullying incidents of Australian minors involving the creation or distribution of online child sexual abuse material that have been investigated by the ACMA.

The research team is unaware of any quantitative or qualitative research into the current use and future potential of civil law avenues of redress to effectively resolve cyberbullying incidents involving minors, but notes the obvious attraction of court orders that are in the nature of an urgent injunction (to restrain behaviour) or in the nature of a takedown order as responses to cyberbullying incidents.

6.3 Relevant laws governing education

6.3.1 The duty to protect/prevent harm

UNCRC Articles 3, 16, 19 & 29 (ante) are relevant to this issue. In particular, Article 3 (2) states: 'Parties undertake to ensure the child such protection and care as is necessary for his or her wellbeing... and to this end, shall take all appropriate legislative and administrative measures'.

Much has been written about the civil liability of schools for bullying, some of it written also about cyberbullying (Srivastava et al., 2013; Butler 2006; Ford 2007). In summary, these articles and others like them review a growing literature on successful cases initiated by students or their parents against schools or school authorities around the world for breach of a school's duty to protect the students from some form of bullying.

Most recently Srivastava et al. (2013) said that in limited circumstances a school's duty to protect students from cyberbullying may extend 'beyond the strict temporal and/or geographical limits of the school day and the school grounds' (p 29). Ford (2007), whilst acknowledging that as a lawyer he could not pretend to be expert on what steps a reasonable teacher ought to take to minimise the risk of injury from cyberbullying, proposed the following for consideration derived from his decades of experience in acting for more than 50 educational institutions:

- learn about cyberspace and about cyberbullying
- amend your policies
- train your staff
- implement bullying prevention activities
- educate and warn your parents
- educate and warn your students
- strengthen your pastoral care programs.

Dwyer and Easteal (2013) conducted a review of the negligence and liability of Australian schools regarding bullying. They stated that a school could be held liable when bullying occurs during school hours, on school grounds, or via school-owned technology. A school could be liable if the behaviour occurs in relation to an activity that is connected to the school, or if the school is aware that a cyberbullying incident is taking place. In addition, a school could be liable if it has behaviour or anti-bullying policies, but fails to implement or monitor the policies adequately. As schools have a duty of care to protect students, a school might also be liable if it does not have an appropriate policy in place (Dwyer & Easteal, 2013). Butler et al. (2011) draw similar conclusions, as do Campbell and Završnik (2013). These studies highlight the importance of schools in addressing bullying and cyberbullying, whether through developing and maintaining relevant policies, or through educative approaches. It also ties in with the widespread feeling that cyberbullying is a behavioural problem that may be better dealt with by schools and families (Srivastava et al., 2013).

6.3.2 The duty to respond to cyberbullying

UNCRC articles 3, 12, 19 & 39 (ante) are relevant to this issue. In particular, article 19 (2) requires States Parties to take such protective measures, as appropriate, including 'effective procedures for the establishment of social programs to provide necessary support for the child and for those who have the care of the child, as well

as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment...’.

It would appear trite to say that schools have a duty to respond appropriately to a child who has been a victim of cyberbullying. That said, the research team was unable to find relevant Australian literature that explored a school’s specific legal duties in this regard, i.e. the legal duty to a victim following on from an incident in regards to things like medical care, counselling, safety and their participation in any associated processes such as disciplinary processes against the cyberbully.

This position would appear to be consistent with a trend identified throughout this research report – that significant and growing literature and evidence is directed to the role of education and prevention in the area of cyberbullying but that a similar evidence base and literature as regards good or best practice in responding to actual incidents is far less well developed.

6.3.3 The law of school discipline

UNCRC Articles 3, 12, 16, 28, 29 (ante) are relevant to this issue. In particular, Article 12 (2) states:

the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

This Article appears to incorporate the common law notion of natural justice. Australian law recognises that students and parents may have rights of natural justice where a school intends to suspend or exclude. Such rights would include receipt of notice of the intended decision, an opportunity to be heard, and a right of review of any decision (Bartholomew et al., 1999). Butler and Matthews (2008: p 324) note that there is contradictory authority for the proposition that non-government schools do not have to accord students and parents natural justice rights.

Bartholomew et al. (1999) also position alternative dispute resolution (ADR – also known as primary dispute resolution or early dispute resolution) within the context of a model for implementing procedural fairness in school decision-making. They opine that ADR processes are complimentary to procedural fairness, and may in fact provide a more meaningful form of participation in the decision-making process for young people (Bartholomew et al., 1999: p 14). In their model process, on substantiating the basis of a complaint, a school decision-maker has a number of options: take no further action, adopt behaviour management strategies, consider ADR processes, or impose a short-term suspension or enforced absence (Bartholomew et al., 1999: p 20).

Butler and Matthews (2008) identify the diverse legal sources of schools' disciplinary powers and the legal character of schools' disciplinary responses. Regarding the latter, they note that even serious disciplinary responses, such as suspension or expulsion, do not in law have the character of a 'punishment' in a criminal sense. As a consequence, the rule against double punishment does not apply and it is possible for a student who has committed a criminal act to be responded to both by school disciplinary means and the criminal justice system (Butler & Matthews, 2008).

They also note that six jurisdictions have statutory provisions concerning detention, whereas each jurisdiction has legislative provisions relating to suspension or exclusion (expulsion). For non-government schools, these matters are based on the terms of the contract formed between the student or his or her parents and the school at the time of enrolment (Butler & Matthews, 2008: p 323–5).

Other lawful action in the nature of discipline that may be considered in cyberbullying cases may include:

- Banning students from using own devices during the course of the school day
- Confiscating devices from individual students
- Requiring students to hand in their own devices to designated school staff at the beginning of the school day for collection when students go home
- Requiring students to delete material from their own devices
- Reporting the matter to the police
(Legal Services Directorate, NSW Department of Education and Communities, 2013).

In relation to this last action, reporting to police, there is much debate surrounding whether we risk criminalising children or if cyberbullying should be considered a disciplinary matter to be dealt with in schools using non-punitive approaches (Campbell & Završnik, 2013; Srivastava et al., 2013). Regardless, there is little disagreement that schools can, and should, play a vital role in addressing bullying and cyberbullying, with research showing that a school approach can be effective (see Cassidy et al., 2013). For example, a study in the UK found that those schools with comprehensive policies that covered the multiple forms and locations of bullying incidents had significantly lower rates of bullying (Smith et al., 2008b). However, cyberbullying was not covered specifically in those school policies.

A recent study examined bullying policies in Australian schools in terms of whether they met expectations of current law and whether a school might have discharged its duty of care (Butler et al., 2011). This study found substantial differences between schools in the development of policy, and the extent and manner of policy implementation, suggesting that policies should be inclusive and describe the full range of bullying – including cyberbullying – behaviours as a matter of best practice.

Policies should clearly describe the procedures for reporting and handling complaints, including police involvement where warranted, and policies should be

widely and consistently enacted and reinforced throughout the school community (Butler et al., 2011).

Cyberbullying was not defined specifically in the schools examined. Butler et al. recommended that any school bullying policy should include a specific definition of cyberbullying. Policies should include clear examples of the misuse of technology and be inclusive rather than definitive to ensure understanding and remove doubt. The Part B Report of this research describes how some schools respond to cyberbullying, based on research carried out in 2014 by IRIS Research. According to this research, the vast majority of schools do have policies which can be used to address cyberbullying, and many schools include cyberbullying in their teaching curriculum. Schools tend to deal with most incidents by mediation, involving parents or punishing cyberbullies.

Hinduja and Patchin (2011) describe a similar context in their study of US schools. They highlight the difficulties that educators and school administrators face in addressing problematic online student behaviour, while protecting the school in terms of civil liability and avoiding overstepping their authority. Hinduja and Patchin state that US law is ambiguous and evolving, with many schools focussing on the effects of cyberbullying constituting a substantial disruption to learning, where it interferes with the educational process or school discipline. Policies also focus on the use of school technology to harass or to threaten other students' civil rights.

The review by Cassidy et al. (2013) found overwhelming support in the literature for the need for schools to address cyberbullying through education, although they state that there is a current lack of evidence-based programs. Effective programs would aim to develop coping skills, digital citizenship and media literacy, promote positive uses of technology, foster empathy and positive self-esteem, and promote positive bystander behaviour. As a minimum, schools should update and monitor existing policies to include cyberbullying, so that any policy is applicable and enforceable.

Cassidy et al. (2013) also highlight the importance of the school environment with a focus on ethics of care, such that school norms promote helping and prosocial behaviours, making it more likely that young people will approach and report incidents to adults. The literature showed that young people prefer approaches that are supportive and that give advice, rather than approaches that are punitive. There was some evidence to show that traditional anti-bullying strategies can be helpful with cyberbullying, which stands to reason given the overlap between the two forms. The more effective anti-bullying strategies were those that took a whole of school approach. It was apparent that children and young people should play a major role in developing any approach to cyberbullying, which corresponds with a UK study that showed the importance of the sharing of expertise when developing cyberbullying policies (Paul et al., 2012a). This aligns with the widely-held belief of young people that they know the technology better than adults (Cassidy et al., 2013). In addition, young people's definitions of bullying differ substantially to those of researchers; therefore, it becomes imperative that young people be included in

the development of clear criteria and assumptions about bullying and cyberbullying, and communicate those criteria effectively (Vaillancourt et al., 2008).

As part of the UK study by Paul et al. (2012a; 2012b), young people were asked their opinions about what might constitute a suitable cyberbullying sanction, with their responses not differing substantially from existing policy. They were generally more lenient, providing more opportunities for the bullying to stop, with greater family involvement for more persistent cyberbullying, rather than harsher punishment. Around half of the students felt that young people were best placed to have responsibility for protecting against cyberbullying, although this does not marry with their insufficient understanding of school and other sanctions. The majority of the remaining students suggested that a supportive family would provide better protection against cyberbullying. Nonetheless, this study found that the information regarding legislation and guidelines that was available at national, local and school levels was not well integrated at the individual level. Put simply, young people lacked awareness (Paul et al., 2012a; 2012b).

6.4 Children's criminal responsibility

Just as children in Australia are holders of rights, so too are they holders of responsibilities. Under Australian law, children can be held responsible for their crimes upon reaching the age of 10. Between the ages of 10 and 13, Australian children are subject to the legal presumption of *doli incapax*. According to this presumption, a child does not have the capacity to be criminally responsible and so cannot be found guilty of an offence unless the prosecution proves that the child understood the wrongfulness of the behaviour alongside all the other offence elements, i.e. that the behaviour was wrong and not merely naughty (Crofts & Lee, 2013).

At the age of 14, however, the criminal responsibility of Australian minors is the same as that of adults. Crofts and Lee (2013: p100), referring to young people and sexting, suggested that children, even those over the age of 14, may lack the requisite level of understanding that the consensual taking and distribution of sexual images may be wrong, rather than just naughty.

Kift et al. (2010), however, suggested that most children aged 10–13 are found criminally responsible, so the question of criminal responsibility as an impediment to prosecution will rarely arise. A scarcity of reported cases dealing with criminal responsibility for cyberbullying, and a lack of police and prosecution data relating to this issue, means that the impact of the presumption of *doli incapax* on the application of the criminal law in response to cyberbullying will remain unclear.

6.5 Young people, police and youth offender options

Young people's cyberbullying may bring them into contact with the police. The police in each state and territory are empowered by legislation and common law, to respond in a similar range of ways which carry differing levels of formality and consequences (Weatherburn et al., 2012).

6.5.1 Police discretion

Police can respond to a young person's cyberbullying in a range of ways that will depend on a police officer's judgement about which is the right response to use in the circumstances. In exercising this discretion, police officers take into account a host of factors including severity of the conduct and co-operation of the young person. The broad options open to police officers under state or territory youth offender legislation or the common law tend to be: to assist parties involved, to give an informal warning, to issue a formal caution, to use a form of youth justice conferencing, and finally – as a last resort – to initiate criminal proceedings (Weatherburn et al., 2012; Cunneen, 2008).

While the common law plays more of a role in some states than others, generally speaking youth offender legislation in each state and territory provides the legal framework for police responses to young people suspected of committing a criminal offence. An officer in exercising his or her discretion will likely have regard, indeed is required to have regard, to the application of these diversionary options in preference to commencing criminal proceedings wherever appropriate (Weatherburn et al., 2012; Cunneen 2008). State and territory youth offender legislation are presented in Section 8 below.

6.5.2 Assistance

The least formal response to a young offender's behaviour is to simply mediate between the people involved. This involves the police officer resolving the issue by talking to the young person and helping them to understand that what they did was against the law. This is often accompanied by the police officer settling the matter with any aggrieved people by trying to undo or mitigate any damage caused. Assistance may include advice to the young people, information provision, referral to organisations, and school crime prevention activities (Cunneen, 2008: p 193). This response does not go on a young person's criminal record and is unlikely to be logged administratively.

6.5.3 Informal warning

The police can choose to give an informal warning to a young person who commits a minor offence. These warnings are usually given on the spot and do not require a young person to admit to the offence. These warnings do not get put on a young

person's criminal record, but may be recorded for the police's own records. Parents or guardians may be contacted (Weatherburn et al., 2012; Cunneen, 2008).

6.5.4 Formal caution

A formal caution is like a warning except that it is more serious and is officially recorded. It is generally administered at a police station and authorised by senior police personnel. It does not appear on the young person's criminal record, but does appear on separate records, which specialised children's courts may access in order to determine sentences. To receive a caution, a young person has to admit having committed the offence. Since young people often do not understand the legal consequences of admitting certain things, states and territories often require cautions and accompanying admissions to be made while an adult is present and can assist the young person. Such cautions are usually given as an alternative to criminal prosecution, and aim to impress upon the young person the severity of their behaviour. The caution is often accompanied by the police officer explaining why the action of the young person was wrong (Weatherburn et al., 2012; Cunneen 2008; Sanders, 2010).

6.5.5 Youth justice conferencing

Youth justice conferencing is a process that attempts to help young people understand the impacts of what they have done. This involves a meeting of the young offender, the victim, support people and others relevant to the case, in which everyone may talk about the crime and its impacts and what the offender can do to repair the harm. This is done in a non-adversarial environment, and is often mediated or facilitated by a neutral third party. In some states the police have the discretion to refer a young person to youth conferencing, whereas in other states it can only happen if a court orders it. In all states though, conferencing is available only where the young person admits to the offence. Like a formal caution, the admission cannot be used to prosecute the young person and will not result in a criminal record. However, it can still be taken into account by a specialised children's court in future proceedings (Weatherburn et al., 2012; Cunneen, 2008; Sanders, 2010).

6.5.6 Criminal proceedings

As a matter of last resort, the police may treat a young person's breach of the law in much the same way as an adult's. Charging and prosecuting a minor is generally reserved for the most serious offences or where the young person has shown an unwillingness to engage in alternative processes like youth justice conferencing. If criminal proceedings are commenced, then, depending on the state, locality within a state or territory, or nature of the offence, the young person may appear before a specialised children's court or a normal court. Other circumstances in which police may initiate criminal proceedings include if the young offender legislation doesn't

apply to the specific offence; if the young person chooses to go to court instead of taking up the offer of a caution or conference; and if for some reason completing a caution or conference proved impractical (Weatherburn et al., 2012; Cunneen, 2008; Sanders, 2010).

6.6 Sentencing young offenders under Commonwealth criminal law

Australian states and territories are responsible for their own criminal laws as there is no single body of criminal law governing the whole of Australia. The Commonwealth Government may, however, enact federal criminal legislation pursuant to the powers vested in the Commonwealth Constitution and has done so in relation to, for example, telecommunications, taxation, immigration, and trade (Findlay et al., 2009).

It has been suggested that s. 474.17 of the *Criminal Code Act 1995* (Cth) (using a carriage service to menace, harass or cause offence) is broad enough and flexible enough to permit the prosecution of most cyberbullies who are minors (Australian Federal Police 2014; Langos 2013). Whilst one police officer interviewed in the Part B Report indicated that police officers in his state or territory were unlikely to commence criminal proceedings and investigations under the Commonwealth Criminal Code, that was not the case for the majority of states and territories.

Section 474.17 carries a maximum penalty of three years imprisonment. As with all criminal offences, it would be open to a court in sentencing to impose a sentence that is proportionate to the circumstances of the case including the age of the offender (ss. 16 A (1) & (2) *Crimes Act 1914* (Cth)) in accordance with both common law and statutory sentencing principles, including those principles that apply specifically in each jurisdiction to the sentencing of minors. Indeed, as three years is the maximum sentence, there are a range of alternative sentences that would be considered first in the context of a young offender; imprisonment would not be imposed unless the court was satisfied, after having considered all other sentencing options, that no alternative sentence was appropriate in all of the circumstances of the case (s. 17 A (1) *Crimes Act*).

Section 4B of the *Crimes Act* provides that, unless the contrary intention appears, a court may impose a fine instead of imprisonment. Under section 4J of the same Act, a s. 474.17 offence could be dealt with summarily, and as a consequence the maximum penalty that could be imposed would be 12 months imprisonment or a fine of up to 60 penalty units.

At the state or territory level, when sentencing minors, courts are generally able to access alternative sentencing options that are available under state and territory law such as a fine, good behaviour bond or community service order (s. 20C *Crimes Act*).

The criminal code also contains a number of alternative and more serious criminal offences that would apply to cyberbullying conduct both online and via telecommunications services that together would have application to the broadest range of significant cyberbullying incidents. The research team has been unable to find any literature in which policing practice, or court's sentencing practices, as regards minors involved in cyberbullying offences, has been investigated.

Nonetheless, following on from the discussions regarding criminal responsibility, youth offender diversionary options and the sentencing of young Federal offenders, it can be seen that only the most serious of cases involving cyberbullying by a minor would find their way into a court, and that within that small group, again only the most serious of cases, or perhaps cases involving repeat offenders, would result in a sentence that imposes a period of detention. This would appear to be an outcome that is entirely consistent with the dominant views expressed throughout this research to the effect that criminalisation of a young cyberbully and/or the detention of a cyberbully should be a matter of absolute last resort.

6.7 State and territory criminal laws

There are a host of state laws capable of regulating instances of cyberbullying where the conduct falls within the scope of existing offences (Kift et al., 2010). To illustrate, Langos (2013: p 175) provides a summary of applicable laws in the South Australian context. Keeping in mind the generally accepted definition of cyberbullying, it is apparent that each of the identified existing criminal provisions below may regulate the specific manifestations of cyberbullying. This demonstrates that the most serious forms of cyberbullying are governed comprehensively in South Australia, albeit in a somewhat piecemeal manner (Langos, 2013).

Table 1 Existing criminal laws applicable in South Australia

Existing criminal laws applicable in South Australia	Prohibited behaviour
<i>Criminal Law Consolidation Act 1935 (SA) s 19.</i>	Unlawful threats
<i>Criminal Law Consolidation Act 1935 (SA) s 20.</i>	Assault (by words or conduct)
<i>Criminal Law Consolidation Act 1935 (SA) s 19AA.</i>	Unlawful stalking
<i>Criminal Law Consolidation Act 1935 (SA) s 257.</i>	Criminal defamation
<i>Summary Offences Act 1935 (SA) s 23AA</i>	Indecent filming
<i>Summary Offences(Filming Offences) Amendment Act 2013 (SA)</i>	Filming offences
Federal legislation: <i>Criminal Code (Cth) s 474.17, s 474.15.</i>	Misuse of telecommunications

Source: Langos, 2013

Reviews of the Australian context indicate that the other states have similar applicable criminal laws (Butler et al., 2009; Kift et al., 2010; Srivastava et al., 2013). For example, all Australian jurisdictions now have legislation prohibiting stalking, proscribing behaviour that is calculated to harass, threaten or intimidate (Butler et al., 2009). These offences aim to contain, for example, domestic violence, which includes behaviours where there is an imbalance of power. It is clear, therefore, that these offences are of particular relevance to cyberbullying, which has a similar exploitation of power imbalance, as does all bullying (Butler et al., 2009: p 92). In addition, all states and territories have threat offences which may apply where cyberbullying does not result in physical injury, but the target is in fear of personal violence. Under the *Crimes Act 1900 (NSW)*, for example, section 31 makes it an offence to maliciously send or deliver, or cause to be received, any document that threatens to kill or inflict bodily harm. Other Australian jurisdictions prohibit cyberbullying in terms of making threats to harm, injure or endanger another (Butler et al., 2009: p 92).

Langos (2013) states that South Australia and other jurisdictions have existing legislation to regulate serious instances of cyberbullying. However, introducing cyberbullying legislation based on a narrow definition will bring clarity to the way that cyberbullying is understood and increase community awareness of cyberbullying as unacceptable conduct. Langos suggests that media coverage associated with law reform would generate dialogue and raise awareness of what constitutes cyberbullying and its harmful effects. In contrast, Cassidy et al. (2013) argue that law reform is not the most effective or important approach, but that it can be a component, with school administrators, teachers and parents having a responsibility to increase their awareness of the relevant legal context. This may lead to an increased likelihood of any intervention being accepted by the wider community and give greater credibility to an intervention. However, Cassidy et al., temper this by emphasising the need for research evidence to inform policy and practice, while looking beyond the incident and the impulse to respond punitively, addressing instead the core of antecedents of harmful behaviours.

The possible impact of criminalising cyberbullying can be seen in a large scale survey of a representative sample of the population, the Legal Australia-Wide Survey (LAW Survey), which provides a quantitative assessment of a wide range of legal needs. This survey explored the nature of legal problems, their resolution, and the groups that struggle with the weight of their legal problems (Coumarelos et al., 2012). The study found that legal problems often had considerable impacts on everyday life, including adverse consequences on health, financial and social circumstances. About half of the legal problems in all jurisdictions (48–57 per cent) were rated as being ‘substantial’, having a ‘severe’ or ‘moderate’ impact on everyday life. Importantly, young participants aged 15 to 17 (n = 1,044) cited prevalence rates of legal problems that approached the levels of those over 18. Young females reported significantly higher prevalence rates of substantial legal problems than young males, at 4.9 and 1.9 per cent, respectively. One of the most

common problems cited by young people was education-related bullying and harassment, for both females (5.8 per cent) and males (3.5 per cent). The study found that young people had disproportionate experiences of legal problems, with issues such as stress-related illness, physical ill-health, breakdowns in relationships (family, peer, romantic), being forced to move home, and loss of income. Those young people who were homeless, suffering mental illness, and not living with either parent, were particularly vulnerable to substantial legal problems (Macourt, 2014).

King (2010) states, however, that some researchers question the effectiveness of educational measures as a response to cyberbullying, as they lack the stronger deterrent effect of specific cyberbullying laws that prohibit and punish such behaviour. Kift et al. (2010) agree that using the law as a deterrent may be an effective approach; however, there is a risk that a punitive approach will change the dynamic, such that perpetrators might focus less on the harm that their actions cause and focus more on the institution. This may result in perpetrators exerting greater effort to avoiding detection, rather than any intervention having a positive influence by modifying the cyberbullying behaviour. There is an existing perception that cyberbullies are anonymous and undetectable, whereby perpetrators already believe that threats of sanctions are ineffective. As it currently stands, many cyberbullying victims do not report incidents to adults. There are a variety of reasons for this, with victims feeling embarrassed, that they will not be believed, or they have a sense of responsibility for being a target. Victims may fear losing access to technology or that adults may be unable to solve the problem or worsen it. This underreporting will influence the severity with which institutions and organisations consider cyberbullying, thereby affecting how they address issues systematically. Kift et al. (2010) conclude that schools may be best placed to deal with cyberbullying using disciplinary measures. It is generally accepted that there is a need to investigate whether it is more effective to criminalise cyberbullying or use non-punitive approaches with young people (Campbell & Završnik, 2013).

6.8 Role of parents

Few would dispute the importance of parental involvement in any response to bullying or cyberbullying (e.g. Kift et al., 2010; Srivastava, 2013). Given that cyberbullying often happens in the home, parents can play a major role in decreasing cyberbullying. Parents can monitor young people's online behaviour and, more importantly, communicate with them about their online social lives, as they might do regarding their offline social relationships (Kift et al., 2010). Parental behaviour and attitudes can directly influence the behaviour of their children. For example, a US study of young people aged 11 to 14 years found that those who had higher appraisals of procedural justice within their family conflict resolutions reported lower frequencies of bullying. This was explained in part by young people internalising their parents' attitudes and behaviour towards them during the course of conflict resolution (Brubacher et al., 2009). Low and Espelage (2012) found that reduced parental monitoring was a significant predictor of non-physical bullying and

cyberbullying in 10 to 15 year old students. Low and Espelage highlight the importance of family, with the social interactions at home playing a significant factor in the development of aggressive behaviour, through self-control and emotion management. They concluded that current findings suggest that comprehensive prevention programs to target self-regulation and social competencies would impact both forms of bullying.

6.9 Adolescent development

Whether interventions are centred on school, the home, or on the legal context, it is accepted that bullying behaviour is something that the majority of children report engaging in at some point during their school years (Pepler et al., 2008). Accordingly, any interventions must be both contextual, with a focus on strained relationships with parents and risky peer relationships; and developmental, with a focus on the behaviour, social cognition, and social problem-solving skills of young people (Pepler et al., 2008). For example, the ability to empathise develops in parallel with developmental processes and brain maturation, combined with the age-related growth and activation of underlying neural structures. It is during the transition from childhood to adolescence that neuronal reactions to emotional stimuli shift from limbic structures (e.g. amygdala) to more frontal regions (e.g. pre-frontal cortex) of the maturing brain (Georgi et al., 2014; Killgore & Yurgelun-Todd, 2007).

These physiological changes relate to the cognitive and social development of young people (Smetana et al., 2006). For example, the findings of a recent study of 3,112 Australian students aged 10 to 19 years found that those who cyberbully reported a lack of awareness of the impact and harshness of their actions, suggestive of reduced empathy and limited moral engagement (Campbell et al., 2013). Furthermore, research into adolescent brain development has demonstrated that mature decision-making does not emerge until the mid-twenties (Cauuffman & Steinberg, 2000; Steinberg & Scott, 2003). A notable example of this research was on adolescents' decision-making competencies and developmental maturity in the context of the legal system. Cauuffman and Steinberg measured psychosocial maturity in terms of responsibility, perspective, and temperance when making decisions. They found that socially responsible decision-making was significantly less common among adolescents than young adults. A review by Steinberg (2007: p 55) concluded that adolescence is a time of heightened vulnerability for risky behaviour due to the temporal gap between puberty, which impels adolescents toward thrill seeking, and the slow maturation of the cognitive-control system, which regulates these impulses. Steinberg further stated that this view partly explains the limited effectiveness of educational interventions designed to change adolescents' knowledge, beliefs, or attitudes. He suggested that, rather than attempting to alter the way adolescents think about risk, interventions that change the contexts in which risky behaviour occurs may be more successful.

6.10 Industry (social network sites)

There is a general expectation that any approach to address cyberbullying should be collaborative, with joint responsibility by industry and consumers (e.g. Byron, 2008). Coyne and Gountsidou (2013) state that industry should provide the technical features to manage risk online, while contributing to the education of young people, parents and teachers in the safe use of technology. There is much evidence to indicate that this is occurring in the European Union, as shown by the development of frameworks and industry codes of practice. However, there is limited evidence of widespread conformity to industry codes, suggesting that many, but not all, organisations, are working effectively towards implementing best practice in fostering safer use of technology (Coyne & Gountsidou, 2013).

7 Conclusions

The literature confirms that cyberbullying is a global, behavioural and relationship-driven phenomenon, embedded in understandings and definitions of traditional bullying, but with far reaching consequences due to the potential size of the audience, levels of anonymity, and the power of the written word and visual imagery to impact beyond the school in a 24/7 environment.

Whilst most countries examined are endeavouring to find some legal approach to address cyberbullying, often in response to youth-related suicides, most are finding it difficult and complex to do so.

Addressing cyberbullying requires a multi-pronged approach, whereby young people and their parents are educated about digital citizenry, and where sanctions are put in place which deter, without being unnecessarily punitive, and which are developmentally appropriate.

8 Young offender legislation (Australia)

Table 2 Young offender legislation (Australia)

Jurisdiction	Act	Age	Offences included in Act's police diversionary operations	Informal (on the spot) warning	Formal warning or caution	Juvenile justice conferencing
NSW	<i>Young Offenders Act 1997</i>	s. 4: over the age of 10 years and under the age of 18 years.	s. 8 (1): summary offences and certain indictable offences that may be dealt with summarily including multiple offences against the person, stalking and intimidation, fraud, hoaxes, identity offences, blackmail, recruiting children and publishing indecent articles. Does not include crimes of act of indecency and aggravated act of indecency and all offences under the <i>Crimes (Domestic & Personal Violence) Act 2007</i> .	s. 13: permitted for summary offences only. s. 14 (2): crimes of violence excluded.	s. 18: permitted for all offences covered by the Act. s. 22: police must explain the nature of the allegations and the right to obtain legal advice before asking the child whether they admit to committing the offence.	s. 35: permitted for all offences covered by the Act. s. 37 (1): officer must determine the matter is not appropriate for a caution. s. 39: police must explain the nature of the allegations and the right to obtain legal advice before asking the child whether they admit to committing the offence.
WA	<i>Young Offenders Act 1994</i>	s. 3: a person who has not reached the age of 18.	Offences excluded from police diversionary operations in the Act are offences that fall under Schedule 1 and/or Schedule 2.	s. 22B: police officer must first consider whether it is more appropriate to (a) take no action, or (b) administer caution to the young	s. 22 (1) police officer can caution the young person instead of laying a charge. (2) caution in writing or orally (4) any admission made by the young person	s. 27: prosecutor may refer the matter for consideration by a juvenile justice team instead of laying a charge. s. 28: court may refer the matter for consideration by a juvenile justice team at any time before the court records

Jurisdiction	Act	Age	Offences included in Act's police diversionary operations	Informal (on the spot) warning	Formal warning or caution	Juvenile justice conferencing
				person.	cautioned around the time the caution is given is not admissible in proceedings as evidence of any matter to which the caution refers. s. 23: caution preferred. s. 23A (1) caution certificate must be given.	a finding that the young person is guilty. s. 29: first offenders usually should be referred to a juvenile justice team.
QLD	<i>Youth Justice Act 1992</i>	s. 4: a child is a person who has not turned 17 years.	s. 11: offences other than serious offences. s. 8: (1) serious offences are offences of a type that, if committed by an adult, would make the adult liable to imprisonment for 14 years or more. (2) An offence is not a serious offence if it is an indictable offence that can be dealt with summarily.	Act is silent. Police rely on discretionary police warnings (informal and not recorded).	s. 15: (1) a police officer instead of bringing a child before a court, may administer a caution to the child. (2) the child is not liable to be prosecuted for the offence. (3) the caution is not part of the child's criminal history. s. 16 (1): prior to administering a caution (a) the child must admit committing the offence and; (b) consent to be cautioned.	s. 22: (1) a police officer may refer an offence for conference if (a) a child admits to committing the offence (b) the police officer considers it relevant and appropriate. (2) the police officer may require the child to attend the conference as directed by the police officer. (3) if any circumstance mentioned in ss (4), (5) occur the offence may be referred back to the police officer by written notice. (8) the Police officer must take reasonable steps to inform the child they have

Jurisdiction	Act	Age	Offences included in Act's police diversionary operations	Informal (on the spot) warning	Formal warning or caution	Juvenile justice conferencing
						received notice.
VIC	<i>Children, Youth and Families Act 2005</i>	s. 3: over the age of 10 years and under the age of 18 years.	Act is silent.	Act is silent. Police rely on discretionary police warnings (informal and not recorded).	Act is silent. Formal cautioning of young offenders not supported by specific legislation.	Police cannot refer.
SA	<i>Young Offenders Act 1993</i>	s. 4: over the age of 10 years and under the age of 18 years.	ss. 6 and 7: apply to minor offences. s. 4: A minor offence is any offence committed by a young offender not excluded by the <i>Young Offenders Regulations 2008</i> , that the police officer believes should be dealt with as a minor offence. As at 1/05/2014, no offences are excluded.	s. 6: if the youth commits a minor offence, the police officer may informally caution the youth.	s. 7 (1)(a): if the youth admits the commission of the minor offence, the Police officer can decide to issue a formal warning. s. 8: (1) a police officer can issue a formal warning for a minor offence. (2) police officer must explain nature of the offence, issue the caution in the presence of a guardian of the youth, and must be put in writing.	s. 7 (1)(b): police officer can notify a Youth Justice Co-ordinator if a youth admits the commission of a minor offence, so that a family conference can be convened to deal with the matter. s. 8 (7)(a): If a youth does not comply with a requirement made under s. 8, a police officer can refer the matter to a Youth Justice Co-ordinator so that a family conference can be convened. s. 11: (1) a family conference consists of a Youth Justice Co-ordinator, the youth, those invited under s. 10, and a representative of the Commissioner of Police.

Jurisdiction	Act	Age	Offences included in Act's police diversionary operations	Informal (on the spot) warning	Formal warning or caution	Juvenile justice conferencing
TAS	<i>Youth Justice Act 1997</i>	s. 3: a person who is 10 or more years old, but less than 18 years old.	s. 3: offence means any offence other than a prescribed offence. s. 3: lists prescribed offences.	s. 8: if a youth admits the commission of an offence, the police officer can issue an informal warning.	s. 9: (1)(a) If a youth admits the commission of an offence, the police officer may decide to issue a formal caution. (2) police officer must explain the nature of the offence, and that the youth is entitled to obtain legal advice. s. 10 (1): police officer can issue a formal caution. (4) caution must be made in the presence of a guardian or a responsible adult, be put in writing, and contain details of the offence and the police officers name.	s. 9: (1)(b) police officer can require the Secretary to convene a community conference to deal with the matter. (2) police officer must explain the nature of the offence, and that the youth is entitled to obtain legal advice. s. 15: (1) family conference consists of the facilitator, the youth, those invited under s. 14, a representative of the Commissioner of Police.
ACT	<i>Children and Young People Act 2008</i>	s. 11: a child is a person under 12 years old. s. 12: a young person is a person who is 12 years old	Act is silent.	Act is silent. Police rely on discretionary police warnings (informal and not recorded).	Act is silent. Formal cautioning of young offenders not supported by specific legislation.	<i>Crimes (Restorative Justice) Act 2004</i> s. 12: applies to 'less serious offences', which is an offence that carries a term of more than 10 years (or more than 14 if the offence relates

Jurisdiction	Act	Age	Offences included in Act's police diversionary operations	Informal (on the spot) warning	Formal warning or caution	Juvenile justice conferencing
		and not yet an adult. <i>Legislation Act 2001</i> Pt 1: adult is a person who is at least 18 years old.				to property), s. 15: applies to 'serious offences' if the offender pleads guilty. s. 16: domestic violence offences committed by young person. s. 22: who can refer a matter to restorative justice. s. 25: must explain nature and procedure of restorative justice. s. 36: must consider suitability of offender to restorative justice.
NT	<i>Youth Justice Act</i>	s. 6: a person under 18 years of age.	s. 38: does not include offences within the meaning of s 9 <i>Fines and Penalties (Recovery) Act</i> and Pt V, VI <i>Traffic Act</i> . s. 39: offence other than a serious offence, as prescribed by the regulations.	s. 39 (2)(a): police officer must give a verbal warning if considered appropriate. s. 40: youth and responsible adult must consent to diversion.	s. 39 (2)(b): police officer must give a written warning if considered appropriate. s. 40: youth and responsible adult must consent to diversion.	s. 39 (2)(c): police officer must cause a Youth Justice Conference to be convened if considered appropriate. s. 39: Youth Justice Conference includes a conference with the victim(s) of the offence. s. 40: youth and responsible adult must consent to diversion.

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Social Policy Research Centre

Level 2, John Goodsell Building
Faculty of Arts and Social Sciences
UNSW Australia
UNSW Sydney 2052 Australia
t +61(2) 9385 7800
f +61(2) 9385 7838
e sprc@unsw.edu.au
w www.sprc.unsw.edu.au