

Managing cyber-bullying in schools: Lessons learnt from American and Australian law

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1 Introduction

Ryan Patrick Halligan (13), an American teenager, committed suicide after being cyber-bullied. After his death, his father had the following to say:

Now certainly my son was not the first boy in history to be bullied and have his heart crushed by a pretty girl's rejection. But when I discovered a folder filled with IM exchanges and further interviewed his classmates, I have realized that technology was being utilized as a weapon far more effective and far reaching than the simple tools we had as kids. Passing handwritten notes or a 'slam' book has since been replaced with on-line tools such as IM, Websites, Blogs, cell phones, etc. The list keeps growing with the invention of every new hi-tech communication gadget.¹

What Ryan's father describes is cyber-bullying. Cyber-bullying is a topical subject: one only has to turn on the television or open a newspaper to read about a new instance. Limited studies show that cyber-bullying does exist in South Africa.² An online poll conducted by Gottfried for Reuters showed that more than 10% of parents throughout the world believed that their child was or had been a victim of cyber-bullying. More than 75% of the people questioned believed that cyber-bullying differs from other forms of bullying and requires special attention from schools and parents.³

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¹Halligan at <http://www.RyanPatrickHalligan.org> (accessed 2011-09-16).

²In a study done by the Centre for Justice and Crime Prevention in 2009, it shows that one in three of the young South Africans interviewed had experienced cyber bullying at school (Burton and Mutongwizo 'Inescapable violence: Cyber bullying and electronic violence against young people in South Africa' CJCP Issue Paper No. 8, December 2009). See also 'Bullying on the rise – Study' <http://www.news24.com/SouthAfrica/News/Bullying-on-the-rise-study-20120723> (2013-04-02).

³Reuters 'Cyber bullying a global problem' (2012) January *IT web digital life* at http://www.itweb.co.za/index.php?option=com_content&view=article&id=50524:cyber-bullying-a-global-problem&catid=284&gadgetsportal=t (accessed 2012-05-08).

Cyber-bullying may take the following forms:⁴

- Harassment – repeatedly sending nasty, mean and insulting messages.
- Flaming – online fights using electronic messages containing angry or vulgar language.
- Denigration – ‘dissing’ or disrespecting someone online; sending or posting gossip or rumours about a person to damage his or her reputation or friendships.
- Impersonation – pretending to be someone else and sending or posting material to get that person in trouble or damage their reputation.
- Outing – sharing someone’s secrets or embarrassing information or images online.
- Exclusion – intentionally and cruelly excluding someone.

Shariff states that ‘cyber bullying has roots in traditional bullying that takes place in the physical school setting; however, the medium of cyber-space allows it to flourish in distinct ways creating numerous challenges’.⁵ Although cyber-bullying is a form of bullying, it has unique elements that make it necessary to find new ways to overcome it.

Although the topic of bullying has received some attention in research in South Africa, cyber-bullying nonetheless continues to be a relatively under-researched topic.⁶ The question to be asked is whether cyber-bullying should be understood in the same way as traditional bullying, or whether this form of bullying requires a reconsideration of established concepts relating to bullying.⁷

This article aims to identify the constituent elements of a legal definition of cyber-bullying. In a school context, school officials will have to deal with cyber-bullying as a form of misconduct. Criminal law and law regulating private relationships could be used to inform the definition of cyber-bullying and the forms that cyber-bullying, as a form of misconduct, could take in schools. The author aims to extract guidelines from current laws and policy in the United States of America and Australia that could inform the formulation of school policies on cyber-bullying.

2 Definition of cyber-bullying

There are many definitions of cyber-bullying, and they contain different elements.

⁴Hayward ‘Anti-cyber bullying statutes: threat to student free speech’ (2011) 59 *Cleveland State LR* 85 at 89.

⁵Shariff and Hoff ‘Cyber bullying: Clarifying legal boundaries for school supervision in cyberspace’ (2007) 1 *International Journal of Cyber Criminology* 76 at 77.

⁶Moodley ‘Cyber bullying: A legal framework for South African educators’ (2012) 27 *SAPL*, Badenhorst ‘Legal responses to cyber bullying and sexting in South Africa’ CJCP Issue Paper no 10, August 2011.

⁷Kift, Campbell and Butler ‘Cyberbullying in social networking sites and blogs: Legal issues for young people and schools’ (2009/2010) 20 *Journal of Law, Information and Science* 61 at 63.

The fact that there is no specific legal definition of cyber-bullying from which the elements of cyber-bullying as a crime or form of misconduct can be deduced hampers the prosecution thereof.⁸ For this reason, in this article, the constituent elements of cyber-bullying both as a criminal offence and as a form of misconduct in schools are identified.

Cyber-bullying is a descriptive term attributed to Canadian educator and anti-bullying activist Bill Belsey. He defines cyber-bullying as '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.'⁹ From this definition it is possible to deduce the following elements of cyber-bullying: the use of information and communication technologies, intent, repeated behaviour, hostile behaviour and harm.

Some definitions go further in stating what form the information and communication technologies can take: 'Cyberbullying can be generally defined as using the Internet, cell phones, e-mails, text messaging, online chat rooms, and other forms of electronic communication to deliberately harass, mock, defame, intimidate or threaten someone'.¹⁰ This definition therefore includes intent and hostile behaviour, and the forms that 'hostile behaviour' can take are identified. However, the requirements that behaviour must be repeated and that the victim must suffer harm as a result of the cyber-bullying are absent.

In other instances authors identify aggression as an element of cyber-bullying. Smith *et al* define cyber-bullying as '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'.¹¹

It is unclear from the above definitions whether repetition is necessarily an element of cyber-bullying. In their definition of cyber-bullying, Patchin and Hinduja concur with Belsey (see above) in appearing to require a repetitive element, which they describe as 'wilful and repeated harm inflicted through the medium of electronic text'.¹² Doering's definition, on the other hand, does not identify repetition as a constituent element of cyber-bullying. The author is of the opinion that the element of repetition is not necessary, as a single act of aggression via electronic communication may cause as much harm as a repeated act.

In some definitions, cyber-bullying is identified as a form of bullying. Willard, for example, defines cyber-bullying as speech that is 'defamatory, constitutes

⁸Pickering 'The jury has reached its verdict ... or has it? Cyberbullying in the Canadian legal arena' (2008) 7/3 *Professional Development Perspectives* 5.

⁹Kift *et al* (n 7) 62.

¹⁰Doering 'Tinkering with school discipline in the name of the First Amendment: Expelling a teacher's ability to proactively quell disruptions caused by cyberbullies at the schoolhouse' (2008/2009) 87 *Nebraska LR* 630 at 635.

¹¹Cited in Kift *et al* (n 5) 63.

¹²Patchin and Hinduja 'Making friends in cyber-space' (1996) 46 (1) *Journal of Communication* 80, Kift *et al* (n 7) 62.

bullying, harassment, or discrimination, discloses personal information, or contains offensive, vulgar or derogatory comments'.¹³ Further: 'Cyberbullying occurs when students use electronic means, including the use of Internet web sites, chat rooms, instant messaging, text and picture messaging on phones, and blogs to bully peers'.¹⁴ In terms of this definition, unwelcome 'sexting' via text messages could be a form of cyber-bullying. Sexting should be included as a form of cyber-bullying, as it is also an act committed via an electronic device that may cause harm.

The brief overview above reveals both the abundance of definitions of cyber-bullying, and the fact that these definitions are inherently open-ended and differ in certain aspects. In order to facilitate legal certainty, the offence of cyber-bullying must be defined to include the following elements or aspects:

- An act,
- The intention to harm the bullied learner/person/individual,
- The use of a communication device to commit the act, and
- Actual harm to the bullied victim.

The author suggests that not specifying the type of act or device will leave the definition open enough to accommodate changes in the rapidly evolving technological landscape. Shariff is of the opinion that definitions of bullying are too simplistic and thus invite reactions that '[fail] to recognise its nuances and complexities'.¹⁵ The author of this article agrees with Shariff that 'cyber-bullying must be understood in the specific paradigmatic context in which it is presented'.¹⁶ This is especially important when defining cyber-bullying for the school milieu.

3 Laws governing cyber-bullying in the United States of America and Australia

In this section, the author will extract guidelines from current laws and policy in the United States of America and Australia that could inform the formulation of school policies on cyber-bullying.

3.1 The United States of America

Cyber-bullying laws and court cases from the United States of America (USA) will be discussed. The USA has passed a number of anti-bullying laws, and has decided a substantial number of cases dealing with cyber-bullying and free

¹³Shariff *Confronting cyber-bullying: What schools need to know to control misconduct and avoid legal consequences* (2009) at 41.

¹⁴Servance 'Cyberbullying, cyber-harassment, and the conflict between schools and the First Amendment' (2003) *Wisconsin LR* 1213 at 1218.

¹⁵Sharif (n 13) 39.

¹⁶*Ibid.*

speech within the school context. As South Africa is a constitutional democracy and has a justiciable bill of rights which, among other things, protects the right to freedom of expression, this article looks at how the USA approaches cyber-bullying in the context of the restriction of the right to freedom of speech of learners in schools.

Since the focus of this article is cyber-bullying within the school context, the following possible obstacles should be kept in mind for further research when defining cyber-bullying in schools:¹⁷

- The anonymity of electronic media.
- The fast pace of development in electronic media may make it difficult for educators to understand relevant electronic forums.
- It is easy for learners to send disparaging comments about fellow learners to a large audience very quickly.
- Learners punished for cyber-bullying may claim that a school lacked the authority to punish them, as the act of cyber-bullying may have happened outside the school or school hours.
- May educators be held accountable if they fail to take action to prevent cyber-bullying?
- May educators take steps to prevent cyber-bullying without violating a learner's right to freedom of expression?

This means that any legislation or policy regarding cyber-bullying should include a broad definition of cyber-bullying, determine specific school policy regarding cyber-bullying and how the cyber-bully will be punished, as well as specifications regarding instances of cyber-bullying that take place off the school grounds.

In the USA, 49 states have passed anti-bullying laws.¹⁸ Fewer than half of these states specifically prohibit cyber-bullying, although in anti-bullying laws some include electronic harassment, which may qualify as a form of cyber-bullying.¹⁹ The laws can further be grouped into those that explicitly include off-campus cyber-bullying or include only cyber-bullying that takes place on campus.²⁰ The USA state anti-bullying laws will now be evaluated in terms of the criteria listed above.

¹⁷Lane 'Taking the lead on cyberbullying: Why schools can and should protect students online' (2011) 96 *Iowa LR* 1791 at 1795-1796, Manuel 'Cyber-bullying: Its recent emergence and needed legislation to protect adolescent victims' (2011) 13 *Loyola Journal of Public Interest Law* 219 at 229.

¹⁸Hinduja and Patchin at <http://www.bullypolice.org/> (accessed 2012-08-13).

¹⁹*Ibid.*

²⁰Hayward (n 4) 91.

The table below summarises USA state anti-bullying laws.²¹

State	Includes cyber-bullying	Includes electronic harassment	Criminal sanction	School sanction	Requires school policy	Includes off-campus behaviour
Alabama	No	Yes	No	No	Yes	No
Alaska	No	No	No	Yes	Yes	No
Arizona	No	Yes	No	Yes	Yes	No
Arkansas	Yes	Yes	Yes	Yes	Yes	Yes
California	Yes	Yes	No	Yes	Yes	No
Colorado	No	Yes	Proposed	Yes	Yes	No
Conneticut	Yes	Yes	No	Yes	Yes	Yes
Delaware	No	Yes	No	Yes	Yes	No
Florida	No	Yes	No	Yes	Yes	No
Georgia	Proposed	Yes	No	Yes	Yes	Proposed
Hawaii	Yes	Yes	Proposed	Yes	Yes	No
Idaho	No	Yes	Yes	Yes	Yes	No
Illinois	Proposed	Yes	No	Yes	Yes	Mo
Indiana	No	Proposed	No	Yes	Yes	No
Iowa	No	Yes	No	Yes	Yes	No
Kansas	Yes	Yes	No	Yes	Yes	No
Kentucky	Proposed	Yes	Yes	Yes	Yes	No
Louisiana	Yes	Yes	Yes	Yes	Yes	Yes
Maine	Proposed	Proposed	No	Yes	Yes	No
Maryland	No	Yes	No	Yes	Yes	No
Massachusetts	Yes	Yes	No	Yes	Yes	Yes
Michigan	No	Yes	Proposed	No	Yes	No

²¹This table was compiled by Hinduja and Patchin. For more information on the relevant legislation see Hinduja and Patchin (n 18).

State	Includes cyber-bullying	Includes electronic harassment	Criminal sanction	School sanction	Requires school policy	Includes off-campus behaviour
Minnesota	No	Yes	No	Yes	Yes	No
Mississippi	No	Yes	Yes	Yes	Yes	No
Missouri	Yes	Yes	Yes	Yes	Yes	No
Montana	No	No	Yes	No	No	No
Nebraska	Proposed	Yes	No	Yes	Yes	Proposed
Nevada	Yes	Yes	Yes	No	Yes	No
New Hampshire	Yes	Yes	No	No	Yes	Yes
New Jersey	No	Yes	No	Yes	Yes	Yes
New Mexico	No	Yes	No	Yes	Yes	No
New York	Yes	Yes	Proposed	Yes	Yes	Yes
North Carolina	Yes	Yes	Yes	Yes	Yes	No
North Dakota	No	Yes	Yes	Yes	Yes	No
Ohio	No	Yes	No	Yes	Yes	No
Oklahoma	No	Yes	No	No	Yes	No
Oregon	Yes	Yes	No	Yes	Yes	No
Pennsylvania	No	Yes	No	Yes	Yes	No
Rhode Island	No	Yes	No	No	Yes	No
South Carolina	No	Yes	No	Yes	Yes	No
South Dakota	No	Yes	No	Yes	Yes	Yes
Tennessee	No	No	Yes	Yes	Yes	No
Texas	No	Yes	No	Yes	Yes	No
Utah	Yes	Yes	No	Yes	Yes	No
Vermont	No	No	No	Yes	Yes	No
Virginia	No	Yes	No	Yes	Yes	No

State	Includes cyber-bullying	Includes electronic harassment	Criminal sanction	School sanction	Requires school policy	Includes off-campus behaviour
Washington	Yes	Yes	No	Yes	Yes	No
West Virginia	No	Yes	No	Yes	Yes	No
Wisconsin	No	No	Yes	Yes	Yes	No
Wyoming	No	Yes	No	Yes	Yes	No
Totals	15	45	12	43	49	8

Although, clearly, America has made strides in combating and legislating cyber-bullying, it is equally clear that laws to address the specific problems created by the unique elements of cyber-bullying are lacking. Manuel points out the following problems:²²

- The statutes of most states do not deal with cyber-bullying specifically, and students' free speech rights may not allow a separate cause of action for cyber-bullying.
- The statutes only dictate when a school may intervene in incidences of cyber-bullying, and provide no regulations as to what disciplinary actions may be used against a cyber-bully, or how to deter cyber-bullies.
- These statutes do not provide redress to the victim of cyber-bullying.²³

As any legislation or policy regarding cyber-bullying may potentially limit a learner's right to free speech, the American situation regarding the limitation of free speech in schools will now be examined.

American authors refer to the three most important court decisions regarding the freedom of speech in a school context as the triumvirate or trilogy.²⁴ In *Tinker v Des Moines Independent Community School District*²⁵ the right to freedom of expression within a public school was upheld. In 1965 a group of high school students protested against the Vietnam War by wearing black armbands to school. The school implemented a policy stating that any student found wearing a black armband at school would be suspended. Subsequently, three students

²²Manuel (n 17) 237.

²³For more information on the different cyber-bullying laws see Beckstrom 'State legislation mandating school cyberbullying policies and the potential threat to students' free speech rights' (2008) 33 *Vermont LR* 283 at 291, Hayward (n 4) 85.

²⁴Shariff 'Cyber-dilemmas in the new millennium: School obligations to provide student safety in a virtual school environment' (2005) 40/3 *McGill Journal of Education* 457 at 467-487; ERIC 27 October 2006, 465, Beckstrom (n 21) 283.

²⁵Shariff (n 24) 465.

were suspended. The Supreme Court held in favour of the students that neither students nor teachers 'shed their Constitutional right to freedom of speech and expression at the schoolhouse gate'.²⁶ The court further emphasised the importance of training and exposing students to an exchange of ideas.²⁷ As Auerbach S stated, this case is reflective of the recognition the Supreme Court gives to protected speech in schools and that students may express their views in a manner that does not 'materially' and 'substantially' interfere with the rights of others or the operation of the school.²⁸ Thus, a student's right to freedom of speech may be limited when it leads to:²⁹

- substantial and material disruption, or
- infringes on the rights of other students.

In instances of cyber-bullying, this test means that the right to freedom of speech of the bully may be limited if he or she infringes on the rights of the victim of cyber-bullying within a school context.

The next case that dealt with student free speech was *Bethel School District No 403 v Fraser*.³⁰ Fraser delivered a speech at a voluntary school assembly in which he used a sexual metaphor in reference to a candidate.³¹ He was warned by teachers not to deliver the speech, as it was deemed inappropriate and might lead to negative consequences.³² He delivered the speech nevertheless, and was subsequently suspended.³³ The court agreed with *Tinker* that students did not shed their rights at the school gate, but that 'vulgar and lewd speech ... undermines the school's basic educational mission'.³⁴ Thus, public schools are allowed to decide what types of language they find permissible and students do not necessarily have the same extent of rights as adults have.³⁵ This means that a public school has the right to limit the freedom of speech of a cyber-bully if his or her language is found to be of such a nature that it will undermine the basic educational mission of the school.

In *Hazelwood School District v Kuhlmeier* the court had to decide whether a school principal may censor the school newspaper.³⁶ A series of articles based

²⁶ *Ibid.*

²⁷ This is in line with the preamble to the Convention on the Rights of the Child, which states that children must be 'fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity'.

²⁸ Auerbach 'Screening out cyberbullies: Remedies for victims on the internet playground' (2008–09)

³⁰ *Cardozo LR* 1641 at 1649.

²⁹ Beckstrom (n 21) 297.

³⁰ 478 US 675 (1986).

³¹ Beckstrom (n 21) 298.

³² *Ibid.*

³³ *Ibid.*

³⁴ Auerbach (n 28) 1649.

³⁵ *Id* 1649-1650.

³⁶ *Ibid.*

on problems such as divorce and pregnancy was to be published in the school newspaper. In the articles, the student writers did not protect the anonymity of the students. Owing to concerns about the lack of anonymity, the principal of the school withdrew some pages from the paper. In this case the court ruled that 'school-sponsored speech' may be limited where the restriction is 'reasonably related to pedagogical concerns'.³⁷ Thus, if student speech is inconsistent with the mission of the school, the school need not tolerate such speech.

From the above cases it is clear that there is no set standard for regulating student speech. *Tinker* is the standard that most US courts use to determine whether the right of a learner to freedom of speech was infringed, though courts have applied this standard in a contradictory way.³⁸ In *JS v Bethlehem Area School District*,³⁹ a student created a website named 'Teacher Sux' on which a number of offensive and threatening comments were made regarding a teacher at the school. The school suspended the student for 10 days, and brought proceedings to expel the student. The student created the website at home, but the court found that this was a form of on-campus speech, as other students could access the website on campus. The court found in favour of the school that the website fell within the authority of the school's discretion in line with state statute.⁴⁰

In *JC v Beverly Hills Unified School District*, a student posted a YouTube video in which she and her friends ridiculed another student from the school. The court found that the action did not cause 'substantial disruption' and that a student should not be disciplined by the court for speech 'simply because young persons are unpredictable or immature, or because, in general, teenagers are emotionally fragile and may often fight over hurtful comments'.⁴¹ The test used in *Tinker* was not followed correctly in *JC v Beverly Hills Unified School District*: surely it would affect a student's rights to be called a 'slut', 'spoiled' and the 'ugliest piece of shit I have ever seen'?⁴² It is a pity that the court in this true case of cyber-bullying dismissed the feelings of the victim so easily as to term her emotionally fragile because of her age. Because the court judged that these hurtful words did not cause a substantial or material disruption in the school, the victim was left with no redress.

Some courts apply the 'true threat' doctrine to student speech. In *Watts v United States* the Supreme Court of the United States held that a 'true threat' is not protected by freedom of speech.⁴³ In *Doe v Pulaski County Special School District*, a boy whose girlfriend broke up with him wrote two violent and obscene

³⁷*Id* 1651.

³⁸*Ibid.*

³⁹Manuel (n 17) 239.

⁴⁰*Ibid.*

⁴¹Beckstrom (n 23) 306.

⁴²*Ibid.*

⁴³*Ibid.*

letters to her.⁴⁴ He did not send the letters to her, but told her and her friends about the content. Later one of his friends delivered the letters to the ex-girlfriend at school. The ex-boyfriend was expelled for a year. The court held that 'most, if not all, normal 13 year old girls (and probably most reasonable adults) would be frightened by the message and tone' of the communication, and would be afraid for their well-being. Thus the letter constituted a true threat, and the student's freedom of speech was not protected.⁴⁵ If the behaviour of a cyber-bully can be seen as a 'true threat' to another learner at school, the right to freedom of speech of that cyber-bully may be limited.

It would seem that even in a country where the right to freedom of speech is fiercely protected, it may nevertheless be restricted in certain instances. These cases show that inappropriate use of communication technology both on and off campus may be punished if they cause substantial and material disruption in the school.

The 'true threat' doctrine may not be the answer. In the *Doe* case there was clearly a true threat, and the 'bully' was rightfully punished. There is no true threat in *JC v Beverly Hills Unified School District*. Thus, even though the victim was ridiculed via electronic media, because there was no true threat, the victim was left without redress.

Although some positives may be taken from these cases, such as that off-campus and on-campus conduct may be punished, the right to freedom of speech may be limited and the existence of tests to determine whether the right to freedom of speech may be limited, it is clear that no uniform standards exist to measure how the right of free speech of a learner may be limited in instances of cyber-bullying.

3.2 *Australia*

In Australia, section 60E of the Crimes Act 1900 (NSW)⁴⁶ creates the following offence:

a person who assaults, stalks, harasses or intimidates any school student or member of staff of a school while the student or member of staff is attending a school, although no actual bodily harm is occasioned, is liable to imprisonment for 5 years.⁴⁷

This may apply to cyber-bullying. Other than this provision, no legislation referring specifically to cyber-bullying has been enacted, and existing legislation has been interpreted to cover or include instances of cyber-bullying. Analysing

⁴⁴Hayward (n 4) 117.

⁴⁵*Ibid.*

⁴⁶Kift *et al* (n 7) 67.

⁴⁷Crimes Amendment (School Protection) Act 2002 (NSW), s60E.

how Australia has utilised existing laws to combat cyber-bullying is a good exercise as South Africa currently has no cyber-bullying legislation and will have to use existing laws to address cyber-bullying.

In Australian law, the crimes of misuse of telecommunications services, stalking, criminal defamation and assault by threat of force may constitute cyber-bullying.⁴⁸

3.2.1 Misuse of telecommunications services

The Australian Commonwealth Criminal Code institutes certain penalties for misusing telecommunications services such as the Internet and cellular phones. Misuse may constitute using these media to threaten to kill, menace, harass or cause harm. The penalties range from three to seven years' imprisonment.

3.2.2 Stalking

Anti-stalking legislation can be found in all Australian jurisdictions.⁴⁹ The legislation varies considerably from jurisdiction to jurisdiction, but in Queensland and Victoria it makes specific reference to sending electronic messages to (or otherwise contacting) the victim.⁵⁰

Shane Gerada (20) from Victoria, Australia, pleaded guilty to stalking after sending threatening messages to Allem Halkic (17). He was sentenced to a community-based order on the condition that he performed 200 hours of unpaid community work. Tragically, Halkic committed suicide after receiving the texts, although the prosecution and defence agreed that Gerada's actions were not contributing factors in Halkic's death.⁵¹

3.2.3 Criminal defamation

Criminal defamation is an offence in all Australian jurisdictions except Victoria. Prosecutions for this crime are rare, but sanctions may include a prison sentence of up to three years,⁵² for example for cyber-bullying in the form of sending or posting gossip or rumours about a person to damage his or her reputation or friendships.

⁴⁸*Id* 71-81.

⁴⁹Kift *et al* (n 7) 73.

⁵⁰See for instance Crimes Act 1900 (NSW) s545B, Criminal Code 1899 (Qld) s359A, Crimes Act 1900 (ACT) s35, Criminal Code 1983 (NT) s189.

⁵¹Twining 'Ex friend of Altona Meadows teen, sentenced' *Hobson's Bay Leader* (2010-04-13) <http://hobsons-bay-leader.whereilive.com.au/news/story/ex-friend-of-altona-meadows-teen-sentenced/> (accessed 2011-10-25).

⁵²See for instance Criminal Code Act 2002 (ACT).

3.2.4 Assault by threat of force

It is possible to commit criminal assault by the threat of force alone, when the target is put in fear of imminent violence. Actual direct or indirect application of force is not necessary.⁵³ Thus, threatening a person with violence over the telephone or Internet may constitute assault by threat of force.

Contributing to websites with the intention of bullying may also result in civil liability for learners.⁵⁴ A number of elements need to be taken into account with regard to civil liability. Owing to the age of a child at school, the child will in all probability not be in a financial position to pay damages should he or she be found liable. In Australia, in general, parents are not legally liable for the acts of their children.⁵⁵ Schools, however, may be a target for liability on the grounds of defamation or negligence.⁵⁶

3.2.5 Defamation

The nature of cyber-bullying, uploading words and images onto websites, blogs and chat rooms, makes it defamation. Owing to the uniform defamation laws enacted in Australia, the common law is applied in determining whether defamation took place.⁵⁷

Thus, when publication:⁵⁸

- exposes the plaintiff to hatred, contempt or ridicule;
- induces others to shun or avoid the plaintiff; or
- lowers the plaintiff in the estimation of others while disparaging the plaintiff in the sense of attributing moral blame to the plaintiff for some disagreeable conduct or attribute, it may constitute defamation.⁵⁹

The interpretation of the reasonable reader is taken into account; thus the motive or intention of the creator is not relevant, and the claim that publication was only in fun is irrelevant.⁶⁰ The elements of cyber-bullying as set out above require intent, although harm of some sort, as a requirement, will fall within the elements of cyber-bullying as set out above. This raises the interesting question of whether intent is required in order for cyber-bullying to have taken place.

⁵³Kift *et al* (n 7) 76.

⁵⁴*Id* 81.

⁵⁵Butler 'Civil liability for cyber bullying in schools: A new challenge for psychologists, schools and lawyers' in Moore (ed) (2007) *Proceedings Psychology making an impact: the Australian Psychological Society 42nd Annual Conference* at 52-56.

⁵⁶*Id* 52.

⁵⁷*Id* 53.

⁵⁸*Ibid.* Publication in this instance means communicated to one other person at least.

⁵⁹*Ibid.*

⁶⁰*Ibid.*

Schools may be held liable for acts of defamation if they do not remove defamatory statements or publications on notice boards or computer sites where the school has editorial control.⁶¹

3.2.6 Negligence

Parsons⁶² gives an enlightening summary of the case of *Cox v State of New South Wales* to illustrate the liability of schools (or for that matter the state) in cases of negligence concerning bullying. It can be argued that liability for negligence in instances of cyber-bullying will also apply if the requirements for negligence are met.

In the above-mentioned case, the learner was repeatedly bullied at school. After his mother made complaints to the school, nothing was done. Consequently, the plaintiff suffered psychological damage severe enough to prevent him from finishing school. The plaintiff will in all likelihood be unable to work. The plaintiff brought his action of negligence against the State of New South Wales as being responsible for the administration and management of schools in New South Wales. The claim was for negligence in not protecting the plaintiff from bullying.⁶³ Damages were awarded to the plaintiff.

For a claim of negligence to succeed, the following must be established:

- Whether the defendant had a duty of care towards the plaintiff,
- The standard of the duty of care,
- Whether the actions of the defendant fall short of the standard of care; if so, the defendant breached the duty of care,
- Whether the plaintiff proved that the breach of duty caused the harm, and
- Whether the harm was reasonably foreseeable.⁶⁴

The Australian approach clearly shows that it is possible to use existing law to combat cyber-bullying. However, the lack of legislation aimed specifically at protecting both victims and perpetrators of cyber-bullying in a school context causes certain problems. When viewed in light of international law pertaining to children, such as the Convention on the Rights of the Child, current legislation may not comply with the following requirements as set out in international law.⁶⁵ In Australia, the uniform minimum age for criminal responsibility is 10 years, the uniform maximum age of presumption against criminal responsibility is 14 years and the maximum age of

⁶¹See *Byrne v Deane* [1937] 1 KB 818 and *Stratton Oakmont Inc v Prodigy Services Inc* 1995 NY Misc LEXIS 229.

⁶²Parsons 'Beware of bullies! Lessons in liability from *Cox v State of New South Wales*' (2008) 14/2 *The National Legal Eagle* 3 at 3.

⁶³*Ibid.*

⁶⁴*Ibid.*

⁶⁵United Nations Convention on the Rights of the Child 28 *ILM* 1448, 1577 UNTS 3 (1989-11-20) (CRC).

treatment as a child for criminal responsibility varies between 16 and 18 years.⁶⁶ Section 3(1) of the Convention on the Rights of the Child states that the best interests of the child must be a primary consideration in all actions pertaining to children. The Convention further states in section 37(b) that '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.' If a jail sentence of three to seven years as seen in the Australian Commonwealth Criminal Code is prescribed for misuse of telecommunications services, section 37(b) of the Convention will not be complied with. Charging a child at school with a criminal offence for cyber-bullying will undoubtedly not be in the best interests of that child, and having a criminal record will be detrimental to his or her future. It would be better to have specific laws with space for developing a solution that fits the needs of every individual perpetrator as well as the child victims.

With regard to the civil liability of schools in cases of negligence, I fully agree that the school should be held liable for negligence. Where a case is pursued against the perpetrator himself or herself, it may entail a lengthy lawsuit that impedes the development of the children involved, as they are unable to move on with their lives.

4 Conclusion

In the United States of America, most states have adopted laws relating to cyber-bullying. This is a good start in creating law and policy to deal with the specific problems created by cyber-bullying in schools. Some of the problems pointed out, such as off-campus bullying, are not comprehensively covered by these laws, and more extensive legislation needs to be adopted.

Case law regarding the possible limitation of freedom of speech of students in cyber-bullying cases is fairly extensive. It is clear that the freedom of speech of students may be limited. There are, however, no uniform standards to measure how the right of free speech of a learner may be limited in instances of cyber-bullying.

The situation in Australia provides an example of how existing laws may be utilised to prevent cyber-bullying and to punish cyber-bullies. Because no laws have been created specifically to deal with cyber-bullying within a school context, it is evident that there are gaps in the current legislation as pointed out above.

South African schools have the responsibility to provide learners with a disciplined school environment, and to provide quality education. In order to do this, the disruption that cyber-bullying may cause must be addressed. Current bullying policies will not suffice as cyber-bullying is a unique form of bullying which needs to be addressed separately, taking into account the new challenges this form of bullying presents.

⁶⁶See 'Legal definition of a juvenile' http://www.aic.gov.au/crime_community/demographicgroup/youngpeople/definition.aspx (accessed 2012-11-01).

Although cyber-bullying may be regulated by existing law, as evident from the discussion of Australian law, it is a specialised and rapidly developing field that contains nuances that will differ from case to case. It would be best to draft legislation that applies specifically to cyber-bullying. Educators must also be made aware of this problem, and how to deal with it. Those involved in drafting legislation regarding cyber-bullying in South African schools may usefully draw on the American experience. Certain constitutional rights of the bully, such as the right to freedom of expression and the right to privacy may be limited, as seen in American case law. The victim of the bullying also has rights, such as the right to human dignity, and the right not to be treated in a cruel, inhumane or degrading way.⁶⁷ Within the South African context, this will lead to a balancing of rights according to section 36 of the South African Constitution.

In order to avoid an abundance of tests and interpretations regarding the rights of the bully and the victim of bullying, legislation with specific regulations regarding cyber-bullying, also taking into account the Bill of Rights, is necessary. This legislation must determine a broad definition of cyber-bullying, determine specific school policy regarding cyber-bullying, specify how the cyber-bully will be punished, and provide specifications regarding instances of cyber-bullying that take place outside school grounds. The legislation must also be wide enough to cover the possible liability of schools and educators.

⁶⁷Constitution of the Republic of South Africa, 1996, ss 16, 14, 10 and 12(1)(e).