



Queensland University of Technology
Brisbane Australia

This is the author's version of a work that was submitted/accepted for publication in the following source:

Butler, Desmond A., Kift, Sally M., Campbell, Marilyn A., Slee, Phillip, & Spears, Barbara (2011) School policy responses to cyberbullying : an Australian legal perspective. *International Journal of Law and Education*, 16(2), pp. 7-28.

This file was downloaded from: <http://eprints.qut.edu.au/49320/>

© Copyright 2011 Australia and New Zealand Education Law Association.

Notice: *Changes introduced as a result of publishing processes such as copy-editing and formatting may not be reflected in this document. For a definitive version of this work, please refer to the published source:*

SCHOOL POLICY RESPONSES TO CYBERBULLYING: A LEGAL PERSPECTIVE

Des Butler^{*}, Sally Kift^{**}, Marilyn Campbell^{***}, Philip Slee,[†] Barbara Spears^{††}

The use of electronic means of contact to support repeated aggressive behaviour by an individual or group, that is intended to harm others – or ‘cyberbullying’ as it is now known – is increasingly becoming a problem for modern students, teachers, parents and schools. Increasingly victims of face to face bullying are looking to the law as a means of recourse, not only against bullies but also school authorities who have the legal responsibility to provide a safe environment for learning. It is likely that victims of cyberbullying will be inclined to do the same. This article examines a survey of the anti-bullying policies of a small sample of Australian schools to gauge their readiness to respond to the challenge of cyberbullying, particularly in the context of the potential liability they may face. It then uses that examination as a basis for identifying implications for the future design of school anti-bullying policies.

1. Introduction

Today technology pervades society. For those who have been born in the digital age, electronic socialising and interactive communications are an integral and indispensable part of their daily lives.¹ But for all their benefits, technologies such as on-line social networking sites like Facebook and MySpace, Twitter, on-line forums, discussion boards, blogs, wikis, e-mail and the ubiquitous mobile phone, also present risks for their users.²

Cyberbullying, or the ‘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’³ is increasingly become a blight on the current generation of school students. There is a disparity in the results that have been reported in the published research concerning the incidence of cyberbullying to date.. One of the first studies in 2002 found that 25% of young people in the United Kingdom had been targets of cyberbullying.⁴ This contrasts with a Canadian study finding 24.9% of adolescents reporting that they had been cyberbullied⁵ while a North American study found only 7% reported being victimised.⁶

^{*} Professor of Law, Faculty of Law, Queensland University of Technology.

^{**} Professor of Law, Faculty of Law, Queensland University of Technology.

^{***} Associate Professor, Faculty of Education, Queensland University of Technology.

[†] Professor in Human Development, School of Education, Flinders University.

^{††} Senior Lecturer, School of Education, University of South Australia.

¹ D Oblinger and J Oblinger, ‘Is it Age or IT: First Steps Towards Understanding the Net Generation’ in D Oblinger and J Oblinger (eds), *Educating the net generation*. EDUCAUSE. <<http://educause.edu/educatingthenetgen/>> at 15 April 2011.

² See, eg, Sally Kift, Marilyn Campbell and Des Butler, ‘Cyberbullying in social networking sites and blogs: Legal issues for young people and schools’ (2009-2010) Vol 20(2) *Journal of Law, Information & Science* 61.

³ Peter Smith, et al, ‘Cyberbullying: Its Nature and Impact in Secondary School Pupils’ (2008) 49(4) *Journal of Child Psychology and Psychiatry* 376, 376. See also the often cited definition by Bill Belsey, ‘Always on? Always aware!’ <www.cyberbullying.org> at 15 April 2011: an “the use of information and communication technologies to support deliberate, repeated, and hostile behaviour by an individual or group, that is intended to harm others”.

⁴ National Children’s Home, ‘1 in 4 children are the victims of “on-line bullying”’ (2002).

⁵ Qing Li, ‘Cyber bullying in schools: A research of gender differences’ (2006) 27(2) *School Psychology International* 157.

⁶ Kimberly Mitchell and Michele Ybarra, ‘Youth Engaging in Online Harrassment: Associations with Caregiver-child Relationships, Internet Use, and Personal Characteristics’ (2004) 27 *Journal of Adolescence* 319.

A 2006 survey of 325 adolescents in a number of countries (including the United States, Canada, the United Kingdom and Australia) found that almost 30% reported that they had been victims of online bullying, which was categorised as having been ignored, disrespected, called names, threatened, picked on, or made fun of or having had rumours spread by others.⁷ Recent data collected from over 7,500 students as part of the Australian Covert Bullying Prevalence Study (ACBPS), suggested that the average level of frequent cyberbullying (every few weeks or more often) across Australia was approximately 7% of students in Years 4 to 9, while 4% reported that they cyberbullied others frequently.⁸ The variance in the number of incidences reported may be in no small part due to the tendency of some researchers to use definitions of cyberbullying that include all forms of cyber aggression and not just bullying per se. In addition, differences may be produced by some researchers asking global questions such as 'have you been cyberbullied?' while others have asked more specific questions, for example as to whether a particular act, such as receiving a nasty email, had been experienced.⁹

Cyberbullying adds a new dimension to traditional concepts of bullying, which most researchers agree involves repeated acts exploiting a power imbalance with an intention to cause harm.¹⁰ While face-to-face bullying¹¹ may involve the infliction of physical and/or psychological harm to the target, cyberbullying may result in purely psychological injury. In face-to-face bullying the bully seeks to exploit a power imbalance, which may be size, age or position, whereas in the case of cyberbullying the bully may remain anonymous. That anonymity places the target at a disadvantage and invests the bully with a measure of power over the target. It also may embolden the perpetrator, who might not be inclined to bully if his or her identity were known. Technology also allows the bully to reach the target whenever and wherever the target may be, even in previous safe havens such as the target's home. In addition, it arms the bully with an easy means of accessing a wide audience for the spread of hurtful messages. Targets of cyberbullying, like those of face-to-face bullying, are typically unable to defend themselves. The far reach of technology combined with the usual anonymity of the bully render the target powerless to respond to the hostility.

In recent times victims of face-to-face bullying have turned to the law, both civil and criminal, as a means of redressing the power imbalance between them and their bullies, or at least as a means of obtaining some form of vindication and/or compensation, in several cases attracting substantial damages awards.¹² It is likely that victims of cyberbullying will be

⁷ Justin W. Patchin and Sameer Hinduja, 'Bullies Move Beyond the Schoolyard: A Preliminary Look at Cyberbullying' (2006) 4(2) *Youth Violence and Juvenile Justice* 148

⁸ Donna Cross et al, *Australian Covert Bullying Prevalence Study (ACBPS)*. Child Health Promotion Research Centre. Perth: Edith Cowan University (2009).

⁹ Ersilia Menesini and Annalaura Nocentini, 'Cyberbullying definition and measurement: Some critical considerations' (2009) 217 *Journal of Psychology* 230.

¹⁰ See, eg, Suzanne Guerin & Eilis Hennessy, 'Pupils' Definitions of Bullying' (2002) 17 *European Journal of Psychology of Education* 249.

¹¹ A term used here to denote all forms of non-technology based bullying, including that involving behaviour such as physical contact, spreading rumours and exclusion.

¹² See, eg, *Cox v State of New South Wales* (2007) 71 NSWLR 225 (NSWSC) (plaintiff was awarded an estimated \$1.5 million for his school's failure to prevent bullying which caused psychiatric disorders and have left him effectively unemployable for life); *Eskinazi v State of Victoria* (unreported, Vic CC, 06471/99) discussed in D Stewart, 'A school's duty to ensure a hostility-free learning environment' (2004) 9 ANZJLE 79 (plaintiff received \$76,600 for a school's failure to prevent a sustained two-year campaign of verbal and physical assaults, harassment and intimidation by other students). See also *Oyston v St Patrick's College* [2011] NSWSC 269 (school failing to properly investigate complaints of bullying and to effectively implement anti-bullying policies over a two year period).

inclined to do the same.¹³ Depending on the circumstances, a target of cyberbullying may be able to take legal action against not only the perpetrator but also third parties who may be held responsible for any damage that the target has suffered. This includes schools, which owe their students a duty of care. Accordingly, it is timely to examine the policies of a sample of Australian schools to gauge their response to the new challenge of cyberbullying, particularly in the context of the potential liability they may face. School anti-bullying policies are normally designed to inform all stakeholders of the acceptable standards of behaviour in that school context, through the identification of those behaviours deemed unacceptable, the sanctions which may be applied in the event of transgression and the processes which should be followed afterwards. They are usually positioned within the broader behaviour management or wellbeing frameworks that are in place in the school. However, the spectre of potential legal liability warrants that greater cognisance also be taken of relevant civil and criminal laws when designing such policies.

2. Relevant laws

Unlike the United States,¹⁴ in Australia there has yet to be a dedicated legislative response to bullying, let alone cyberbullying, apart from Division 8B of the *Crimes Act 1900* (NSW).¹⁵ This section, which was inserted into the principal Act by the *Crimes Amendment (School Protection) Act 2002* (NSW),¹⁶ makes specific criminal provision in section 60E for assault, stalking, harassment or intimidation of any school staff or student. The terms of the section

¹³ Des Butler, Sally Kift and Marilyn Campbell "Cyber Bullying in Schools and the Law: Is there an Effective Means of Addressing the Power Imbalance?" (2010) 16(1) *eLaw Journal: Murdoch University Electronic Journal of Law* 84.

¹⁴ For example, see Vickie Fix-Turkowski and Fred Hartmeister, 'Getting Even with Schoolyard Bullies: Legislative Responses to Campus Provocateurs' (2005) 195 *Education Law Reporter* 1, 5-6 which discusses statutes in Arkansas (ARK. CODE ANN. § 6-18 (2003); §§ 6-18-514 (2007)), California (CAL. EDUC. CODE §§ 32261, 32265, 32270, 32285, 32288, and 35294 (2004)), Colorado (COLO. REV. STAT. § 22-32-109.1 (2003)), Connecticut (CONN. GEN. STAT. § 10-222d, 10-263e (2003)), Florida (FLA. STAT. ANN. § 1006.147 (West 2009)), Georgia (GA. CODE ANN. §§ 20-2-145, 20-2-751 (2004)), Idaho (IDAHO CODE ANN. § 18-917A (2009)), Illinois (105 ILL. COMP. STAT. 5/10-20.14(d) (2001)), Iowa (IOWA CODE § 280.28 (2007)), Kansas (KAN. STAT. ANN. § 72-8256 (West 2008)), Louisiana (LA. REV. STAT. ANN. § 17:416.17 (2002)), Maryland (MD. CODE ANN., EDUC. § 7-424 (West 2009)), Nebraska (NEB. REV. STAT. ANN. § 79-2, 137), New Hampshire (N.H. REV. STAT. ANN. § 193 (2004)), New Jersey (N.J. STAT. ANN. § 18A (2004)), New York (N.Y. EDUC. LAW § 2801-a (2004)), North Carolina (N.C. GEN. STAT. §§ 14-458.1 and 14-453), Minnesota (MINN. STAT. ANN. § 121A.0695 (West 2009)), Oklahoma (OKLA. STAT. tit. 70, § 24-100 (2004); OKLA. STAT. ANN. tit. 70, § 24-100.3 (West 2009)), Oregon (OR. REV. STAT. § 339 (2001); OR. ADMIN. R. 137-085-0010 (2004); OR. REV. STAT. ANN. § 339.356 (West 2009)), Pennsylvania (PA. CONS. STAT. ANN. § 13-1303.1-A (West 2008)), Rhode Island (R.I. GEN. LAWS §§ 16-21-24 and 16-21-26 (2003)), South Carolina (S.C. CODE ANN. § 59-63-120 (2006)), Vermont (VT. STAT. ANN. tit. 16 §§ 11, 140a, 165, 565 and 1161 (2004)), and Washington (WASH. REV. CODE § 28A.300.285 (2009)), and West Virginia (W. VA. CODE §§ 18-2C-1 to 18-2C-6 (2003)). See also Colleen Barnett, 'Cyberbullying: A New Frontier and a New Standard: A Survey of and Proposed Changes to State Cyberbullying Statutes' (2009) 27 *Quinnipiac Law Review* 579; Michael R. Gordon, 'The Best Intentions: A Constitutional Analysis of North Carolina's New Anti-Cyberbullying Statute' (2009) 11 *North Carolina Journal of Law & Technology, Online Edition*, 48.

¹⁵ A Bill was introduced into the House of Representatives on 24 June 2010 to amend the *Sex Discrimination Act 1984* (Cth) to make cyberbullying in the form of sexual harassment in limited school-related circumstances illegal regardless of a student's age. The *Sex Discrimination Amendment Bill 2010* lapsed before passing through both Houses of Parliament due to the calling of the 2010 Federal Election. The Bill was re-introduced in September 2010, renamed the *Sex and Age Discrimination Legislation Amendment Bill 2010*: see Commonwealth, *Parliamentary Debates*, House of Representatives, 20 September 2010, 275-276 (Robert McClelland, Attorney General) <http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2010-09-30/0049/hansard_frag.pdf;fileType=application%2Fpdf > at 15 April 2011.

¹⁶ Commenced in February 2003.

are capable of embracing cyberbullying. This section is unique in the Australian criminal law, but is limited in its scope to staff and students while 'attending the school'.¹⁷ As such, the section will only apply in a cyberbullying context where the conduct actually occurs on the school premises or while entering or leaving school premises for the purposes of school activities.

Schools will generally be concerned for the wellbeing of their students. School authorities will also be concerned to minimise their exposure to legal liability. Accordingly, in the context of a consideration of the adequacy of school responses to the threat of cyberbullying, the relevant laws will primarily be those laws that are capable of extending responsibility for the misbehaviour beyond the perpetrator to the school, namely negligence and defamation.

2.1 Negligence

An action in negligence requires breach of a relevant duty of care which causes damage. It has long been recognised that a school owes a non-delegable duty of care to its students.¹⁸ The duty requires a school to take reasonable care to prevent its students from being exposed to the risk of not only physical but also psychiatric injury (or 'recognised psychiatric illness', as it is known, to distinguish it from more transitory emotional or mental distress).¹⁹ Less clear is the scope of the duty of care, both in geographical and temporal terms. The duty of care is not limited to incidents occurring on school grounds or during official school hours. Instead, the relevant determinant is whether the relationship of school teacher and pupil is in existence. Thus in *Geyer v Downs*²⁰ a school was held to have owed a duty of care to a student who had arrived at the school before school hours and who was injured when struck by a softball bat. This was because the Principal, in an attempt to keep safe those children who arrived early at school when there were no teachers available to assign to supervisory duties, had prescribed rules governing before-hours behaviour (such as requiring students to sit quietly and not play sports). These instructions were regarded as having created the necessary relationship of school teacher and pupil.

Similarly, the duty of care may extend to incidents occurring outside school grounds. In the New South Wales Court of Appeal case *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman*,²¹ a school was held to have owed a duty of care in circumstances involving an injury that was sustained by one of its students 20 minutes after the end of the school day at a bus stop 400 metres from the school grounds. In this case, the school authority knew that its students routinely used the bus stop, which was located near a high school, and ought to have known of the mischief that was likely when children of different ages and from different schools mix without adequate supervision. Indeed, one judge was of the view that if a school authority

... were aware ... that on a particular journey older children habitually and violently bullied younger children, the duty may well extend so far as to require the school to take preventative steps or to warn parents. This duty would be founded in the relationship of teacher and pupil.²²

Such considerations will be relevant when determining the potential scope of liability for cyberbullying. There will be no doubt that a school's duty of care will embrace cyberbullying

¹⁷ As defined in s 60D(2).

¹⁸ *Commonwealth v Introvigne* (1982) 150 CLR 258, 264, 269.

¹⁹ See, eg, *Oyston v St Patrick's College* [2011] NSWSC 269.

²⁰ (1977) 138 CLR 91.

²¹ (1996) Aust Torts Reports 81-399.

²² *Ibid*, 63,597 (Shellar JA).

occurring on school grounds and during school hours. Less clear is the extent of the duty of care at other times. It is conceivable for the relationship of school teacher and pupil to exist in other circumstances involving cyberbullying. For example, the duty may embrace a case where entries are made on a school-hosted blog, wiki or other website which is accessed remotely by a student, perhaps from home or some other location away from school premises. In such a case the duty would be based on factors such as the school's control over the hosting server and its grant of remote access by the school to a student user under instructions or conditions of use. The duty may also embrace students using school computers on school premises, whether during school hours or not, to access sites hosted on third party servers (such as a Facebook profile or the like), where there are school rules or instructions relating to use of these computers. By contrast, a bully who uses his or her home computer to post offensive material on a fellow student's Facebook site, or who sets up a bogus Facebook profile to denigrate a fellow student, would not fall within the scope of the school's responsibility simply because they were students at the same school. Such a case may more properly be a matter for parents or possibly the police. Other cases are more problematic, such as where a student uses his or her own personal device to bully a fellow student while either or both is at school.

If a duty of care is owed, the school's liability for any injury resulting from cyberbullying will depend upon two questions: (1) whether first the risk of injury must have been reasonably foreseeable in the circumstances in the sense that the risk was 'not insignificant' and (2) whether a reasonable person would have taken precautions to avoid that risk. This second question requires a consideration of the 'negligence calculus', which involves an assessment of the probability that harm would occur absent care, the likely seriousness of that harm, the burden of taking precautions, and the social utility of the risk-creating activity. If this assessment suggests that a reasonable person would have taken precautions in the circumstances the question will then be whether the defendant in fact exercised the appropriate standard of care.²³

In most jurisdictions when deciding what would be a reasonable response to a risk, the court is to defer to a 'responsible body' of expert opinion 'unless no reasonable court would do so.'²⁴ Thus, the accepted practices in the teaching profession, unless judged unreasonable, will be relevant to determining the responses of a reasonably prudent school authority. It would be reasonable to expect schools to have an anti-bullying policy which expressly refers to cyberbullying. This is an important measure to address those students who might not view their misuse of technology as bullying but instead as merely having fun.²⁵ These policies might extend to the use of technology outside of school grounds and/or hours, although as already noted, the prescription of rules of conduct in some cases may bring into existence a relationship of school teacher and pupil and therefore a duty of care in circumstances where otherwise no duty of care would have been owed.

Other lessons may be drawn from cases involving face to face bullying. Reasonable care would also require complaints to be taken seriously and investigated properly by those

²³ See *Civil Law (Wrongs) Act 2002* (ACT), ss 42, 43; *Civil Liability Act 2002* (NSW), s 5B; *Civil Liability Act 2003* (Qld), s 9; *Civil Liability Act 1936* (SA), ss 31, 32; *Civil Liability Act 2002* (Tas), s 11; *Wrongs Act 1958* (Vic), s 48; *Civil Liability Act 2002* (WA), s 5B. The Northern Territory still applies the common law which, whilst following a similar two-tier approach, defines 'reasonable foreseeability' in terms of not far-fetched or fanciful.

²⁴ *Civil Liability Act 2002* (NSW), s 5O; *Civil Liability Act 2003* (Qld), s 22; *Civil Liability Act 1936* (SA), s 41; *Civil Liability Act 2002* (Tas), s 22; *Wrongs Act 1958* (Vic), s 59. Cf. *Civil Liability Act 2002* (WA), s 5PB which only applies to medical professionals.

²⁵ See, eg, Peter Smith, 'Cyberbullying: Its nature and impact in secondary school pupils' (2008) 49 *Journal of Child Psychology and Psychiatry* 376; Ann Stoltz, 'Involvement in traditional and electronic bullying among adolescents' (2007) 43 *Developmental Psychology* 564; Barbara Reekman, 'Cyberbullying: A TAFE perspective' (2009) 28 *Youth Studies Australia* 41.

charged with that responsibility, normally Principals or deputy Principals.²⁶ To facilitate this policies should identify the person or persons to whom complaints of cyberbullying should be directed by students and delineate a clear process by which complaints will be handled. Clear records must be kept of the course followed when complaints are received, what conclusions are drawn from any investigation and what was done by way of response if bullying or other inappropriate response towards the student is uncovered.²⁷ Passing conversations in the corridor, ad hoc record keeping or making no notes at all are not likely to be regarded as reasonable responses.²⁸

Also, just as supervision of the school playground is recognised as a practical precaution against some cases of face to face bullying,²⁹ it would be reasonable to expect a school to, for example, provide reasonable supervision and monitoring of the use of computer equipment for those cases where the target and perpetrator are both on the premises of the school authority. It would also be reasonable to expect schools to routinely check school-hosted blogs, wikis and other websites for potentially deleterious content. However, even the most vigilant supervision and monitoring will not guard against all cases of cyberbullying without a full understanding of context. For example, students may use obscure terminology, slang or code. Indeed a deliberate refusal to acknowledge a particular student's contribution to a website like a chat room may be part of a campaign of exclusion or isolation of the target – the technological equivalent of 'being sent to Coventry.'

Some schools now ban the use of mobile phones during school hours on school property as a precaution against their misuse. However, it is an open question whether this measure is yet so widespread that it can be said to presently reflect 'accepted practice' in the teaching profession and thus considered to be an expected response by a school in discharge of its duty of care.³⁰

The widespread understanding that cyberbullying, no less than face to face bullying, may have serious deleterious consequences for targets demands that as a matter of policy schools declare that such behaviour is unacceptable. Further, if remedial action is warranted then it must be taken in a consistent fashion. Otherwise, potential cyberbullies may be led to believe that any such a policy is nothing more than words with no substance.³¹

It is also important to encourage a culture in which bystanders do not stand idly by whilst bullying, including cyberbullying, takes place and at least have an avenue for the reporting of instances of this misbehaviour.³²

²⁶ *Cox v New South Wales* [2007] NSWSC 471; *Eskinazi v State of Victoria* (unreported, Vic CC, 06471/99); *Oyston v St Patrick's College* [2011] NSWSC 269 .

²⁷ *Oyston v St Patrick's College* [2011] NSWSC 269 at 36.

²⁸ *Scott v Lothian Regional Council* (1998) Outer House Cases, 29 September 1998; *Oyston v St Patrick's College* [2011] NSWSC 269.

²⁹ Cf *Warren v Haines* (1987) Aust Torts Reports 80-115 (NSWCA).

³⁰ Indeed one study has suggested that banning mobile phones from schools would neither reduce the frequency of use of mobile phones nor the prevalence of cyberbullying inside or outside of school, so that a complete ban of mobile phones and internet at school will not solve the problem: see Jan Pfetsch, Georges Steffgen and Andreas Konig, 'Banning Solves the Problem? Effects of Banning Mobile Phone Use in Schools on Cyberbullying' Poster, 'XIV Workshop Aggression', Free University and Technical University of Berlin, 6-8 November 2009, cited in Dorothy Grigg, 'Cyber-Aggression: Definition and Concept of Cyberbullying' (2010) 20(2) *Australian Journal of Guidance & Counselling* 143, 153.

³¹ See, eg, *Oyston v St Patrick's College* [2011] NSWSC 269.

³² Wendy Craig and Debra Pepler, 'Observations of bullying and victimization in the schoolyard. (1998) 13(2) *Canadian Journal of School Psychology* 41; Lyn Hawkins, Debra Pepler, and Wendy Craig 'Naturalistic Observations of Peer Interventions in Bullying' (2001) 10(4) *Social Development* 512; Ken Rigby and Bruce Johnson, 'Expressed Readiness of Australian School Children to Act as

2.2 Defamation

An action for defamation is available where defamatory matter that is referable to the plaintiff is 'published' in the sense of being communicated to a least one other person. It has been held that where defamatory material is posted in a place under the control of a third party who becomes aware of its existence but fails to take steps to remove the material the third party will be regarded as having republished the defamatory material and will incur personal liability for that publication.³³ This doctrine has been applied to computer sites where the host of the site exercises editorial control.³⁴ Accordingly, school authorities who exercise editorial control over the computer sites they host must act promptly, upon becoming aware of potentially defamatory material having been posted on the site, in order to ensure that the offending material is taken down or risk liability for defamation.³⁵ When it is borne in mind that a student who posts defamatory material on a school website is unlikely to have sufficient resources to warrant being sued, a school authority – which in the case of a public school will be a State government and in the case of a private school either a company, trust or Church diocese backed by insurance – will be a more attractive prospect as a defendant to the defamed person. It would be prudent, therefore, for schools to have a policy and practice of monitoring and exercising editorial control over any website, blogs, wikis or similar fora that the school is hosting not only to forestall any action in negligence but also as a precaution against third-party liability for defamation.

2.3 Criminal laws

Schools should be aware of the potential for cyberbullying to amount to criminal behaviour, so they may better gauge when it may be appropriate to contact police. For example, under the *Criminal Code Act 1995* (Cth), offences have been enacted proscribing the misuse of telecommunication services to menace, threaten or hoax other persons. These include using telecommunication services to menace, harass or cause offence,³⁶ using telecommunication services, including the internet, to threaten to kill or to cause serious harm to another person (the target) or to a third person, if the bully intends the target to fear that the threat will be carried out;³⁷ and sending a hoax communication intending to induce a false belief that an explosive has been left somewhere.³⁸

All Australian jurisdictions have anti-stalking legislation prohibiting behaviour calculated to harass, threaten or intimidate,³⁹ although the terms in which the offence is described in the

Bystanders in Support of Children who are Being Bullied' (2001) 26(3) *Educational Psychology* 425; Christina Salmivalli, et al, 'Bullying as a Group Process: Participant Roles and their Relations to Social Status Within the Group. (1996) 22(1) *Aggressive Behaviour* 1; Jessica Trach, 'Bystander Responses to School Bullying: A Cross-Sectional Investigation of Grade and Sex Differences' (2010) 20(1) *Canadian Journal of School Psychology* 114.

³³ *Byrne v Deane* [1937] 1 KB 818, 829.

³⁴ *Stratton Oakmont Inc v Prodigy Services Inc* 1995 NY Misc LEXIS 229; cf *Cubby Inc v CompuServe Inc* 776 F Supp 135 (SDNY) (1991).

³⁵ Cf *Bishop v New South Wales* [2000] NSWSC 1042.

³⁶ *Criminal Code Act 1995* (Cth) s 474.17.

³⁷ *Criminal Code Act 1995* (Cth) s 474.15. Mirror legislation proscribing threats to kill or inflict bodily harm has been enacted in every Australian State and Territory: see *Crimes Act 1900* (ACT) s 30; *Crimes Act 1900* (NSW), s 31; *Criminal Code 1983* (NT) s 166; *Criminal Code 1899* (Qld) s 308; *Criminal Law Consolidation Act* (SA) ss 19(1)-(3); *Criminal Code Act 1924* (Tas) s 163; *Crimes Act 1958* (Vic) s 20; *Criminal Code 1913* (WA) ss 338A-B. In New South Wales, Queensland and Tasmania the threat to kill must be in writing.

³⁸ *Criminal Code Act 1995* (Cth), s 474.16.

³⁹ See *Crimes Act 1900* (ACT) s 35; *Crimes Act 1900* (NSW) s 545B; *Criminal Code 1983* (NT) s 189; *Criminal Code 1899* (Qld) s 359A; *Criminal Law Consolidation Act 1935* (SA) s 19AA; *Criminal Code*

various statutes is subtly different.⁴⁰ Anti-stalking laws are well suited as a criminal law response to cyberbullying context: the absence of an immediate physical threat is no impediment to prosecution and the very essence of cyberbullying – cause emotional, rather than physical, harm and distress – is central to the offence. The potential for the application of these laws to cases of cyberbullying was illustrated by the 2010 prosecution for stalking in Victoria of a man who sent several threatening text messages to his former friend, who ultimately committed suicide. The accused pleaded guilty to the charge and received an 18-month community-based order.⁴¹

Other criminal offences that might potentially apply to cyberbullying in appropriate circumstances include common assault, by threat of force.⁴²

3. School policy responses

Against this backdrop of applicable laws, it is instructive to examine the policy response of a random sample of schools in order to obtain a sense of how well these schools are addressing the threat of cyberbullying facing their students according to the expectations of the law.

The study was done as an adjunct to a broader study of students and their experiences of cyberbullying in government and non-government schools in Queensland and South Australia.⁴³ Of the 34 schools that participated in the broader study, nine schools – three government and three non-government schools in Queensland and one government and two non government schools in South Australia – also agreed to participate in a study of their anti-bullying policies and practices. In March 2010 the schools were asked to provide copies of all policies that they considered covered cyberbullying as currently in operation, and were asked to respond to a short series of questions concerning their practices.

3.1 Situating cyberbullying in a wider bullying policy context

All nine schools had anti-bullying policies, contained in various documents with titles such as the *Responsible Behaviour Plan*, *Anti Bullying Policy*, *Anti-Harassment Policy* and *Personal Responsibility Policy*. Individual schools had between two to five documents that were relevant to cyberbullying.

Act 1924 (Tas) ss 192, 192A; Crimes Act 1958 (Vic) s 21A and Criminal Code 1913 (WA) ss 338D, 338E; Crimes (Domestic and Personal Violence) Act 2007 (NSW) ss 8, 13.

⁴⁰ For detailed recent discussions of the several Australian offences see: Heather Douglas, *Personal Protection and the Law: Stalking, Domestic Violence and Good Behaviour* (8 January 2006) Association of Law Reform Agencies of Eastern and Southern Africa Conference, South Africa <<http://www.qirc.qld.gov.au/events/personalProtection.pdf>> at 15 April 2011; Gregor Urbas, 'Look who's stalking: cyberstalking, online vilification and child grooming offences in Australian legislation (2007) 10(6) *Internet Law Bulletin* 62.

⁴¹ Selma Milovanovic, 'Man avoids jail in first cyber bullying case', *The Age*, 9 April 2010 <<http://www.theage.com.au/victoria/man-avoids-jail-in-first-cyber-bullying-case-20100408-rv3v.html>> at 15 April 2011. In the US, see also 'Girl who killed herself experienced 'unrelenting' bullying', *The Age*, 30 March 2010 <<http://www.theage.com.au/world/girl-who-killed-herself-experienced-unrelenting-bullying-20100330-r8z4.html>> at 15 April 2011.

⁴² See *Criminal Code Act 2002 (ACT) ss 26, 26A; Crimes Act 1900 (NSW) s 61; Criminal Code 1983 (NT) ss 187(b), 188; Criminal Code 1899 (Qld) ss 245, 335; Criminal Law Consolidation Act 1935 (SA) s 20; Criminal Code Act 1924 (Tas) ss 182(1), 184; Crimes Act 1958 (Vic) s 31; Criminal Code 1913 (WA) ss 222, 313. For a more detailed discussion of these and other potential bases for criminal liability see: Kift, Campbell and Butler, note 2 above, 69-82.*

⁴³ Marilyn Campbell, Barbara Spears, Phillip Slee, Sally Kift and Des Butler (2011) *The Prevalence of Cyberbullying in Australia*, International Observatory on Violence in Schools Conference, Mendoza, Argentina, April 2011.

Most of the nine schools included a definition of bullying or harassment in their policies. These definitions varied in their terms, some but not all reflecting the common understanding that bullying conduct is underpinned by the three features of an intention to hurt, power imbalance and repetition of conduct. For example, one Queensland government school included the following definition:

Bullying is repeated oppression, psychological or physical to obtain power over others. It is deliberate and persistent.

A Queensland non-government school adopted a similar meaning:

Bullying is a systemic abuse of power. It typically involves repeated acts of aggression that aim to dominate and cause hurt, fear, or embarrassment in another person. Bullying is generally deliberate and planned, but can also be a result of thoughtlessness. It can be perpetrated by an individual or groups.

One South Australian non-government school eschewed the term 'bullying' for 'harassment', for which it adopted a definition that draws on traditional concepts of bullying:

... repeated intimidation of a physical, verbal or psychological nature of a less powerful person by a more powerful person or group of persons. It is any behaviour which is unwelcome and makes you feel uncomfortable or fearful. This power may be physical or social and may shift over time from one person to another. Included in the examples of harassment is sending offensive messages in writing, by telephone or email.

The definitions chosen by some schools adopt some but not all of the traditional concepts, thereby widening the type of conduct contemplated. For example, a Queensland non-government school used the following meaning:

The repeated attack, physical, psychological, social or verbal in nature, by individuals or groups, with the intention of causing distress.

This meaning is therefore not limited to cases involving an imbalance of power. By contrast, another Queensland non-government school did not see a need for the behaviour to be repeated, defining bullying for its purposes as:

Intentionally hurting another person who is less powerful - either physically or psychologically. We consider bullying to be that which makes another person feel uncomfortable and includes: harassment (being a nuisance to another person), bullying (listed are physical, verbal and indirect forms) and violence (serious and isolated incidents).

However, this approach was not uniform, with some schools not including a clear definition of bullying in the documents. For example, the South Australian government school merely referred to 'harassment' in its *Anti-Harassment Policy* and stated:

Harassment can occur in a range of ways. These include racial, intellectual, physical, verbal or sexual.

The policy then went on to categorise 'harassment' into racial, physical, intellectual, verbal, sexual and 'cyberbullying' and provided examples of each.

Similarly, one of the South Australian non-government schools simply stated in its *Anti-Harassment/Anti-Bullying Policy* that:

A bully is someone who tries to build their own sense of worth by picking on others.

The document did not use words like repetition, imbalance of power or intention to cause harm.

A Queensland government school that appeared to have no specific anti-bullying policy but rather appeared to address bullying by way of its code of conduct included the following reference in its policy document:

Bullying and harassment is one or more of these behaviours: inappropriate sexual language/behaviours, gestures, teasing, put-downs, name-calling, threats, pushing and shoving, hitting, intentionally leaving out, gossiping and rumour spreading, intimidation.

Of the nine schools, only four made any express reference to cyberbullying. The most extensive reference was by another Queensland government school, which followed its formal definition (cited above) with a reference to cyberbullying (called 'e-bullying') which it defined as:

The use of information and communication technologies such as email (mobile) phone and text messages, instant messaging, defamatory personal websites and defamatory personal polling websites, to support deliberate, repeated and hostile behaviour by an individual or a group that is intended to harm others.

Another approach, taken by two schools in the sample, was to include instances of misusing technology as examples of their general definitions of bullying. Thus a Queensland government school stated that:

Bullying is an act of aggression causing embarrassment, pain and discomfort to another: Bullying can take many forms including physical, verbal, gesture, blackmail, innuendo and exclusion. It is an imbalance of power and involves inappropriate actions. Bullying may be planned and organised or unintentional without thinking. Individuals or groups may be involved. It is repeated.

It then included under the heading 'Some Examples of Bullying' the following:

Writing offensive messages (could be in electronic format).

This was supported by its *Student Internet Policy* which declared that:

Students must not: send or display offensive messages or pictures.

Further, in its *Responsible Behaviour Plan* it stated that:

Unacceptable behaviours are: antisocial behaviour - including bullying and harassment ... abuse of information communication technologies such as mobile phones, cameras, internet.

As already noted, in its *Anti-Harassment Policy* a South Australian government school categorised 'harassment' into racial, physical, intellectual, verbal, sexual and cyberbullying and provides examples of each. In relation to cyberbullying, the document stated that it 'includes sending or receiving offensive text messages, writing of offensive comments on ... chat lines and establishing offensive websites about others. It also includes sending or receiving offensive and unwanted graphics and photographs.'

By contrast, in its *Safe School Policy* a South Australian non-government school included in its definition of 'harassment' several examples which include '*sending offensive messages in writing, by telephone or email.*'

It can be seen, therefore, that even among a small sample of nine Australian schools there were very different approaches to the threshold issue of situating cyberbullying in their policy frameworks.

Policy implications

Better practice would require a dedicated document on anti-bullying that includes a definition of bullying that is either accompanied by a further definition of cyberbullying or at least makes express reference to cyberbullying. A definition ensures objectivity and removes doubts that may result from different subjective views or opinions on a topic. Whether the behaviour is referred to in the document as a form of 'bullying', 'harassment' or 'bullying or harassment' may for these purposes not be significant. While the title 'bullying' may perhaps to some denote behaviour that is more aggressive than harassment, 'harassment' may to some be regarded as a wider term. What is more important is the definition itself. Similarly, whether the definition reflects some but not all of the three elements associated with researchers' traditional conceptions of bullying, namely an intention to harm, repetition and a power imbalance, is not a deficiency but instead an extension of the behaviour caught by the policy that is regarded as being unacceptable. It is important to recognise that in law 'there is no magic in the term bullying.'⁴⁴ For example, depending on the circumstances, a school authority may be held to have breached its duty of care to a student by a failure to take reasonable care to prevent harm from even one-off instances of objectionable behaviour.⁴⁵

Any definition that includes examples of unacceptable behaviour should be in terms that are inclusive rather than definitive. In other words the definition should not be restricted to a named set of types of behaviour. It is important that the document includes a definition of cyberbullying or makes express reference to cyberbullying, with examples of misuse of technology. Once again this is an effective strategy in removing doubt. In addition it is an important measure designed to ensure that students realise that while they may regard the use of technology as having fun, they should not look upon the *misuse* of technology in the same light and instead must recognise it for what it is: unacceptable behaviour that warrants sanction.

3.2 Reporting cyberbullying and the handling of complaints

When determining whether a school has discharged its duty of care, a relevant consideration will be how the school handled any complaint or notification of cyberbullying. This question will include whether it was made plain to students how to report cyberbullying and whether that was a clear process for the handling of complaints set out in the policy.

All nine schools in the sample stated a process for the handling of complaints, although with varying degrees of detail. Many advised students whom they should inform if they were the target of bullying. For example, a Queensland government school stated that students could seek assistance from:

⁴⁴ *Bradford-Smart v West Sussex County Council* [2002] LGR 489, [38].

⁴⁵ See, eg, *Warren v Haines* (1987) Aust Torts Reports 80-115 (NSWCA); *Gray v State of New South Wales* (unreported, NSW Sup Ct Grove J, 17 February 1998); *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman* (1996) Aust Torts Reports 81-399.

... a trusted teacher/adult, year coordinator, deputy principal, guidance officer, sexual harassment officer, youth health nurse at school, chaplain, ... parent or guardian, peer mentor. Staff: are to report to the head of Middle or Senior School or Deputy.

Similarly, a Queensland non-government school included in its anti-bullying policy that students who have been bullied:

... should alert your Head of Year, your Form Teacher, another member of teacher staff, counsellor, or a senior student (at school). For middle school students you should alert the Director of Middle School, Form Teacher, Head of Year or a parent/responsible adult (at home).

Four of the schools included advice for parents on the relevant person(s) to whom complaints of bullying could be directed, while another four expressly stated the person – whether the Principal, Deputy Principal or Head of School/Year – to whom staff could report the bullying of students.

Most schools detailed a process that should be followed in the handling of complaints, although with varying degrees of specificity. Two Queensland schools – one government and one non-government – provided useful flowcharts that showed the procedure to be followed. One clearly described the process to be followed as part of its *Responsible Behaviour Plan*, detailing the respective case management processes for what it termed ‘some forms of bullying (unintentional but unwanted)’ – a curious phrase since all bullying is traditionally understood to be intentional – which was deemed to be ‘medium level behaviour’ and ‘intimidation – both physical and emotional bullying, continual teasing that constitutes harassment (sexual, physical, racial, verbal) – endangering safety of self and others’, which was categorised as ‘high level behaviour’. Four of the schools prescribed as a matter of policy that complaints and actions taken were to be properly documented.

One school in the sample did not prescribe a single process for the handling of complaints in terms of steps to be followed, and instead described the process in terms of a troubleshooting method for problem solving and involving four options: do nothing, confronting the perpetrator ‘if you feel able to’, ‘see your home class teacher or head of School’ or ‘go to the contact person’. Each option provided the steps and the result for choosing the particular path.

Only five of the nine schools made any reference in their policies to the *manner* in which complaints should be handled. Of the schools, four recognised that sensitivity should be shown to not only the target but also the bully. For example:

Wherever possible ... both victims and persecutors will be provided with support.

and

All students are entitled to be treated in a way that supports privacy, ensures and maintains confidentiality and respects their dignity.

One Queensland government school expressly referred to students who were faced with severe consequences as having the right to natural justice and being provided with the opportunity to present their case prior to a decision being made. One South Australian non-government school prescribed that the student's report must be managed confidentially and that for the bully a ‘No Blame Approach’ must be taken upon the initial interview of a bullying report.

Policy implications

There is great value in prescribing as a matter of policy the relevant contact points for students, parents and teachers. Parents and teachers should be included in the policy since the process should not place the onus to initiate the process on the target, who may already feel covered as a result of the abuse by the bully and who may feel reluctant to complain for fear of making matters worse. In the case of cyberbullying the target may also feel reluctant to complain for fear that adults may choose to deal with the situation by removing or limiting the target's own access to technology as a means of eliminating the medium for the abuse.

Certainty in the handling of complaints for all persons concerned can also be achieved by prescribing a step-by-step process in which complaints will be handled, including the proper documentation of the complaint, the process by which it is dealt with and any review or follow-up actions to be taken. As a matter of policy complaints should be handled in a sympathetic manner, which respects the dignity and privacy of both the target and the bully. The policy should also dictate that the bully must be afforded the right to natural justice, with no quick judgments made against him or her. However, such a policy must not be implemented in a manner which places overemphasis on caring and support for the bully at the expense of properly ensuring that the target of the behaviour is not injured as a result of being bullied.⁴⁶

Whilst, for example, providing that complaints should be dealt with in a troubleshooting manner may reflect a reasonable method of dealing with complaints, there is a risk that such a process may appear vague in terms of the necessary investigatory procedure to be followed and not offer clear direction to anyone not familiar with or not understanding such a process, including young people. Its effectiveness would therefore depend upon the particular way in which it was expressed. Further, deeming certain cases of bullying to be 'medium level behaviour' and others to be 'high level behaviour' introduces unnecessary uncertainty concerning where the line should be drawn between different types of conduct, for all persons concerned. All bullying is harmful: it should not be the subject of false and artificial division in a policy document. A policy that purports to stipulate different levels of bullying, with teachers and/or year coordinators entrusted with discretion concerning the correct classification of behaviour, and consequently how it is dealt with, is apt to produce a situation in which judgment and discretions are exercised to the point where an effective bullying policy is not in practical operation.⁴⁷

3.3 Peer bystanders

An effective response to cyberbullying, like other forms of bullying, may require a 'whole of community' response. It is important to encourage a culture in which bystanders do not stand idly by whilst bullying, including cyberbullying, takes place. This was explicitly recognised by seven of the nine schools in the study, although in varying terms in their policies.

Some schools chose to frame the obligation in general terms. For example, a Queensland government school stated that:

Bullying must be dealt with effectively. The whole school community is responsible for the elimination of bullying and harassment.

Similarly a South Australian non-government school provided that:

⁴⁶ *Oyston v St Patrick's College* [2011] NSWSC 269 at [34].

⁴⁷ *Ibid* at [29].

We all have a responsibility to take action where we see harassment occurring. Bystanders can choose to be part of the solution or part of the problem.

Other school policies made express reference to bystanders reporting incidences of bullying. A Queensland government school sought to address any reluctance on the part of bystanders by using these terms:

All members of the school community, staff, students and parents have an obligation to report all incidents of bullying. Telling about bullying is not 'dobbing' or 'telling tales'. Instead it is 'reporting inappropriate behaviour' which is the responsibility of all members of the school community

A Queensland non-government school provided a reporting path for bystanders by prescribing that:

If we are aware of another being bullied, then this situation must be brought to the attention of the Student Protection Contact.

Another Queensland non-government school sought to cast the duty to report in terms of the good that the bystander could do for both the victim and the school. It did so by supporting its general statement in its Anti-Bullying Policy that:

As a School Community all members have the responsibility to work actively towards the prevention of bullying with a statement.

with specific statements addressing each of staff, students and parents who witness bullying. When addressing students the policy stated that:

When a student who witnesses bullying has the courage to speak out he helps reduce the distress to the victim and he contributes to the building of a safe and secure school environment.

By contrast, a South Australian government school took a 'big stick' approach of following its reference to bullies being subjected to sanction with the following:

Students who stand by and watch without trying to prevent incidents or who encourage others to bully or harass, will experience similar consequences.

None of the schools made express reference to bystanders who became aware of cyberbullying reporting the fact.

Policy implications

Bystanders may be reticent to act when they become aware of bullying, and specifically cyberbullying, for a number of reasons. These include fear of drawing attention to themselves, perhaps becoming a target of the bullying themselves, peer pressure, simple indifference to the plight of the target and/or simply not knowing what they can do to help. For this reason, in addition to any general statements that makes it clear that peer bystanders as members of the school community have a role in preventing cyberbullying (as well as other forms of bullying), policies should provide for at least a reporting path so that they understand what bystanders can do to meet that expectation.

3.4 School technology policies

The use of technology has become a common feature in modern school curricula. It is to be expected, therefore, that schools will have specific policies governing student use of the school's technology. Nevertheless, two of the schools in the sample make no mention of restrictions on the use of its technology in any of the policies that they supplied for this study.

Some of the schools provided only general statements regarding the use of their technology, such as stating that 'the administration team at the school will decide what is acceptable use of the Internet.' Other schools were more prescriptive, proscribing the use of school computers, school networks and email for sending, accessing, displaying or downloading material that is illegal or offensive.

Some of the schools made an explicit link between the use of a school technology and behaviour that would be considered cyberbullying. For example, the South Australian government school stated that students

... will not use school or personal computers or networks to bully, harass or invade the privacy of others.

Two of the Queensland non-government schools went further, emphasising that students assumed personal responsibility for their use of school technology by requiring them to sign an internet use agreement.

Policy implications

With the central role that technology plays in modern schools, it would be prudent for schools to have express policies governing its use. Equally prudent would be the inclusion in such a policy of an explicit reference to the misuse of technology, including examples of the type of behaviour that will be regarded as inappropriate so that students may have a clear understanding of their boundaries. The expedient of requiring students to sign an internet use agreement does not serve as a means of, for example, legally enforcing any promises in the agreement since children, as persons under 18 years of age, lack the capacity to make binding contracts.⁴⁸ Instead it may be regarded as a sensible measure to bring to the forefront of students' minds the importance of only using technology for legitimate purposes.

It would also be a wise precaution to provide that school technology is only able to be used to access the internet under approved supervision and/or that access will be monitored. Just one of the schools in the sample included such a statement in its policies. This was perhaps surprising since, as noted, supervision and/or monitoring of the use of technology is as important a precaution against cyberbullying as supervision and/or monitoring is a precaution against face-to-face bullying. This is so even though not all misuse of the technology will be easily detected even by the most diligent supervision or monitoring. It may be that the other schools in the sample provided supervision or monitoring as a matter of practice so that the absence of any reference in their policies would not necessarily mean that they would be lacking in the duty of care they owed to their students in a particular case. However, including a reference to supervision and/or monitoring in the policy will again be a useful means of helping students to have an appreciation of their boundaries.

3.5 Policies with potential extra-mural scope

⁴⁸ *Age of Majority Act 1974 (ACT)* s 5; *1974 (NT)* s 4; *1973 (Tas)* s 3; *1977 (Vic)* s 3; *1972 (WA)* s 5; *Minors (Property and Contracts) Act 1970 (NSW)* s 8; *Age of Majority (Reduction) Act 1971 (SA)*, s 3; *Law Reform Act 1995 (Qld)*, s 17..

Three of the schools, both government and non-government, provided in their policies that students must not use the internet, e-mail or messaging in a manner that damages the reputation of the school or members of the school community. One of these, a Queensland non-government school, went further by providing that it was:

... forbidden for students to 'gang up' on another person and use their mobile phones to take videos and pictures of acts to denigrate and humiliate that person and send the pictures to other students or upload it to a website for public viewing.

Such policies against bringing in school into disrepute are noteworthy in as much as they have the potential to extend beyond the use of school technology and embrace the use of technology by students in other places such as at their homes. Indeed, the South Australian government school expressly stated that students must not use their personal computers to bully, harass or invade the privacy of other users, without any connection being made to protection of the school's reputation.

Policy implications

As has been seen, the courts have held in other contexts that prescribing rules of behaviour on students for periods outside of school hours may bring the relationship of school teacher and pupil into existence and thereby create a duty of care owed by the school. In other words, it may be possible to argue that, in such a case, the school's duty of care would extend to a situation where, for example, a student has been cyberbullied by a fellow student using his or her personal computer at home. That does not automatically mean that any injury suffered as a result of such cyberbullying will result in liability being visited upon the school. As always, whether the duty is breached depends upon whether there was a risk that was reasonably foreseeable, in the sense of being not insignificant, and a failure to take reasonable precautions in the circumstances. That breach must also be adjudged to have caused the injury. It does mean, however, that schools that have such provisions in their policies must be prepared to treat such cases of off-campus cyberbullying like other cases of cyberbullying occurring on school grounds or using, for example, school technology, and would not be able to merely claim that it was an incident occurring between individuals outside of the school's area of concern, and therefore solely within the concern of parents, or possibly the police.

3.6 Mobile phones and other personal technology

Students having mobile phones is another increasingly common feature in the modern schools, whether because they are an easy means of contact with parents, a safety measure or simply a must-have accessory among peers. Whatever their virtues, mobile phones and other personal technology including cameras, represent non-school technology that may be brought on to school grounds during school hours and which have the potential to be used by bullies to gain ready access to, or means to abuse, their targets.

Two of the nine schools in the sample made no reference at all in their policies to mobile phones and/or personal technology and their use on school grounds, while one did no more than state in its *Information Technology Policy* that it 'hopes the guidelines will be able to inform students on how to use information technology in an appropriate manner'.

The other schools were more explicit in limiting the use of personal technology by students, but broadly four different approaches were taken. One South Australian government school simply stated that mobile phones, iPods and MP3 players must be kept at home, while a South Australian non-government school did not prohibit bringing mobile phones to school but provides that students are not permitted to use them during school hours. A Queensland government school did not encourage personal devices being brought to school but required

that they be turned off and stored in the front office for collection after school. It further provided that students must not record images anywhere that recording would not be considered appropriate, such as in change rooms or toilets,⁴⁹ or used to record private conversations. The other schools allowed their students to retain their personal devices during school hours but restrict their use to outside class time. Two of these schools required mobile phones to be kept out of sight, one providing that phones could be confiscated if they are found.

It can be seen, therefore, that even in this small sample there was no unanimity in the response to personal technology being brought onto the school grounds. Not all schools perceived it as a potential problem requiring a policy response, and even those that did recognise it as an issue had different attitudes to the nature and extent of any potential problem. For this reason, there is no reason to suspect that a similarly diverse range of responses would not be found across a wider sample of schools.

Policy implications

It could not yet be suggested, when considering what the ‘accepted practices in the teaching profession’ might be for the purposes of determining what reasonable precautions ought to have been taken to prevent a student being cyberbullied, that a reasonable school should ban mobile phones from being brought on school grounds, or even ban them from being used during school hours. It might be suggested that a reasonable school will make provision in its policies that stipulate that while on school grounds personal devices may not be used for unacceptable purposes, including taking photos or videos or making recordings. That is not to suggest, however, that if concerns over the extent of cyberbullying, both in terms of its incidence and deleterious consequences, continue to grow and if the misuse of personal devices at school is identified as playing a more significant role in enabling that misbehaviour, ‘accepted practices in the teaching profession’ may evolve to the stage where a reasonable school should either require mobile phones or other personal devices to be surrendered on arrival at school and collected after school, or even be banned from being brought to school altogether.

3.7 Cyberbullying as unacceptable behaviour

It may be that the ‘accepted practices in the teaching profession’ now recognise that schools should make it clear in their policies that cyberbullying is regarded as unacceptable behaviour. For the most part this was reflected in the policies of most of the nine schools in the sample. Surprisingly, one South Australian non-government school made no such declaration in the documents that it supplied.

The policy documents of the others tended to express the school’s attitude in clear and unequivocal terms. For example, a Queensland government school stated:

Bullying behaviour and harassment are learned behaviours which will not be tolerated in our school.

Similarly, a Queensland non-government school declared that it

⁴⁹ It is noted that non-consensual visual recording of a person who is engaged in a private act or in a private place (such as showering or toileting at school) has recently been criminalised in some states, as has the distribution of those recordings (for example, by posting them on a social networking site). See, for example, *Criminal Code 1899* (Qld) ss 227A, 227B respectively; *Summary Offences Act 1988* (NSW) ss 21G, 21H; *Criminal Code* (Canada) s 162; *Sexual Offences Act 2003* (UK) s 67.

... is committed to providing a safe and secure community for all of its members and will therefore not tolerate any action that undermines a person's rights in relation to this.

Another Queensland non-government school went further and expressly referred to cyberbullying by stating its policy in these terms:

Verbal, written, technological, physical, gesticulate or emotional harassment such as exclusion of or extortion of one person or group of people against another person or group will not be tolerated.

Policy implications

While a clear policy statement that bullying is unacceptable behaviour would be regarded as reflecting expected teaching practice, it is still open as to whether this is sufficient alone to also embrace cyberbullying or whether some specific reference to the use of technology should also be included.

If part of the purpose of the policies is to convey a strong message to potential bullies that their behaviour is unacceptable then a case might be made for making that message as explicit as possible. If there is a risk that some students regard the misuse of technology more as a matter of having fun than as engaging in a form of bullying, then there may be some benefit in making an express reference to technology in any statement of policy. Nevertheless, the mere absence of such an express reference should not render any more general statement that bullying or harassment is unacceptable behaviour an insufficient exercise of the school's duty of care.

3.8 Sanctions

An appropriate response to bullying, including cyberbullying, is to impose sanctions in a consistent fashion. Failure to do so, for example randomly taking remedial action in some cases but not others, may undermine any attitude that a school may profess.

One way to facilitate consistency is to make provision for the relevant sanctions in school policies. However, only six of the nine schools set out in their policies the penalties that may be applied to bullying. Typical responses included steps such as contacting parents, counselling, suspension or exclusion. The penalties provided for in some schools included behaviour monitoring sheets, loss of school privileges such as excursions or leadership roles, exclusion from class activities, and social skills lessons.

Just five of the schools made specific reference to penalties for cyberbullying. These schools did not take a common approach. One school provided that failure to comply with its computer use policy would result in computer access being limited to only a certain number of hours per week and/or the use of certain computers. Others prescribed that in the case of cyberbullying, access would be denied to school computers for a time determined by the Principal or, in the case of one school, for a fixed two-week period while the breach was investigated. All schools in the sample that stipulated penalties specifically for cyberbullying also made the link to the broader sanctions for misbehaviour. In all cases where a penalty was stipulated for cyberbullying through the use of school technology that penalty was expressed as being mandatory.

Policy implications

There may be two ways to view the question whether specific penalties for cyberbullying should be included in a school's policy. On the one hand, those schools that simply

prescribe penalties for bullying presumably would regard cyberbullying as a species of behaviour to which those general penalties may be applied. On the other hand, much may be gained by specifically focusing students' attention on the fact that misusing technology – whether school equipment or personal equipment within the ambit of the school's concern – is a form of behaviour which will not be tolerated and which may warrant specific remedial action, perhaps in addition to other penalties of more general application, even if the student regards that misuse as less serious than bullying per se.

3.9 Referrals to police

It has been noted that various types of cyberbullying may amount to criminal offences. This factor was recognised in the policies of only five of the schools in the sample. Generally speaking, three approaches were apparent. Two schools alerted students to the possibility of police action. For example, a Queensland non-government school stated that:

It should be noted that it may be a criminal offence to use a mobile phone to menace, harass or offend another person ... failure to heed to the rules set out may result in an alleged incident being referred to the police for investigation.

Similarly, a Queensland government school provided that:

The sending of text messages that contain obscene language and/or threats of violence may amount to bullying and/or harassment and will subject the sender to discipline and possible referral to the Queensland Police Service.

A second Queensland non-government school went further and included the following in its *Student Protection Policy*:

If the matter would (if proved) be criminal or potentially criminal the Principal or where appropriate Director of the Board will immediately report the matter to the police.

Policy implications

It would be a prudent measure for a school to include a reference in its policies that draws students' attention to the fact that the misuse of technology is potentially a crime that may lead to police involvement. Such a reference may send a strong educative message that should bring into sharp focus the seriousness of the behaviour and in the process serve as a powerful deterrent against engaging in behaviour.

3.10 Conveyance and reinforcement of policies

All schools in the survey provided their students with copies of the school policies, including those relevant to cyberbullying, whether in a school handbook, student diary or other print form. Several also posted their policies on their websites. Reinforcement of the policies was done through avenues such as posters in classrooms and repeated reminders in school newsletters and at school assemblies. Some schools also used avenues such as peer mentor programmes, curriculum modules, police briefings, annual sessions devoted to making students aware of their rights and responsibilities, and personal development programs to remind students of their anti-bullying policies. Parent and broader school community information and education disseminations and teacher staff development opportunities are other strategies frequently adopted to promote a whole-of-school response around bullying prevention and protection.

Policy implications

The effectiveness of any policy depends upon the language used to express it, and whether it is accessible to those it concerns. It also depends upon how well it is drawn to the attention of those who are governed by it and how well it is put into practice. A school is unlikely to be regarded as having discharged its duty of care to prevent students from being exposed to the risk of cyberbullying if, for example, it expresses its policy in terms not easily understood by young people or if all it does is post its policy on a noticeboard or website. Development of policy in easily understood terms is a first step that must be reinforced by constant reminders and consistent implementation when the need arises. However, there is no single best way by which schools may convey and reinforce the content of their policies in the minds of their students.

4. Conclusion

Cyberbullying is a phenomenon of this age that is of concern to students, parents, teachers and school authorities alike. Technology has provided bullies with new capabilities to inflict harm on their targets, both in terms of ease of reach and size of audience for hurtful messages. Victims of face-to-face bullying are increasingly turning to the law as a means of addressing the power imbalance they feel at the hands of their tormentors. While there has not yet been a reported case of a civil claim for compensation for cyberbullying, the first instances of the criminal law being invoked as a response to such behaviour have started to emerge.

From the perspective of school authorities who seek not only to establish systems that will provide the best learning environments for their students but also to discharge their legal duty of care, lessons may be learnt from those cases of face-to-face bullying that have resulted in courts awarding compensation. Principal among those is that it is essential for schools to have effective policy documentation that addresses bullying, and by extension cyberbullying, and that those school policies are well-publicised, enforceable and implemented consistently.

How well do school policies currently measure up to the expectations of the law? The size of the sample of schools included in this survey was very small and, while comprising a mixture of government and non-government schools in two different Australian States, cannot claim to be a representative cross section of all schools in Australia. Nevertheless the exercise is instructive in a number of respects. When determining whether a school has discharged its duty of care, accepted teaching practice will be an important consideration. Better practice would require, among other things, the school to adopt as a matter of policy that bullying – including cyberbullying – is unacceptable behaviour and provide an inclusive definition of those terms. The policy should describe procedures by which various members of the school community may report bullying behaviour and prescribe a process by which complaints of such behaviour will be handled, with complaints to be properly investigated, handled with sensitivity and properly documented. Potential sanctions should be stipulated, including the possibility of police involvement. Policies should also be consistently reinforced in the minds of students and the broader school community and not merely left on noticeboards and/or websites. Measured against these requirements there were differences – in some respects significant differences – in policy approach among even this small sample of schools. It would be surprising if these differences were not replicated on the larger scale of all Australian schools.

State government education departments and independent school organisations may propagate template policies which address those matters and practices. However, not all schools are the same, and education departments and school organisations typically recognise that there may be reasons for deviating from such template policies. There is unlikely to be one set of policy documents that will suit all schools. Nevertheless, in the context of cyberbullying it is possible to identify matters and practices that all school policies

should embrace to educate students, staff and parents and to deter and deal with such behaviour. Cyberbullying is a problem of a new age and it should not be assumed by schools that policies developed in previous times will be sufficient to respond to the challenge. It is incumbent upon all schools to ensure that their policy documentation is in order to establish an appropriate institutional response to minimise the risk that cyberbullying now poses to their students.