MONASH University

'Sufficiently serious behaviour'? When should cyberbullying by children be subject to criminal law?

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Abstract

Cyberbullying is a growing phenomenon, widely viewed as being a significant social and public health issue. Responding to cyberbullying is a complex task, particularly when there is a need to engage the criminal law. The Australian government has repeatedly asserted that the criminal law may apply to 'sufficiently serious' cyberbullying incidents.

This thesis explores the threshold at which the law in Victoria, Australia, can identify and respond to 'sufficiently serious' cyberbullying incidents.

Firstly, the thesis explores academic work to establish what is meant by some key terms, especially 'cyberbullying'. This exploration necessitates an interdisciplinary approach consisting of research from a broad range of disciplines such as law, psychology, and education.

Secondly, the thesis undertakes a doctrinal analysis of the various legal responses to cyberbullying. This analysis involves an overview of tort and regulatory law before moving on to criminal law. The two offences that form the focus of this thesis are s 474.17 of the *Criminal Code 1995* (Cth) which prohibits using a carriage service to menace, harass or cause offence; and s 21A of the *Crimes Act 1958* (Vic) that makes stalking an offence.

Finally, the thesis assesses the extent to which those legal responses can effectively identify and respond to 'sufficiently serious' incidents of cyberbullying.

One of the key findings of the thesis is that exploring responses to cyberbullying, where there are no identifiable responses to similar behaviour offline, is nonsensical. There is a need to consider bullying behaviour as a whole – it is aggressive behaviour accompanied by an intent to cause harm. Many of the nuances associated with cyberbullying are secondary, rather than primary, indicators of harm.

This thesis argues that the Victorian legal framework requires more protection of children from being exposed to the criminal justice system. Further, it argues that the regime administered by the (Commonwealth) Office of the eSafety Commissioner does little to

respond to bullying by children. However, the uptake in the number of applications and granting of Personal Safety Intervention Orders suggests that victims of bullying are increasingly seeking forms of redress that are not regulatory actions exercised by the state or the criminal law.

Presently, cyberbullying correlates closer to an offence punishable by a three-year maximum term of imprisonment, whereas adding offline (or 'in person') behaviour arguably escalates that to an offence with a ten-year maximum term of imprisonment. The disparity in maximum penalty is of concern as most forms of offline bullying have not historically been considered criminal behaviour, and most instances of cyberbullying involve some forms of offline behaviour.

Significant reform is required to ensure that an adequate response exists to bullying and cyberbullying by and of children in the State of Victoria. The argument for reform is in Chapter Seven of the thesis.

Declaration

This thesis is an original work of my research. It contains no material accepted for the award of any other degree or diploma at any university or equivalent institution. Furthermore, to the best of my knowledge and belief, this thesis contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

Stephen Alwyn Jones

Date: 18 July 2021

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List of commonly used abbreviations, acronyms and defined terms

Unless otherwise specified, the abbreviations and acronyms below have the following meanings:

21A means the offence of stalking, under section 21A of the *Crimes Act*;

474.17 means the offence of using a carriage service to menace, harass or cause offence, under section 474.17 of the *Criminal Code*;

ABS means the Australian Bureau of Statistics;

AOI means an alleged offender incident;

ACMA means the Australian Communications and Media Authority;

CCV means the Children's Court of Victoria;

Crimes Act means the *Crimes Act 1958* (Vic);

Criminal Code means the *Criminal Code Act 1995* (Cth);

end-user notice (EUN) means a notice issued under section 42 of the eSafety Act;

eSafety Office means the Office of the eSafety Commissioner;

eSafety Act means the *Enhancing Online Safety Act 2015* (Cth);

FCA means the Federal Court of Australia;

FCCA means the Federal Circuit Court of Australia;

HCA means the High Court of Australia;

ICT means information and communications technology;

MCV means the Magistrates' Court of Victoria;

PSIO means a personal safety intervention order;

SBO means a stop bullying order.

Chapter One – Introduction

1.1 Thesis Overview

In a 2014 study of data from 145 countries, UNICEF found that bullying is a problem that exists in every country.[1] Subsequently, on 18 December 2014, the United Nations (UN) General Assembly adopted Resolution 69/158, 'Protecting children from bullying'. The Resolution specifically recognises that bullying, including 'cyberbullying', can have potential long-term impacts on the enjoyment of the human rights of children and adverse effects on children harmed by or involved in bullying. Further, it encourages Member States to take all appropriate measures to prevent and protect children from bullying,[2] to generate statistical information as a basis for which to elaborate effective public policies[3] and to share national experiences and best practices for preventing and tackling cyberbullying.[4]

As will be explored in this thesis, Australia has significant bullying and cyberbullying rates, yet identifying best practice for preventing and tackling bullying (including cyberbullying) remains an ongoing challenge. The central question explored in this thesis is the extent to which criminal law is an appropriate response to cyberbullying by children.[5] Two aspects are particularly challenging in answering that question. Firstly, the emergence

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[1] UNICEF 'Hidden in Plain Sight: A statistical analysis of violence against children' September 2014, 120.

[2] Protecting children from bullying, GA Res 69/158, 69th sess, Agenda item 64(a), UN Doc A/RES/69/158 (18 December 2014), sub-s 3(a).

[3] Ibid sub-s 3(c).

[4] Ibid sub-s 3(e).

[5] Unless otherwise specified, the thesis defines a child as being a person under the age of 18.

of cyberbullying as a subset of bullying, but with its distinctive characteristics. Secondly, the challenge of when to use criminal law as a response to serious cases of cyberbullying.

Another critical factor is that some elements of cyberbullying may not have a 'real world' counterpart. By way of example, the rapid and wide dissemination of material online may have limited or no real-world counterparts.

This thesis is focused on those two issues and examines whether the threshold at which criminal law should or ought to be the response to cyberbullying by children in the state of Victoria, Australia, is identifiable. In achieving this, the thesis primarily addresses cyberbullying, although this necessitates examining bullying as a whole, capturing offline and online behaviour, before exploring the legal tools available to address cyberbullying.

As will be detailed, criminal laws and regulatory processes can apply to bullying behaviour in all its forms in Victoria and all other Australian jurisdictions. However, the circumstances in which criminal law should be used to respond to bullying and cyberbullying are unclear. This thesis's genesis was an assertion by the Australian government in 2013 that *sufficiently serious* instances of cyberbullying may be treated as a criminal offence (added emphasis).[6] The argument put forward was that existing criminal law provisions in the Commonwealth's *Criminal Code* ('*Criminal Code*')[7] and relevant state and territory crimes acts were sufficient to cover the field.[8] However, no elaboration of which laws or guidance about the requirements of sufficiency or severity were offered. Therefore, the key question

[6] Commonwealth Attorney General's Department, 'National Plan to Combat Cybercrime' Canberra (2013), 5.

[7] *Criminal Code Act 1995* (Cth) ('Criminal Code').

[8] See Commonwealth Attorney General's Standing Council on Law and Justice, 'Communique' (5 October 2012), and ES to the Enhancing Online Safety for Children Bill 2014 (Cth).

remained – when is cyberbullying sufficiently serious to warrant the application of the criminal law; and is the threshold of seriousness readily ascertainable?

The central thesis is that what Piekarzewski describes as the 'legal line' is undesirably unclear:

> The legal line indicates when cyberbullying behaviour crosses over from an issue to be dealt with by parents, students, or teachers alone, to one where courts, police, and legislators become involved. Knowing when behaviour crosses the legal line helps to define our legal rights and responsibilities. Understanding how the law deals with cyberbullying reflects where our society currently stands on this issue.[9]

As of June 2021, no Australian jurisdiction has enacted criminal laws addressing bullying or cyberbullying as a named form of behaviour. On that basis, law enforcement agencies use existing laws to tackle elements of those behaviours.[10]

This difficulty of identifying how or when the criminal law should apply as a response to cyberbullying is not unique to Australia. Internationally, high profile cases such as the suicide of Megan Meier, a 13-year-old in the American state of Missouri in 2006, triggered

[9] Anna Piekarzewski, 'The Legal Line', *McGill University* (web article, undated) <https://www.mcgill.ca/definetheline/cyberbullying/legal-line>. Piekarzewski's piece is part of a broader project 'Define the Line' at McGill University that looks at issues including sexual violence and cyberbullying. Define the Line is an interdisciplinary project that spans the fields of policy, law, education, arts, popular culture, and media and 'the legal line' is referred to in this thesis as a term of general application rather than having legal weight.

[10] Bradley A Areheart 'Regulating Cyberbullies through Notice Based Liability' [2007] *The Yale Law Journal Pocket Part* 117:41.; Sameer Hinduja and Justin W Patchin above n 48; Ryan Broll 'Collaborative responses to cyberbullying: preventing and responding to cyberbullying through nodes and clusters' [2014] 26(7) *Policing and Society: An International Journal of Research and Policy*, 8.

fervour in the United States of America for legislation to target the harm caused by cyberbullying.[11] By January 2015, 49 states had introduced or amended legislation to deal with cyberbullying, primarily through a range of civil and administrative remedies. At that time, nine states had specific criminal law provisions.[12] By 2020, 44 states had implemented criminal sanctions for cyberbullying or electronic harassment.[13]

The absence of specific laws in Australia was noted in research conducted by GfK Australia into youth awareness of cyberbullying as a criminal offence. Their research found that there was an apparent lack of definitive understanding about what behaviours constituted cyberbullying; low levels of education and discussion around cyberbullying as being a criminal offence; uncertainty about what acts constitute a crime and in what circumstances; and inconsistent knowledge and expectations of punishment and penalties.[14]

The research showed a significant recognition of cyberbullying as a term (93%) among respondents aged between 10 and 17.[15] As noted earlier in the thesis, 63% of respondents considered cyberbullying an offence punishable by law[16] despite 'no active consideration of this or knowledge of what might constitute a criminal case' of

[11] Matthew C Ruedy 'Repercussions of a MySpace Teen Suicide: How should anti-cyberbullying laws be created?' [2008] 9(2) *North Carolina Journal of Law & Technology* 4.

[12] Sameer Hinduja and Justin W Patchin, (2010) 14 'Bullying, Cyberbullying and Suicide' *Archives of Suicide Research*, 206.

[13] *Cyberbullying Research Centre* (Web Page) <cyberbullying.org>.

[14] Benita Tan and Fadil Bedic (2014), 'Youth awareness of cyber-bullying as a criminal offence (Full report of research findings, prepared for Department of Communications)', (GfK Australia Pty Ltd, Sydney, Australia) ('GfK Report).

[15] Ibid 2.

[16] Ibid 38.

cyberbullying.[17] Only 9% of respondents indicated they did not think cyberbullying was a crime.

Respondents indicated that they imagined it 'would have to be an extremely serious case for the police to become involved (e.g. something involving actual physical violence, sexual abuse or something resulting in death).'[18]

When asked about what bodies they perceived as having the authority to deal with cyberbullies, 72% of respondents perceived the police to have authority (parents scored highest at 76%), the law courts at 59% and government at 49%.[19] However, the knowledge of legal sanctions was limited, and participants struggled to discuss legal consequences with any authority beyond the idea that there can be legal consequences (knowledge reportedly gained through police talks given at school).[20]

The research also showed a limited understanding amongst respondents of the kinds of penalties that the criminal law could impose, and there was no clear sense of how different behaviours would be dealt with.[21] The need for education on possible sanctions became clear – respondents indicated that education about penalties, and evidence of them being enforced, would act as a strong deterrent, particularly when visible and known to them (e.g. at their school, in their local community).[22]

The report suggested that two prerequisites exist when addressing youth perception of cyberbullying – the expectation that police only get involved in extremely serious cases

[17] Ibid 39.

[18] Ibid.

[19] Ibid 35.

[20] Ibid 37.

[21] Ibid 55.

[22] Ibid.

(e.g. something involving sexual violence or death) needs addressing; and a perception of the low likelihood of apprehending cyberbullies.[23] In addition, communication and education around cyberbullying, criminal law and children require significant work. In particular, the finding suggested a need to communicate that cyberbullying can be considered an offence punishable by law; clarity about what behaviours constitute a criminal offence; and education about the penalties and punishments that may apply.[24]

There is also confusion about what laws apply to cyberbullying within the broader community. For example, as part of a 2017 inquiry into the adequacy of existing offence provisions for cyberbullying behaviour, Marilyn Campbell gave evidence that neither children nor parents understood the laws that applied to cyberbullying and that education around the existing laws was necessary.[25] The law's applicability also confused legal practitioners,[26] and the need for education of law enforcement authorities and the public was a recurring theme.[27] Further, the Law Council of Australia submitted that 'research shows that police

[23] Ibid 73.

[24] Ibid 73.

[25] The Senate Legal and Constitutional Affairs References Committee, *Adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying*, Committee Hansard, (7 March 2018, Melbourne, Australia), 3.

[26] Ibid 14 (Evidence of Alex Dworjanyn, Law Reform Committee Co-Chair, Victorian Women Lawyers).

[27] See, for example Chapter 4 of the Legal and Constitutional Affairs Committee, Australian Senate, *Adequacy of existing cyberbullying laws,* Report March 2018, 3 ('AECL Report'). The AECL Report explored education for law enforcement and Government at 38, and school and public education at 55.

often refuse to lodge complaints from disgruntled victims of cyberbullying because of the lack of knowledge of the various laws applicable to cyberbullying incidents.'[28]

This thesis examines a range of existing options for victims of bullying. It also proposes significant reform to ensure the availability of clear and effective options and that the threshold for behaviour that is 'sufficiently serious' to attract criminal consequences becomes identifiable. The reform options also move that line, minimising children's exposure to indictable criminal law offences by proposing a new form of notice, called a 'Stop Bullying Order', and introducing a new lower-level summary offence to capture 'harassment'.

1.2 Summary of Argument

The central thesis is that applying the criminal law to cyberbullying is currently not informed by any coherent rationale, and statements such as 'sufficiently serious' do little to provide clarity. Criminal law has been applied to cyberbullying in a piecemeal way because it is recognised that generally, it is not suitable as a response to bullying by children. This concern is compounded by the fact that the criminal law was never clearly applied to offline bullying.

Two issues underpin the need to develop a strong and cohesive response to cyberbullying. Firstly, the overall level of harm caused by cyberbullying is significant. Secondly, as will be outlined in Chapter Two, children are becoming increasingly reliant on information and communications technology as a social tool.

The harm caused by cyberbullying is emotional harm, including anxiety, distress, fear, grief, anger or humiliation, and extends to more severe harm in the form of protracted psychological injury and long-term psychiatric harm.[29] There are serious consequences for

[28] AECL Report, 38.

[29] See, for example Colette Langos, 'Cyberbullying: The Shades of Harm' (2014) 22(1) *Psychiatry, Psychology and Law* 1.

bullying victims, and numerous surveys have indicated that both offline bullying and cyberbullying can lead to increased suicidal ideation.[30] In addition, Pettalia found that cyberbullying victims were significantly more likely than offline bullying victims to report social difficulties, anxiety and depression.[31] The kinds of harm caused by cyberbullying depend on the various behaviours captured by the term cyberbullying.[32] In 2014, Langos argued that 'cyberbullying is a relatively new phenomenon… there is limited empirical research of the 'harmfulness' of the activity to inform policy',[33] and this position remains true in 2021.

Children's reliance on social media and access to technology for their socialisation aligns with higher under-reporting of online bullying than offline bullying. This reliance means that children may accept more significant risks and aggression as a 'trade-off' for this access and correlates significantly with a finding by UNICEF that children's violence, harassment, and bullying are often hidden, under-recorded, and under-reported.[34] The tension between reporting cyberbullying and access to technology was one of the earliest themes to identify why reporting rates were low. A 2007 study showed that students were unlikely to report bullying conducted by mobile/cell phones at schools if possession of those phones during school hours went against school policy. They also showed a reluctance to report bullying

[30] Sameer Hinduja and Justin W Patchin (2010) 'Bullying, Cyberbullying and Suicide' 14(3) *Archives of Suicide Research* 206.

[31] Jennifer L Pettalia, Elizabeth Levin and Joël Dickinson (2013) 'Cyberbullying: Eliciting harm without consequence' 29(6) *Computers in Human Behaviour* 2758, 2760.

[32] Langos (2014), above n 29.

[33] Ibid 5.

[34] United Nations General Assembly 'UN Secretary General's Study on violence against children', UN Doc A/61/299 (2006) paras 25 -27, <http://www.unicef.org/violencestudy/reports.html (viewed 26 August 2010)>.

online to their parents for fear of losing online access.[35] Further, Whittaker and Kowalski argue that the venues through which cyberbullying occurs reflect the technologies most in use at the time. These technologies and channels of communication change rapidly, with implications for prevention and intervention efforts.[36]

This thesis's central argument is that referring to 'sufficiently serious' cyberbullying incidents does little to address our understanding of how or when bullying or cyberbullying should warrant criminalisation. The suggestion that criminal law only applies to 'sufficiently serious' cyberbullying incidents implies that other responses apply to lesser serious incidents. This thesis takes a step back to identify and question the threshold issues for when the criminal law should respond to children's overall bullying. The law serves many purposes, including deterring behaviour, marking societal norms, and influencing policymaking.[37] Specifically, the criminal law sits at the top of the legal framework – it exists to address wrongfulness that education and other tools such as non-criminal law fail to address, and speaks with a moral voice:

[35] Patricia W Agatston, Robin Kowalski, and Susan Limber, 'Students' Perspectives on Cyber Bullying' (2007) 41(6) *Journal of Adolescent Health* 59; Faye Mishna, Michael Saini, and Steven Solomon, 'Ongoing and online: Children and youth's perceptions of cyber bullying, (2009) 31(12) *Children and Youth Services Review* 1222.

[36] Elizabeth Whittaker and Robin M Kowalski, 'Cyberbullying via Social Media' (2015) 14(1) *Journal of School Violence* 11, 12.

[37] Marilyn Campbell, 'How Research Findings can inform legislation and school policy on cyberbullying' in Sheri Bauman, Donna Cross and Jenny Walker, *Principles of cyberbullying research definitions, measures, and methodology* (New York, NY : Routledge, 2013), 261; Mary Anne Franks 'The Banality of Cyber Discrimination, or, The Eternal Recurrence of September' [2010] *Du Process*, Vol. 87, 1.

> Criminalisation speaks directly to subject-citizens … The message conveyed by the censure is that the behaviour is wrongful, and that the person should consider its wrongfulness (and not just the threat of adverse consequences) as reason to desist. This is not just a manner of informing or teaching addressees that the conduct is inappropriate: they may know that already … if the response does not track the wrongfulness of the conduct, then it loses its moral voice.[38]

This thesis examines two criminal offences that are suggested by many to be appropriate responses to cyberbullying in Victoria – the use of a carriage service to menace, harass or cause offence (contrary to s 474.17 of the *Criminal Code*), and stalking (contrary to s 21A of the Victorian *Crimes Act 1958* ('*Crimes Act*'). As will be argued, each provision is suited to cover some form of cyberbullying. Although the Australian Federal Police can investigate state offences that have a federal aspect (e.g. the use of a carriage service in the offence of stalking), the thesis focuses on Victoria Police as the main enforcement agency in Victoria rather than undertaking an analysis of both bodies.

As outlined below, the thesis first looks at bullying and cyberbullying through multi-disciplinary approaches, grounding the research and providing a background to the remainder of the thesis. Next, the thesis examines existing legal approaches to bullying and cyberbullying. In doing so, it examines selected non-criminal law responses before moving on to the criminal law and the two offence provisions detailed above.

The thesis then examines the extent to which the law responds to bullying and cyberbullying. Finally, the thesis makes recommendations for significant reform so that bullying and cyberbullying are readily identifiable behaviours and that appropriate mechanisms and sanctions are in place to respond to those behaviours. Although the thesis focuses on the law in Victoria, it draws upon state and federal law and therefore any reform

[38] AP Simester and Andrew von Hirsch, '*Crimes, Harms and Wrongs: On the Principle of Criminalisation*' (Hart Publishing, 2014), 12.

will not necessarily be purely a state matter. To the extent that the suggestions for reform in this thesis are related to federal law, they will necessarily impact other jurisdictions as well, Whilst this could be beneficial, it may also present challenges to the overall reform process.

1.2 Responding to a growing harm

This thesis concerns itself with the development of laws that not only respond to bullying and cyberbullying behaviour but also protect the perpetrators of that behaviour from undue or overly-punitive criminal justice responses. Central to this concern is the growing body of literature detailing the growth in cyberbullying and studies showing growth in reported levels of harm caused by bullying and cyberbullying.

Research undertaken by Tan and Bedic found that 63% of young people believed that cyberbullying was a criminal offence, despite being unable to identify a relevant offence provision.[39] However, as will be detailed in this thesis, there are no clear offence provisions that apply to bullying in either offline or online forms. Put simply, there is a growth in the volumes of harm caused to children (and this thesis focuses on the harm caused by other children), but the lack of an identifiable criminal law response to that behaviour is a cause of significant concern. Referring to 'sufficiently serious' behaviour without an understanding of the roles of formal and substantive criminalisation (outlined in Chapter Two) and an appreciation of the growing volume of alleged offending by, and prosecutions of, children caught by the existing criminal offence provisions are insufficient to develop our understanding of how bullying and cyberbullying should be responded to at law.

The concept of harm has a significant role to play in considering the criminalisation of cyberbullying behaviour. Not only is harm an element in Olweus' definition of bullying

[39] Benita Tan and Fadil Bedic (2014) Youth awareness of cyber-bullying as a criminal offence (Full report of research findings, prepared for Department of Communications), (GfK Australia Pty Ltd, Sydney, Australia) ('GfK Report), 38.

(discussed in Chapter Two), this thesis argues that it is also a necessary prerequisite for the criminalisation of bullying behaviour. Harm is also central to the right of a state to intervene with the rights of a person. In the absence of harm, or the risk of harm, the state is not morally entitled to intervene,[40] and, on a libertarian view, the only purpose for which power can rightfully be exercised over any member of a civilised community against his will is to prevent harm to others.

At its most extreme, bullying and cyberbullying may lead to suicide and other forms of serious harm; at the lower end, it may be low-level short-term incidents that amount to no more than 'mere affronts'. Despite this, a combination of lower-level incidents may still result in distress and humiliation that may appropriately be classed as bullying, and this is largely dependent on the element of repetition rather than the ferocity of the aggressive behaviour.

The cases of *Cox*[41] and *Oyston*, which are explored in more detail in Chapter Four, show that victims of bullying can suffer significantly from short term and longer-term harm. More notably, in *Cox*, the victim, Benjamin Cox, suffered long term psychiatric harm, including post-traumatic stress disorder,[42] resulting in being deemed unemployable as an adult.[43] As this thesis argues, cyberbullying cannot always be clearly distinguished from 'traditional' bullying and at times a victim may be subject to both forms of aggression. Whilst both behaviours share some common elements, the specific nature of cyberbullying means that harm can be caused to victims quicker, by larger audiences and at any time or any place. However, in circumstances such as bullying between students, cyberbullying may

[40] Simester, AP, John R Spencer, and Graham Virgo, 'Simester and Sullivan's Criminal Law: Theory and Doctrine' (Oxford: Hart Publishing, Fifth ed. 2013), 3.

[41] *Cox v State of New South Wales* (2007) NSWSC 471 ('Cox').

[42] Ibid (Simpson J, [106]).

[43] Ibid [103].

also be accompanied by physical violence or verbal abuse/denigration when the bully and victim are in physical proximity to each other.

A large number of studies conducted have shown that cyberbullying has a significant effect on the mental health of victims and that they experienced significantly more social difficulties, higher anxiety levels and depression than victims of offline bullying.[37] The United Nations Committee on the Rights of the Child have declared the use of ICTs to cyberbully a form of mental violence and that exposure to violence can cause immediate physical and mental damage and is associated with lifelong social, emotional, cognitive and physical problems.[44]

One of the potential reasons for the greater level of harm could be that the Internet allows social networks to be broadened to include hundreds of people, which may prove to have a profound influence on the impact of an aggressive incident. Further, the archival nature of the Internet means victims (and bullies) can repeatedly re-read, re-visit, or re-watch the aggravating incidents and 'relive' the experience.

Langos suggests that 'harm' in relation to cyberbullying includes emotional harm which includes anxiety, distress, fear, grief, anger or humiliation, and extends to more severe harm in the form of protracted psychological injury and long-term psychiatric harm.[45] Langos, however, also noted that at the time (2013) there was limited empirical research on the 'harmfulness' of cyberbullying to inform policy.[46]

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[44] UNGA, *UN Secretary General's Study on violence against children,* UN Doc A/61/299 (2006) p 12. At <http://www.unicef.org/violencestudy/reports.html (viewed 26 August 2010).

[45] Colette Langos, *Cyberbullying, associated harm and the criminal law* (PhD Thesis, The University of South Australia, 2013), 137

[46] Colette Langos (2014) 'Cyberbullying: The Shades of Harm' *Psychiatry, Psychology and the Law*, 5. At the date of submitting this thesis, that position remains accurate and only a small body of

The question of harm caused by cyberbullying has also been the subject of judicial consideration in the Supreme Court of Canada case of *AB v Bragg Communications*:

> It is logical to infer that children may suffer harm through cyberbullying. Such a conclusion is consistent with the psychological toxicity of the phenomenon described in the Report of the Nova Scotia Task Force on Bullying and Cyberbullying ….
>
> … Its harmful consequences were described as "extensive", including loss of self-esteem, anxiety, fear and school drop-outs. Moreover, victims of bullying were almost twice as likely to report that they attempted suicide compared to young people who had not been bullied.[47]

There are many other serious consequences for victims of bullying, and numerous surveys have indicated that experience with traditional bullying and cyberbullying is associated with an increase in suicidal ideation.[48] Research conducted by Pettalia found that victims of cyberbullying were significantly more likely than victims of traditional bullying to report social difficulties, anxiety and depression.[49] The kinds of harm caused by bullying and cyberbullying will be illustrated in Chapter Four.

1.3 Chapter outlines and methodology

The remainder of the thesis is structured in three parts, as outlined below.

Part A: Examining bullying and cyberbullying through multi-disciplinary approaches

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literature detailing harms caused by cyberbullying was identified, with Langos' broader body of work forming the majority of Australian literature on the issue.

[47] *A. B. v Bragg Communications* (2012) SCC 46, [22].

[48] Sameer Hinduja and Justin W. Patchin, above n 12.

[49] Jennifer L. Pettalia, Elizabeth Levin and Joël Dickinson (2013) 'Cyberbullying: Eliciting harm without consequence' 29 *Computers in Human Behaviour* 2758, 2760.

Part A of the thesis presents foundational and definitional issues central to examining legal responses. This part examines the context in which the behaviour known as cyberbullying has developed. Further, it highlights the critical role that definitions play, not only in our understanding of cyberbullying but how it may be differentiated from offline bullying.

Chapter Two – Foundational issues

This chapter grounds the thesis and draws on literature from the law, education, and psychology. Firstly, the chapter examines the technological environment in which cyberbullying has emerged as a form of behaviour. Secondly, the chapter provides an outline of some of the key theoretical issues surrounding criminal law and criminalisation. Finally, the chapter provides an overview of the youth criminal justice system in Victoria.

Chapter Three – Definitional issues

This chapter argues that there is a need for consistent and agreed definitions of the terms 'bullying' and 'cyberbullying' and proposes adopting the Australian Education Council's definition.

The absence of agreed definitions raises difficulties for both researchers and developing a statutory response to bullying-type behaviours. From a research perspective, variants to defined terms as to what constitutes bullying and cyberbullying has resulted in significant international variations in reported bullying prevalence and victimisation rates. This issue makes it difficult to gauge the size of the overall bullying problem. In addition, the lack of a statutory definition/offence means that responding to bullying and cyberbullying occurs on a 'best-fit' approach, in that the offences which align most closely with impugned behaviours are more likely to be applied.

Part B: A doctrinal analysis of legal responses to bullying behaviour

Part B undertakes a doctrinal analysis of the main kinds of legal responses available to respond to bullying and cyberbullying. In particular, it presents empirical data to illustrate a growth in the prosecution of children in Victoria, demonstrating a need for a strong, clear, and cohesive framework to be developed.

Chapter Four – Non-criminal law responses to bullying

Responses to cyberbullying are increasingly addressing behaviour that was formerly unregulated, therefore these responses are problematic, particularly when the behaviour consists of conduct by a child. This thesis argues that the criminal law should not apply as a response to cyberbullying, particularly by children, unless other approaches are insufficient or inappropriate to address the harm caused by that behaviour. This chapter examines the extent to which those other legal approaches respond to bullying behaviour by children.

The chapter briefly explores tort law as a response to bullying before focusing on two other responses that offer a more proactive and timely remedy – the Victorian personal safety intervention order (PSIO) scheme and redress provided by the Commonwealth Office of the eSafety Commissioner ('eSafety Office').

The chapter argues that the PSIO scheme provides a well-designed and appropriate response to bullying behaviour by putting perpetrators on notice that their behaviour is wrongful, and this is particularly important when dealing with children. This assertion is supported by data showing an evident growth in the number of PSIO applications made to and granted by Victorian courts.

The chapter then explores the role of the eSafety Office and the framework for dealing with cyberbullying complaints. The cyberbullying complaints scheme's key features include the concept of 'cyberbullying material directed at an Australian child', a 'tiered' social media scheme, and the eSafety Office's power to issue end-user notices.

The chapter finds that the PSIO scheme can offer significant protection for victims of bullying in all its forms; and highlights significant deficiencies in the *Enhancing Online Safety for Children Act 2015*[50] ('*eSafety Act 2015*'), leading to reform recommendations in Chapter Seven.

Chapter Five – Criminal law responses to cyberbullying

The chapter commences with an overview of criminal law theory before examining the two most relevant criminal laws that may apply to cyberbullying in Victoria. First, the chapter examines the offence of using a carriage service to menace, harass or cause offence contrary to s 474.17 of the *Criminal Code*. The use of a carriage service captures all forms of online communications and can apply to email communications, social media, and other electronic media. In addition to examining the offence elements, the chapter presents cases to develop our understanding of the behaviours captured by the provision.

Second, the chapter examines the offence of stalking, contained in s 21A of the *Crimes Act*, which prohibits engaging in a course of conduct with the intent to cause physical or mental harm to a victim or to arouse apprehension in the victim for their safety or of any other person. Both provisions are indictable offences, with the maximum penalty in s 474.17 being three years' imprisonment and the maximum penalty in s 21A being ten years' imprisonment.

Data is then presented, showing the volumes of offending under each provision investigated by or reported to Victoria Police. In addition to alleged offender incidents,[51] the

[50] The *Enhancing Online Safety for Children Act 2015* (Cth), as made. The Act was subsequently renamed as the *Enhancing Online Safety Act 2015* and discussed later in the thesis.

[51] An alleged offender incident (AOI) is a matter that is investigated by Victoria Police and recorded on their law enforcement assistance program (LEAP) database. As will be shown in Chapter Five of this thesis, the matters listed on LEAP are not necessarily subject to prosecution.

number of prosecutions at the Children's Court of Victoria (CCV) shows continued growth in the number of proceedings under each of the offence provisions at those courts.

Finally, the chapter presents data showing the total number of prosecutions under s 474.17 of the Criminal Code between 2005 and 2013. The data shows that, unlike the total of 308 cases cited in the Enhancing Online Safety Policy, there were approximately 14,000 cases prosecuted (including both children and adults), suggesting that the eSafety regime fails as an example of evidence-based regulation.

Part C: Identifying and establishing a criminal law threshold for bullying and cyberbullying

Part C examines the extent to which the frameworks explored in Part B of the thesis address bullying and cyberbullying behaviour. In doing so, the Part argues that the existing frameworks are piecemeal at best and presents a case for significant reform.

Chapter Six – Identifying the line at which bullying behaviour warrants a criminal law response

The chapter categorises the responses detailed in Part B through a graduated response lens, based on Ayres and Braithwaite's compliance pyramid. The offence of stalking, being the most punitive response based on the maximum penalty, sits atop the regulatory pyramid, with education at its base. The chapter argues that the laws and responses examined in Part B provide an uncoordinated patchwork of responses, leaving the criminal law's role in responding to cyberbullying by children unclear.

The chapter concludes that the PSIO regime may offer the best protection and response to bullying in Victoria. The chapter argues that there are significant deficiencies in the existing eSafety regime; and argues that the level of harm required by and penalty attached to ss 21A and 474.17 is too high to be applied as a primary response to bullying by children. Whilst there is a need for a criminal law response, a summary offence would be a more appropriate response at the first instance.

Chapter Seven – Reform – establishing a criminal law threshold for bullying and cyberbullying

The chapter argues that significant reform is required to address bullying behaviour in all its forms. Part A of the thesis showed that cyberbullying rarely occurs without some form of offline bullying. Therefore, offences that apply solely to online behaviour are unsuitable to address offline bullying. It is argued that it is nonsensical to criminalise online behaviour when there is no clear response to offline behaviour; therefore, there is a need for the law to respond to bullying as a whole.

Although the offence of stalking can cover both online and offline behaviour, the ten-year maximum penalty places it at the top of the graduated response pyramid in Chapter Six. Despite this, the number of proceedings for the offences examined in this thesis continues to grow at the CCV.

If recourse to the criminal law is considered a necessary response to bullying behaviour, there must be adequate protections for child offenders before being charged with an indictable offence. This chapter begins with an overview of existing attempts at reform before arguing for significant reform in several areas. Firstly, there is a need to reform the *eSafety Act* and PSIO framework to warn perpetrators that their behaviour is problematic, and there are criminal law sanctions for continuing with the behaviour. This tranche of reforms focuses on putting bullying perpetrators on notice, strengthening the end-user notice regime, and providing a new form of notice in Victoria – a 'stop bullying order'. The chapter then argues for a new lower-level offence of harassment based on the criminal offence provisions of the *Protection from Harassment Act 1997* (UK).[52]

[52] *Protection from Harassment Act 1997* (UK).

The chapter argues that criminal law certainly plays a role in addressing bullying behaviour, but it should not be the primary response. The reform argued for in the chapter ensures that the line at which bullying behaviour ought to be criminalised is clearer to identify.

These reforms provide the necessary level of certainty about when bullying behaviour is sufficiently serious to warrant criminalisation. By adding a summary offence provision, the reform also ensures that criminal sanctions are 'softened', allowing children access to further safeguards in the youth criminal justice system before potentially being charged with committing an indictable offence. The chapter concludes that the offences at ss 474.17 and 21A continue to form a vital part in responding to bullying behaviour, but their application should be restricted when other, less punitive measures are available to address alleged behaviour.

Chapter Eight – Conclusion

Chapter Eight summarizes the findings and arguments and concludes the thesis.

Part A: Examining bullying and cyberbullying through multi-disciplinary approaches

Chapter Two – Foundational issues

2.1 Introduction

Cyberbullying is a global phenomenon and is the subject of a growing body of academic research and literature. This chapter reviews the existing research and frameworks relevant to the two fundamental issues relevant to this thesis.

The first issue, being the technical environment in which cyberbullying has emerged, will explore the rapid growth in information and communications technology (ICT) and its integration into children's lives. Australian children have made effective use of social media since the early 2000s, with an increasing reliance by children on those services for their socialisation.[53] These developments have provided the environment in which bullying has moved online; so-called 'cyberbullying'.

The chapter then details some of the key principles underlying criminalisation and the relevant facts in deciding if or when certain behaviours should be subject to criminal law. As will be detailed, there are a great number of approaches; however, this thesis examines the criminalisation of cyberbullying through the prism of harm and wrongdoing rather than considering bullying as a moral offence.[54] Despite this, the thesis draws upon the work of

[53] Faye Mishna, Michael Saini, and Steven Solomon. Above n 35.

[54] To a large extent, the focus on harm offers the simplest argument for criminalisation – the prevention of harm to others, and in the case of this thesis, the prevention of harm to children.

Husak and Feinberg because their work lends themselves significantly to an analysis based on harm.

The third issue involves capacity and the age of criminal liability. There is a minimum age of criminal responsibility; in Victoria, it is 10 years of age.[55] This section of the chapter outlines the youth justice criminal justice system's major features that become relevant when discussing criminal law responses to cyberbullying in later chapters.

2.2 The technological environment

A child born on 1 January 2000 would have entered a world rife with technological uncertainty. It was anticipated that at midnight on 31 January 1999, the Y2K (or 'millennial') bug would cause unprecedented global chaos. Disruptions were expected internationally in 'banking, finance, transportation, communications, manufacturing, energy, water and sewerage, health facilities, emergency supplies and food supply'.[56]

Although the Y2K threat did not eventuate,[57] the next twenty years would bring with them significant developments in the availability and kinds of ICT accessible to that child. Amongst them was the growth of two technologies that are central to this thesis – the

[55] *Children, Youth and Families Act 2005* (Vic) (*CYF Act*), s 344; *Criminal Code*, sub-div 7.1.

[56] Gay Alcorn, 'Cabinet papers show Y2K fears spooked Coalition and sparked $12bn in contingency plans' *The Guardian* (online), 1 January 2020, citing former Australian Foreign Affairs Minister Tim Fischer.

<https://www.theguardian.com/australia-news/2019/dec/24/cabinet-papers-show-y2k-fears-spooked-coalition-and-sparked-12bn-in-contingency-plans>.

[57] See for example, Francine Uenuma, '20 Years Later, the Y2K Bug Seems Like a Joke—Because Those Behind the Scenes Took It Seriously', *Time* (online), 30 December 2019, <https://time.com/5752129/y2k-bug-history/>.

proliferation of internet access[58] and the development of social media such as Facebook (social media will be examined in Chapter Three of the thesis). In the year 2000, less than half of Australian households (3.5 million households) had a home computer, and only 28 per cent (1.9 million households) had home internet access.[59] By the year 2017, as that child approached adulthood, 86% of Australian households had access to the internet, rising to 97% for homes with children under 15.[60]

A corresponding niche has accompanied virtually every technological progress – Clough argues that the ubiquity of technology in our day to day lives, including how we socialise, has a dark side.[61] Lessig's observation that 'law regulates behavior in cyberspace'[62] is particularly relevant to cyberbullying – how the law responds to online

[58] This thesis uses the lower-case spelling of 'internet' in accordance rule 1.7 of the Australian Guide to Legal Citation, unless in a quote in which a capitalised version appears in the original text.

[59] Australian Bureau of Statistics (ABS), 'Use of the Internet by Householders, Australia, Feb 2000' (Media Release 8147.0, 13 June 2000) <https://www.abs.gov.au/AUSSTATS/abs@.nsf/Previousproducts/8147.0Media%20Release1Feb%202000?opendocument&tabname=Summary&prodno=8147.0&issue=Feb%202000&num=&view=>.

[60] ABS, 'Household Use of Information Technology, Australia, 2016-17' (Release 8146.0, 28 March 2018) <https://www.abs.gov.au/ausstats/abs@.nsf/mf/8146.0>.

<https://www.abs.gov.au/ausstats/abs@.nsf/productsbytopic/ACC2D18CC958BC7BCA2568A9001393AE?OpenDocument>. No data was provided about the number of households with a home computer, but 91% of internet connected households used a desktop or laptop computer to access the internet.

[61] Jonathan Clough, *Principles of cybercrime* (Cambridge, UK ; New York : Cambridge University Press, 2nd ed, 2015), 3.

[62] Lawrence Lessig, *Code version 2.0* (Basic Books, New York, 2006), 124.

behaviour can indicate the relative merit or harm attached to that behaviour. Clear laws should deter and condemn harm-causing behaviour.

There is strong evidence to suggest that the nature of adolescent peer aggression has evolved due to the proliferation of ICT,[63] using these technologies in the commission of behaviours against the person, including cyberbullying, stalking, sexting, and trolling.[64] Within this context, behaviours describable as 'cyberbullying' developed as a 'new' form of aggression.

2.2.1 The proliferation of ICT

As noted above, 97% of Australian households with children under the age of 15 have access to the internet.[65] Further, the development of smartphones means that the

[63] Sameer Hinduja and Justin W Patchin, 'Bullying, Cyberbullying, and Suicide' (2010) 14(3) *Archives of Suicide Research* 206, 207; Nathaniel Levi et al, *Kinder & Braver World Project: Research Series. 'Bullying in a Networked Era: A Literature Review*, September 2012, The Berkman Centre for Internet and Society at Harvard University; Julian Dooley et al, *Review of Existing Australian and International Cyber-Safety Research*, Edith Cowan University (2009); Charles E Notar, Sharon Padgett and Jessica Roden, 'Cyberbullying: A Review of the Literature' (2013) 1(1) *Universal Journal of Education Research* 1.

[64] Lisa M Jones, Kimberley J Mitchell, and David Finkelhor, 'Online Harassment in Context: Trends from Three Youth Internet Safety Surveys (2000, 2005, 2010)' (2012) 3(1) *Psychology of Violence* 53. Sexting' is the use of digital and online technologies to produce and distribute erotic images and commentaries. See: Michael Salter, Thomas Crofts, and Murray Lee, 'Beyond Criminalisation and Responsibilisation: Sexting, Gender and Young People' (2013) 24(3) *Current Issues in Criminal Justice* 301, and Dena Sacco et al, *Sexting: Youth Practices and Legal Implications*, Berkman Centre for Internet and Society Research, Harvard University (2010).

[65] ABS, above n 29.

distinction between computers and telecommunications technology has become blurred,[66] and there is a significant growth in the level of data being accessed on mobile devices to support this view. For example, research published in 2016 showed that 91% of Australian teenagers aged 14 to 17 had a mobile phone, and 94% of those had a smartphone with internet capability.[67] As of December 2018, 48% of Australian children aged 6-13 either had access to or owned a mobile phone (with levels rising to 80% for children aged 12-13).[68]

This access to technology means that most Australians, particularly teenagers, are online and accessible at unprecedented levels. Research published by the Australian Communications and Media Authority also showed that 82% of teenagers aged 14 to 17 see the internet as 'very important in their lives' while 50% say it is 'extremely important'.[69] The importance placed on teenagers' access to technology contributes, in part at least, to underreporting of occurrences of cyberbullying. Several studies support the hypothesis that children are less likely to report cyberbullying incidents or other forms of online aggression, fearing the removal of their access to technology.[70]

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[66] Bauman and Belmore 'New Directions in Cyberbullying Research', (2014) 14(1) *Journal of School Violence* 1, 2

[67] Erin Raco, 'Aussie teens online', (Web Page 1 July 2016) <https://www.acma.gov.au/theACMA/engage-blogs/engage-blogs/Research-snapshots/Aussie-teens-online>.

[68] Australian Communications and Media Authority (ACMA), *Kids and Mobile Phones. How Australian Children are Using Mobile Phones* (November 2019) <https://www.acma.gov.au/publications/2019-11/report/kids-and-mobiles-how-australian-children-are-using-mobile-phones>.

[69] Raco, above n 67.

[70] See, for example, Mishna, Saini, and Solomon, above n 35, 1226.

Sadly, some take access to others provided by ICT as an opportunity to harass, bully or intimidate others beyond more traditional/physical boundaries, as reflected in the following comments made by children cited in the Australian government's 'High Wire Act' Inquiry:

> Cyberbullying is really bad because there is no escape. Yes, bullying at school is horrible but at least it stays at school. Cyberbullying follows you everywhere and is at home, the one place your [sic] meant to feel safe. There needs to be more information on how to prevent or stop it. (Female aged 14)[71]

However, other respondents did not see pervasiveness as such a distinct issue, focussing on the underlying behaviours rather than technology:

> Weirdly enough, the government seems to have this idea that cyber bullying is somehow different from normal bullying. It isn't, it's fundamentally the same thing, teasing, harassing, etc, except it is aided by the constant accessibility provided by electronic media, and "staying safe online" has nothing to do with whether you are bullied or not. As always, people will bully and there will be people who are bullied, the only way to stop that would be to make people realise the ramifications of their actions, even though there will be some people who won't care regardless, but there's not much you can do about that. (Male aged 17)[72]

The proliferation of ICT arguably provides tools enabling significant growth in online bullying, shifting the dynamic of aggression and an intent to harm to a different forum. It is within this environment that the phenomenon known as cyberbullying has risen to prominence.

2.3 Criminal law and criminalisation

[71] Parliament of Australia, Joint Select Committee on Cyber-Safety, 'High Wire Inquiry Interim Report' (Report, June 2011), 68.

[72] Ibid 67.

The question of when bullying and cyberbullying is sufficiently serious to be a criminal offence necessitates some understanding of the role of criminal law and associated theories of criminalisation. The central question here is – is a criminal law response to bullying and cyberbullying justified?

As detailed in Chapter One, it is well established that bullying and cyberbullying can cause harm. As will be detailed below, John Stuart Mill's Harm Principle provides that it is always a good reason in support of penal legislation that it would be effective in preventing, eliminating, or reducing harm to persons other than the actor and there are no other means that is equally effective at no greater cost to other values. As this thesis argues, the criminal law should only be invoked when there is no other suitable mechanism to prevent harm, particularly concerning children, and this needs to be balanced against the risk that the criminal law has been overused as a regulatory device.[73]

One of the difficulties in exploring the central thesis about the 'sufficiently serious' threshold for criminalisation is that the harm caused by bullying and cyberbullying exists on a spectrum, making it difficult to differentiate between lower-level bullying and bullying that deserves a criminal law response. The ability to identify when bullying and cyberbullying is 'sufficiently serious' to warrant criminalisation is the central line of enquiry in this thesis. There is no clear threshold. Serious harms can readily be responded to by the offence provisions at ss 21A or 474.17 where appropriate, however lesser harms (which may of themselves have a profound effect on the victim) are far more difficult to align with existing criminal law offences.

The section below details some of the key theories of criminalisation and criminal law, providing the framework for considering many of the issues explored in subsequent chapters.

[73] AP Simester, John R Spencer, and Graham Virgo, '*Simester and Sullivan's Criminal Law: Theory and Doctrine'* (Oxford: Hart Publishing, Fifth ed. 2013), 3.

Simester and Sullivan state that there are three salient functions of the criminal law - 'The first might be called criminalization: the law sets out for citizens those things that must not be done. The second thing the law does is *convict* persons who are proved to have transgressed its prohibitions. Finally, it may *punish* those whom it convicts; and, more generally, the criminal law offers the prospect of punishment to reinforce its functions of criminalisation.'[74]

Underlying all of this is the Rule of Law, embodying a cluster of values including certainty, clarity and perspectivity.[75] The Rule of Law requires a system of legal ordering, not just ad hoc responses to the conduct of individuals[76] and as such the criminal law and criminalisation should only occur or be engaged following those values. This is particularly important given that criminal law has a communicative function that civil law lacks, and it speaks with a distinctly moral voice.[77] The message conveyed by criminal law is that specified behaviour is wrongful and that the person engaging in that behaviour should consider its wrongfulness as a reason to desist.[78] Accordingly, criminal law does not exist solely to guide law enforcement and judicial officers. It must give all people fair warning by defining the prohibited activity with sufficient certainty.[79]

As Simester and von Hirsch state, unlike any other area of law (e.g. tort, which is to be discussed in Chapter Four), the criminal law systematically condemns activities through

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[74] Ibid 4 (original emphasis).

[75] Ibid 21.

[76] Ibid 28.

[77] AP Simester, and Andrew Von Hirsch, 'Crimes, harms and wrongs : on the principles of criminalisation' (Oxford: Hart., 2011), 4.

[78] Ibid 12.

[79] Ibid 199.

prohibition and condemns persons through conviction and punishment.[80] Further, they argue that the act of criminalisation is both to declare that the action should not be done and to deploy desert-based sanctions as supplementary reasons not to do it.[81]

Research conducted by Spears et al. showed that young people showed varying levels of understanding and awareness about cyberbullying and the law. About two-thirds understood that cyberbullying can be considered an offence under existing laws.[82] Of particular interest to the current research project was the finding that young people identified that they were not adequately informed.

> Regardless of their self-reported role in cyberbullying, the majority (94%) of students in the present study perceived the cyberbully behaviors depicted in the scenarios as harmful to the victim; however, they were significantly less (75%) likely to believe that the bullies in the scenarios would receive consequences for their actions. This finding suggests that children are aware that hurtful cyberbullying is occurring without consequence.[83]

This finding strongly suggests that the belief that there may be no consequences attached to the wrongdoing may be emboldening children to engage in behaviour that they ordinarily would not. As Pettalia notes, 'youth are knowingly engaging in harmful behavior on the internet that they believe is unlikely to receive consequences,'[84] however, a general belief by children that they are engaging in potentially harmful behaviour is not sufficient on its own to justify criminalisation.

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[80] Ibid 197.

[81] Ibid 6.

[82] Barbara Spears et al, Research on youth exposure to, and management of, cyberbullying incidents in Australia', Part C: An evidence-based assessment of deterrents to youth cyberbullying, (Sydney: Social Policy Research Centre, UNSW Australia (2014)), 7.

[83] Pettalia, above n 31, 2763.

[84] Ibid 2758.

One way of addressing this concern is the expectation/requirement that laws must clearly label prohibited behaviours. As noted above, the Rule of Law requires a system of legal ordering, not just ad hoc responses to the conduct of individuals - laws must be accessible, clear, and predictable, requiring the development of legal rules.[85] Appropriately defining behaviours and obligations as to when those behaviours warrant criminalisation is central to achieving the goal of developing clearly identifiable legal rules — precise and unambiguous definitions of prohibited behaviours enable citizens to understand the social expectations and behaviours required of them. This 'fair warning rule' is essential in applying or developing a criminal law response to offending behaviours:

> There are two guiding principles: no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly and ascertainably punishable when the act was done.[86]

The fair warning rule requires clear notice that behaviour is criminal, and it must also tell citizens what not to do in advance. As Simester and Von Hirsch note - 'Criminal convictions are not like birthday presents. (Surprise!)'. [87] As outlined in Chapter One of the thesis, knowledge of cyberbullying being an actual offence is low, meaning the fair warning principle has a role in addressing this. The need for clearly defined terms will be examined further in the following chapter, both as a basis for clearly defined laws and as a basis for research into cyberbullying. Further, the development of clearly articulated criminal law (i.e. making it a specific offence) may greatly contribute to the knowledge or understanding that

[85] Simest and Von Hirsch, above n 77, 4.

[86] *R v Rimmington* [2005] UKHL 63 (21 July 2005), [33] (Bingham LJ).

[87] Simester and Von Hirsch, above n 77, 199.

cyberbullying is a matter to be dealt with by criminal law. Chapter Seven of the thesis presents proposals for reform on this point.

The analysis above lends itself to an argument that clear laws are required to address bullying and cyberbullying behaviour. Proposed offence provisions are detailed in Chapter Seven of the thesis; however, the criminal law should only be invoked where supported by convincing justifications; and when labelling conduct as wrongful and labelling those it convicts as culpable wrongdoers, the state should 'get it right'[88] (i.e. as Simester and Von Hirsch note, the criminal law should only be deployed 'where supported by convincing justifications').[89] Rightly, Simester and Von Hirsch suggest that given the 'onerous' nature of criminalisation (arguably, for all parties involved – victims, the accused, and police), it is surely right that the default presumption should be against its use – unless the case for doing so, and for doing so in preference to other regulatory tools, is clearly established.[90]

2.3.1 Criminalisation

The following section highlights some of the various principles which help to analyse whether criminalisation is warranted for specific forms of behaviour, and examines two key forms of criminalisation, referred to by McGorrery as formal criminalisation and substantive criminalisation.[91] – Formal criminalisation involves declaring previously non-criminal forms of conduct as being crimes, usually in the form of legislation, whereas substantive criminalisation involves subjecting a person to the criminal law process, usually by way of

[88] Ibid 19.

[89] Ibid.

[90] Ibid 31.

[91] Paul Mc Gorrery, 'The philosophy of criminalisation: a review of Duff et al's criminalisation series' (2018) 12 *Criminal Law and Philosophy* 185, 189.

prosecution. As will be explored later in the thesis, there is a significant risk of overcriminalisation of bullying and cyberbullying behaviour, with significant growth in the number of alleged offender incidents and prosecutorial actions under each of s 21A of the *Crimes Act* (Vic) and s 474.17 of the *Criminal Code* (Cth).

As Duff notes, there is a need to consider both criminalisation 'on the books' (formal criminalisation) and criminalisation 'in practice' (substantive criminalisation):

> If we are to ask what kinds of conduct should be criminalized, or to identify the principles and values that should guide criminalization decisions, we must attend not only to the formal processes of criminalization in the books, but also to the processes through which formally criminalized conduct comes to be brought substantively within the ambit of the criminal process.[92]

McNamara echoes this view, and further clarifies the various components of criminalisation:

> In simple terms, criminalisation is a public policy strategy that involves the creation of a defined legal wrong (a 'criminal offence'), the authorisation of state agents (police officers or officers employed in other regulatory agencies) to detect and punish breaches of the crime so defined, and the enforcement practices adopted by those officers.[93]

However, McNamara et al also rightly warn that the creation of new offences is not synonymous with criminalisation, arguing that 'it is simply one of the ways in which the reach

[92] R. A. Duff, *The Realm of Criminal Law*, (Oxford University Press, 2018), 44.

[93] Luke McNamara, 'Criminalisation Research in Australia: Building a foundation for normative theorising and principled law reform' in Thomas Crofts and Arlie Loughnan (eds), *Criminalisation and Criminal Responsibility in Australia* (Oxford University Press, 2015), 33, 39.

of the criminal justice system is extended'.[94] Criminalisation must be considered in both its formal and substantive forms.

Formal criminalisation - criminalisation 'on the books':

As Duff rightly argues, 'it is important to remember that the criminal law is not simply the moral law given institutional form. It is part of the political structure of the state'.[95] In practice, the 'most salient criminalization process is legislation: a type of conduct is criminalized by the enactment of a statute defining it as criminal; the process of criminalization is the process through which the statute came to be enacted'.[96]

Duff also notes that the processes of criminalisation does not arise from nowhere – they begin in response to a perceived problem.[97] In addressing this problem, Duff suggests three conditions that must be satisfied if we are to have a good reason to criminalise a specified behaviour. Firstly, the criminalizable conduct must be wrong.[98] Secondly, the wrongful conduct must require or make a collective response appropriate.[99] Thirdly, the

[94] Luke McNamara et al, 'Theorising Criminalisation: The Value of a Modalities Approach' [2018] *International Journal for Crime, Justice and Social Democracy*, 91, 92. The authors also raise the issue of sub-modalities of expanding criminalisation to include 'criminal-civil hybridity' in the form of two-step criminalisation, 95. This issue is explored in more detail in Part C of the thesis.

[95] R. A. Duff, 'Towards a Modest Legal Moralism' (2014) 8 *Criminal Law and Philosophy* 217, 223.

[96] Ibid 224.

[97] Ibid 226.

[98] Ibid 229.

[99] Ibid 229.

response must take the perpetrator seriously as a responsible citizen who can be held to account and display a commitment to the values that the wrong violated.[100]

Extreme caution must however be exercised in the process of formal criminalisation, and there are numerous theories promoting the need for caution and the role of checks and balances before declaring that specified behaviour is to be made criminal. As will be detailed in subsequent chapters, there have been several attempts to develop legal responses to cyberbullying, including a proposal by the Australian Liberal Party to investigate the development of a criminal offence directed at cyberbullying.

The Harm Principle: "your freedom to swing your fist ends where my nose begins."

The starting point of this analysis is Mills' harm principle, requiring us to question whether the behaviour causes harm and whether that harm is sufficient to warrant a criminal response. In essence, the principle recognises that people should be free to act however they wish unless those actions cause harm to another.[101] Harm involves more than generating distress. It involves a setback to a person's interests or interferes with their long-term means or capabilities.[102]

To examine whether kinds of conduct warrant a criminal response, Simester and von Hirsch developed the 'Standard Harms Analysis' requiring consideration of the gravity of the eventual harm and its likelihood. The greater the gravity and the likelihood of harm, the stronger the case for criminalisation. Further, it requires weighing up the social value of the conduct and the degree of intrusion upon actors' choices that criminalisation would involve. The more valuable the conduct is, or the more the prohibition would limit liberty, the stronger the countervailing case would be. The Standard Harms Analysis also requires parties to

[100] Ibid 230.

[101] The principle stems from John Stuart Mills, *On Liberty,* (John W Parker and Son, 1859), 22.

[102] Simester and Von Hirsch, above n 77, 112.

observe certain side constraints that may preclude criminalisation. The prohibition should not, for example, infringe rights of privacy or free expression.[103]

To apply the Standard Harms Analysis to the central focus of this thesis, it is argued that the growth of cyberbullying has magnified both the gravity and the likelihood of harm caused by bullying behaviour.[104] As will be detailed in the cases of Cox and Oyston later in the thesis, bullying can cause significant harm to children who are subjected to that behaviour (and cyberbullying has many features that can amplify or exacerbate the impact of the behaviour). On the issue of the social value of the conduct, this thesis argues that there is none attached to bullying or cyberbullying behaviour (or at a concession, the social value is extremely limited). Whilst laws that respond to bullying may limit free expression, that limitation is justified on the basis that it prevents harm to victims of bullying. Accordingly, this thesis undertakes an approach that is consistent with Mills' harm principle.

The section below provides an overview of two of the most important works on the limits of criminalisation – Douglas Husak's work on overcriminalisation, and Joel Feinberg's work on the moral limits of the criminal law.

Husak – Overcriminalization

[103] Simester and von Hirsch, above n 77, 55. The authors note that the Standard Harms Analysis does not require that the conduct automatically be criminalised whenever its criteria are met and that existing prohibitions may suffice to deal with the problem.

[104] Chapter Four undertakes a deeper analysis of bullying and cyberbullying.

In his seminal work on overcriminalisation, Husak proposed a 'minimalist' theory of criminalisation,[105] providing 'a strong foundation for furthering the cause of justice by 'combating the problem of overcriminalization'.[106]

Husak argues that the criminal law itself is the source of four internal constraints on the authority of a state to enact and enforce criminal offences – 'crimes must be designed to proscribe a harm or evil; criminal conduct must be wrongful; persons may only be punished according to their desert, and the state must bear the burden of proof to justify a penal offense.'[107]

Husak also argues that these internal constraints are supplemented by three external constraints, reflecting the political conditions of the time – 'a criminal offense is unjustified unless the government has a substantial interest in enacting it; the statute must directly advance the government's purpose; and the law must be no more extensive than necessary to achieve its objective.'[108]

Feinberg – The Moral Limits of the Criminal Law

Although this thesis focuses on the notion of harm and does not explore cyberbullying as being a 'moral' offence, Feinberg's work on moral harm warrants discussion. His work begins from a seemingly simple premise – 'when a particular legal

[105] Douglas Husak, *Overcriminalization: The Limits of the Criminal Law*, (Oxford University Press, 2007), 176

[106] Ibid 206.

[107] Ibid 55.

[108] Ibid 120. Husak himself notes (at 177) that the most processing challenge is to provide substantive content for each of these principles, and this is the task of 'many lifetimes'.

prohibition oversteps the limits of moral legitimacy, it is itself a serious moral crime'.[109] Feinberg also poses the basic question underlying his work in another way – 'what kinds of reasons can have weight when balanced against the presumptive case for liberty?'.[110] Within this context, Feinberg undertook a rigorous assessment of morally offensive behaviours (e.g. the prohibition on pornography) victimless crimes (e.g. drug consumption) as being exercises in legal moralism and legal paternalism.

Feinberg also argued that 'it is always a good reason in support of penal legislation that it would be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and there are no other means that is equally effective at no greater cost to other values.'[111] As will be argued in Chapter Four, there are significant limits to the regulatory/non-criminal law responses available and, accordingly, Chapter Five will argue that this supports the need for the criminal law in responding to bullying and cyberbullying.

Substantive criminalisation - criminalisation in practice

Consideration now turns to the role of substantive criminalisation – how criminal laws are administered and interpreted by law enforcement organisations. The role of Victoria Police and relevant prosecution policies in deciding to charge an accused person, and in particular child offenders, are outlined below.

[109] Feinberg, Joel, *The Moral Limits of the Criminal Law - Volume 1: Harm to Others* (New York : Oxford University Press, 1987), 4.

[110] Ibid 9.

[111] Simester, Spencer and Virgo, above, n 73, 583 citing Joel Feinberg, *Harm to Others* (*The Moral Limits of the Criminal Law*), (Oxford University Press, 1984), 26.

2.3.3 Police as gatekeepers to prosecution

As the first interaction between an alleged offender and the criminal justice system is ordinarily with a police officer,[112] those officers play a crucial role in keeping children away from the criminal justice system. As Duff notes, we must consider the police as 'agents of criminalisation',[113] and McNamara rightly argues that inclusion of police powers in discussions on criminalisation is essential because 'a comprehensive and meaningful account of criminalisation demands engagement with the full range of ways in which behaviour is regulated by criminal justice institutions.'[114]

Fletcher raised the relationship between police and alleged cyberbullies following the Enhancing Online Safety Inquiry:

> Interestingly, the majority of police officers involved in the research were opposed to the creation of a new offence for cyberbullying.[115] This may well be linked to the typical, and understandable, reluctance of police to lay criminal charges against a young person unless it is absolutely necessary – given that if you are convicted of a crime early in life, it can seriously damage your life prospects. There was a preference for measures including

[112] Australian Law Reform Commission, 'Seen and Heard', above n 139, [18.1]. The terms 'police officer' and 'law enforcement officer' are used interchangeably at times in the thesis, dependant on the case or article being considered.

[113] Duff (2018), above n 92, 44.

[114] McNamara (2015) above n 93, 39.

[115] The Australian Federal Police were the only law enforcement agency to make a formal submission to the Department's consultation.

> counselling and restorative justice as the first means of redress before treating a cyberbullying matter as a criminal offence.[116]

As will be discussed in Chapter Five, stalking is one of the two offence provisions that may readily apply to bullying and cyberbullying cases and can be applied by police officers in Victoria. The following interview conducted by the University of New South Wales with a police officer illustrates their reluctance to prosecute children with stalking as a response to cyberbullying:

> Because stalking is a serious indictable crime, it's not something that we apply to cases unless they're particularly serious. So what was suggested was that effectively a parallel summary offence be created to cater for less serious offending. We could then use that to deal with youth who bully one another. My personal position is that's a bad idea because in a lot of instances what we're talking about with young children especially bullying one another is not something that should be dealt with by the criminal justice system… We should be looking at education as a means of resolving it, not coming down with the heavy hand of a criminal justice approach where we're trying to punish people.[117]

The quote illustrates the range of complex policy and operational issues police officers face when dealing with bullying incidents. For example, stalking, as one of the most applicable offence provisions to bullying, is an indictable crime punishable by a maximum

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[116] Paul Fletcher, Parliamentary Secretary to the Minister of Communications, during a speech presented to the National Centre Against Bullying Conference 6 August 2014: http://paulfletcher.com.au/speeches/portfolio-speeches/item/1107-national-centre-against-bullying-conference-wednesday-august-6-2014.html.

[117] Barbara Spears et al, *Research on youth exposure to, and management of, cyberbullying incidents in Australia: Part B* (SPRC Report 15/2014), Sydney: Social Policy Research Centre, UNSW Australia (2014), 99. As will be noted below, the offence of stalking in NSW carries a significantly lesser maximum penalty that the 10 years' proscribed in Victoria.

term of imprisonment of 10 years in Victoria. Although matters can be heard summarily[118] (bringing the maximum term of imprisonment per charge down to two years' imprisonment[119]), Victoria's maximum penalty is significant compared with the maximum penalty of five years' imprisonment in jurisdictions such as New South Wales (NSW) and Queensland.[120] This has significant flow-on effects on the decision to prosecute. Although the criminal law may exist (i.e. criminalisation in its 'formal' sense), there may be hesitancy by law enforcement officers (or others involved in the criminal justice system) to seek charges for an indictable matter where that person is a child, and especially when that child is having their first interaction with the criminal justice system. As a consequence of this position, this thesis advocates for clearer laws that would address concerns about criminalisation in both its formal and substantive forms (i.e. clearly drafted laws that name the prohibited behaviour, tied with a range of lesser penalties).

A further theme above is the notion that bullying by 'young children' is not something that should be dealt with by the criminal justice system. Without clear statutory guidance, such a notion becomes highly subjective – the assessment of behaviour and its severity can become blurred by personal views and values. The assertion that bullying behaviour may not be an issue to be dealt with by the criminal justice system is problematic. Such a view may

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[118] *Criminal Procedure Act 2009* (Vic), s 29.

[119] *Sentencing Act 1991* (Vic), s 113.

[120] The NSW offence of 'stalking or intimidation with intent to cause fear of physical or mental harm' is subject to a maximum penalty of 5 years or 50 penalty units or both – *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s 13. As of 30 June 2020, one penalty unit was $110, making the maximum fine $5,500 – *Crimes (Sentencing Procedure) Act 1999* (NSW), s 17. The maximum penalty for 'unlawful stalking' in the *Criminal Code 1899* (Qld) is five years' imprisonment, s 359E(2). Subsection 359E(3) also includes an aggravated offence for the use of violence etc., which attracts a maximum penalty of seven years' imprisonment.

preclude victims from the police's protection and the criminal justice system more generally, and there is a risk that the first officer a victim has contact with may downplay the behaviour or proffer a view that the behaviour is not unlawful.[121] Given that views or opinions about bullying and bullying behaviours can be subjective, victims of bullying may end up searching for more appropriate mechanisms than criminal law.

In Victoria and other jurisdictions, police officers have discretion regarding what enforcement action (if any) addresses alleged offending behaviours.[122] Victoria Police requires that the 'minimum (least severe) action must be chosen that achieves the purposes of taking that action against the offender.'[123] In deciding whether to prosecute a child,[124] officers must regard the seriousness of the offence, the age and apparent maturity (including cognitive, social or emotional development and mental capacity) of the child and available alternatives to prosecution, such as giving the child a caution.[125] Other considerations include assessing the drivers to the offending behaviour, whether a prosecution would be likely to be harmful to the child or be inappropriate, family/environmental factors and any

[121] See Ryan Broll and Laura Huey, '"Just Being Mean to Somebody Isn't a Police Matter": Police Perspectives on Policing Cyberbullying' (2014) 14(2) *Journal of School Violence* 1.

[122] Victoria Police 'Victoria Police Manual – Policy Rules - Disposition of Offenders' (2014); Simon Bronitt and Philip Stenning 'Understanding discretion in modern policing' (2011) 35(6) *Criminal Law Journal* 319; Lucinda Jordan and James Farrell, 'Juvenile Justice Diversion in Victoria: A Blank Canvas?'(2013) 24(3) *Current Issues in Criminal Justice*, 419.

[123] Victoria Police Manual, ibid, 2

[124] 'Child' is the terminology used by Victoria Police. A person under the age of 10 cannot be held criminally liable in Victoria (*CYF Act 2005* (Vic), s 344), therefore it is presumed the term refers to people aged 10 to 17 years of age (inclusive).

[125] Victoria Police Manual, above n 122, 2.

previous enforcement action taken and result, particularly to ascertain if it addresses the causal factors contributing to the offending behaviour.[126]

When dealing with child offenders, the primary enforcement option applied by Victoria Police is giving a caution, where the child admits to offending and their parent or guardian consent to, and be present at, the giving of the caution.[127] Research conducted by the Victorian Crimes Statistics Agency showed that during the period 1 April 2015 to 31 March 2016, more than half of the alleged young offenders in Victoria received a caution, rather than being formally charged by Victoria Police.[128] The study also found that police cautioning resulted in a significantly lower proportion of children reoffending.[129]

The same study also found that, due to their discretionary nature, the use of cautions being given by Victoria Police officers as a response to alleged offending by children varied. Despite being guided by the same policies, factors such as the socio-economic profile of communities/locations and culture within the relevant policing areas can also impact the outcome of interactions between children and law enforcement officers.[130] For example, indigenous children were twice as likely to be charged than receive a caution as non-

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[126] Victoria Police, 'Victoria Police Manual – Procedures and Guidelines – Disposition of Offenders', 3. Note – the Victoria Police Manual is structured to have a policy rule that is supported or supplemented by procedures and guidelines.

[127] Victoria Police (2017) 'Victoria Police Manual – Policy Rules - Caution', 3; *Y v F* [2002] 130 A Crim R 11, [33] (Mc Donald J). Victoria Police may also give a child over the age of 14 a 'formal warning' in limited circumstances such as drunk and disorderly behaviour and breach of bail (Police Manual – Policy Rules – Caution, 5). A caution may only be given to an adult for shop stealing or the possession of cannabis (Victoria Police Manual 'Disposition of Offenders', 4).

[128] Kimberley Shirley 'The Cautious Approach: Police cautions and the impact on youth reoffending'' *In:Brief*, Number 9, (September 2017) Crime Statistics Agency, Victoria. (n= 3368 of 7320).

[129] Ibid 19.

[130] Ibid.

indigenous children, and children residing in the most disadvantaged postcodes were twice as likely to be charged than those living in affluent postcodes.[131] In certain policing districts, cautions were given to to 32.6% of alleged young offenders, whereas in other districts they were given to 86% of alleged young offenders.[132]

Although the factors above may appear to be directed towards 'de-criminalisation', they highlight the subjective nature of substantive criminalisation. Whilst law enforcement officers are all tasked with enforcing the same criminal law provisions, human nature and subjective beliefs (such as cultural or other) can have a significant effect on how, when and on whom those laws are enforced. Chapter Five of the thesis examines the extent to which each of the offences at s 21A of the *Crimes Act* and s 474.17 of the *Criminal Code* are actively prosecuted in Victoria. It does so by providing two data sets. The first data set concerns 'alleged offender incidents' – where alleged behaviour is considered to fall within the remit and scope of an offence provision. The second data set looks at the eventuating volume of prosecutions, highlighting the significant role that substantive criminalisation has in keeping children away from the criminal justice system.

As argued above, the need for clearly defined laws to educate the community about what behaviours are expected or prohibited. However, the Rule of Law requirements of fair labelling and clear laws would also greatly assist law enforcement and criminal justice agencies in understanding and applying the relevant criminal laws in response to behaviour

[131] Ibid 13. The research also found, amongst other things, that children born in a country other than Australia were 1.6 times more likely to be charged than those born in Australia. It also found that children residing in regional or rural Victoria were 1.6 times more likely to be cautioned than those residing in metropolitan areas.

[132] Ibid 8. The figures in the study were aggregated across the entire range of alleged offences by geographic areas, rather than being tied to the 'severity' of the offence.

that is prohibited by formal criminalisation. Creating that nexus is undoubtedly a critical step in the overall process of criminalisation.

2.3.4 The role of prosecution policies in diverting children from the court system

In his work The Realm of the Criminal Law, Duff also highlights the role of prosecutors in determining what is treated as criminal behaviour (noting that their role might vary between different systems),[133] and the Commonwealth and Victorian Directors of Public Prosecutions (DPP) prosecution policies are relevant tools in so far as they are instruments of, or applicable to the processes of, criminalisation. Pressing charges does not necessarily lead to prosecution. Even though Victoria Police may commence proceedings, the DPP can intervene and take over matters in their relevant jurisdictions.[134]

With specific regard to the prosecution of children, the Commonwealth DPP Policy focuses on the welfare of the accused:

> Prosecution of a juvenile should always be regarded as a severe step, and generally speaking a much stronger case can be made for methods of disposal which fall short of prosecution unless the seriousness of the alleged offence or the circumstances of the juvenile concerned dictate otherwise. In this regard, ordinarily the public interest will not require the prosecution of a juvenile who is a first offender in circumstances where the alleged offence is not serious.[135]

[133] Duff, (2018), above n 92, 45.

[134] Office of Public Prosecutions Victoria, 'Policy of the Director of Public Prosecutions for Victoria' Melbourne, Victoria, chap 8; and Commonwealth Director of Public Prosecutions, 'Prosecution Policy of the Commonwealth' Canberra, Australia, para 4.1.

[135] Commonwealth Director of Public Prosecutions, 'Prosecution Policy of the Commonwealth', (last updated August 2019) para 2.15.

The Victorian DPP's Direction also generally provides that a prosecution may only proceed if a reasonable prospect of a conviction exists and a prosecution is in the public interest.[136] Consistent with the Commonwealth DPP, the Victorian Direction provides that the prosecution of a child is a severe step, and the public interest will not normally require the prosecution of a first-time offender if the offence is not serious.[137] Factors to consider in determining the public interest include the seriousness of the offence, availability and efficacy of any alternatives to prosecution, prevalence of the offence and the need for deterrence.[138]

Criminalisation, in both its formal and substantive senses, underpins the remainder of the thesis. Relevantly, Chapters Four and Five examine what civil and criminal laws are there that apply to cyberbullying by children and how those laws have been applied in practice. Chapter Six considers the ability of existing legal frameworks in identifying the threshold at which criminalisation is warranted, and Chapter Seven advocates for reform in terms of both formal and substantive criminalisation

[136] Office of Public Prosecutions Victoria, 'Director's Policy, Prosecutorial Direction', (last updated 18 January 2021), para 1.

[137] Ibid para 4.

[138] Ibid para 3.

2.4 Children and the criminal justice system

Children occupy a unique place in the criminal justice system and applying the criminal law to children is a complex and highly emotive issue.[139] If criminalisation is warranted, it is imposed in a system with numerous mechanisms to divert children away from the courts and, if that is not possible, to mitigate its impact. Not only must cyberbullying offences, if any, fit into this system but they must also presumably be informed by the approach that is adopted concerning children and criminal justice.

The UN Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules'), adopted by General Assembly resolution 40/33 of 29 November 1985, recognise juveniles and juvenile offenders' unique needs in the criminal justice system. For example, Rule 5 requires that 'the juvenile justice system shall emphasise the wellbeing of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.'[140] Of relevance to the discussion below is the diversion requirement in Rule 11, in that consideration should be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority, such as police discretion.

As there are growing calls for the criminalisation of cyberbullying, particularly of cyberbullying by children, this section highlights three main issues in youth justice – the age

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[139] See generally, Attorney-General's Department (Cth) 'Interim Report: Principles of Criminal Responsibility and other matters' Review of the Criminal Law; Paul Cavadino 'Goodbye doli, must we leave you?' (1997) 9 *Child and Family Law Quarterly* 165; Australian Law Reform Commission 'Seen and Heard: priority for children in the legal process (ALRC Report 84)' (1997), [18.12] - [18.20].

[140] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules'), adopted by General Assembly resolution 40/33 of 29 November 1985, Rule 5.1.

of criminal responsibility, the role of the police and prosecutorial policies, and the Victorian youth justice framework.

2.4.1 Capacity and the age of criminal liability

A child's capacity to commit an offence varies by jurisdiction, and the United Nations Convention on the Rights of the Child requires Member States to set a minimum age below which children cannot be held criminally responsible.[141] The central question for determining how criminal capacity can be assessed is whether a child can 'live up to the moral and psychological components of criminal responsibility'.[142]

As will be examined in Chapter Three, children of all ages can be victims and perpetrators of bullying. However, the appropriate responses to bullying behaviour are dependent upon the age of the alleged perpetrator. In all Australian jurisdictions, a child under the age of 10 is deemed incapable of incurring criminal liability.[143] Australian children aged between 10 and 14 are subject to the rebuttable common law presumption of *doli*

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[141] United Nations 'Convention on the Rights of the Child' (1990), Article 40, para 3(a).

[142] United Nations 'Commentary on the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)' (Adopted by General Assembly resolution 40/33 of 29 November 1985).

[143] Alphabetically – Australian Capital Territory, *Criminal Code 2002* (ACT), s 25; Commonwealth, *Criminal Code Act 1995* (Cth), sub-div 7.1 and *Crimes Act 1914* (Cth), s 4M; New South Wales (NSW), *Children (Criminal Proceedings) Act 1987* (NSW), s 5; Northern Territory, *Criminal Code Act 1983* (NT), s 38(2); Queensland, *Criminal Code Act 1899* (Qld), sch 1, s 29(1); South Australia, *Youth Offenders Act 1993* (SA), s5; Tasmania, *Criminal Code Act 1924* (Tas) sch 1, s 18(1); Victoria CYF Act (Vic), s 344; Western Australia, *Criminal Code Act Compilation Act 1913* (WA), sch 2, s 29.

incapax,[144] and the presumption is also expressly replaced in the legislation of some jurisdictions.[145] The presumption requires proof that the child understood their conduct was seriously wrong, and Justice Gageler of the High Court of Australia summarised the presumption thus:

> To establish that a child under the age of 14 years has committed an offence in a jurisdiction in which the common law presumption continues to apply, the prosecution must prove more than the elements of the offence. The prosecution must prove beyond reasonable doubt that the child understood that the child's conduct which constituted the offence was seriously wrong by normal adult standards. That understanding cannot be inferred from the fact that the child engaged in the conduct which constituted the offence; it must be proved by other evidence. That other evidence might be or include evidence of the circumstances or manner of the conduct. That other evidence might also be or include evidence of the development or disposition of the child.[146]

What suffices to rebut the presumption that a child defendant is *doli incapax* will vary according to the nature of the allegation and the child's nature, circumstances, and characteristics. The inquiry directs attention to the intellectual and moral development of the particular child.[147] It is only necessary to prove that the child knew that doing an act was

[144] Latin for 'incapable of crime' - (*R v ALH* (2003) 6 VR 276, [75]).

[145] Alphabetically – Australian Capital Territory, *Criminal Code 2002* (ACT), s 26; Commonwealth, *Criminal Code Act 1995* (Cth), sub-div 7.2 and *Crimes Act 1914* (Cth), s 4N; Northern Territory, *Criminal Code Act 1983* (NT), s 38(1); Queensland, *Criminal Code Act 1899* (Qld), sch 1, s 29(2); Tasmania, *Criminal Code Act 1924* (Tas) sch 1, s 18(2); Western Australia, *Criminal Code Act Compilation Act 1913* (WA), sch 2, s 29. By way of contrast, the United Kingdom abolished the presumption in 1998 via the *Crime and Disorder Act 1998* (UK), section 34; *R v JTB* [2009] UKHL 20

[146] *RP v The Queen* (2016) 259 CLR 641, 659 [38] (Gageler J)).

[147] Ibid.

morally wrong rather than knowing that the behaviour engaged in was a crime.[148] Ultimately, the presumption protects children who are unable to understand the wrongfulness of their actions.[149]

There are reform suggestions within Australia to abolish *doli incapax* and raise the minimum age of criminal responsibility to 14. However, as of 30 June 2020, the Australian Council of Attorney-Generals declined to do so, despite compelling arguments and substantial evidence in support put forward by several prominent organisations.[150]

2.4.2 Keeping children away from the courts

The offence provisions explored later in this thesis are indictable matters, making it highly desirable to avoid or limit their application to children. As will be discussed, the Children's Court of Victoria (CCV) has a range of sentencing options to reduce the criminal

[148] Ibid 656 [29] (Kiefel, Bell, Keane, and Gordon JJ).

[149] Thomas Crofts '*Doli incapax*: Why children deserve its protection', (2013) 10(3) *Murdoch University Electronic Journal of Law* [44].

[150] See for example - Law Council of Australia, 'Council of Attorneys General – Age of Criminal Responsibility Working Group Review' (2 March 2020) Canberra, Australia; Australian Human Rights Commission, 'Submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group' (26 February 2020) Sydney, Australia; Australian Medical Association, Submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group' (2 February 2020) Canberra, Australia. Submissions also raised significant concerns about the over-representation of indigenous children in Australia's criminal justice system — in 2019, 70% of imprisoned children aged 10-13 years in Australia were indigenous — see for example, National Aboriginal and Torres Strait Islander Legal Services, 'Submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group' (28 February 2020) Preston, Victoria, 13, citing Australian Institute of Health and Welfare, 'Youth Justice in Australia 2018-2019', Table S78b: Young people in detention during the year by age, sex and Indigenous, Australia, 2017–18 (Commonwealth of Australia).

justice system's impact on children, and there are also other mechanisms designed to keep children away from the Court. The Australasian Juvenile Justice Administrators Juvenile Justice Standards state that the 'principal purpose of a youth criminal justice system is to intervene with children and to contribute to the reduction in reoffending.'[151] In doing so, it seeks to balance community safety, repair the harm caused to victims and hold children accountable for their behaviour while ensuring they are supported to develop pro-social behaviour and effectively participate in the community.[152]

Figure 1, below, provides a visual overview of a child or young person's progression through the youth justice system, as will be examined in this Chapter.

Figure 1 Progression through the youth criminal justice system in Victoria.

2.4.3 The Children's Court of Victoria

The Children's Court of Victoria (CCV) hears most criminal law cases against children in Victoria. The Court has jurisdiction to hear all summary offence matters and most indictable offences where the defendant is between the ages of 10 to 17 (inclusive) at the

[151] Australasian Juvenile Justice Administrators 'Juvenile Justice Standards 2009' (updated October 2012), 3.

[152] Australasian Juvenile Justice Administrators (2014) 'Principles of Youth Justice in Australia'.

time of the alleged offending.[153] Matters are heard summarily unless the child objects or the court considers the charge is unsuitable because of exceptional circumstances,[154] and the divestment of summary jurisdiction must only occur reluctantly and 'not just for convenience or to avoid difficulties.'[155] In 2018-19, the Court's Criminal Division finalised 9,230 cases with a child defendant, representing 29.2% of the finalised matters at the Court for that year.[156]

Sentencing:

The Court has a range of sentencing options to minimise the impact of a criminal proceeding, including whether to record a conviction [157] or give an accountable or unaccountable undertaking.[158] Punitive measures include orders detaining the child in a youth residential centre or youth justice centre.[159]

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[153] Paragraph 516(1)(b) of the *CYF Act* excludes murder, attempted murder, manslaughter, child homicide, arson causing death and culpable driving causing death. The offences explored in this chapter may both be heard summarily at the Children's Court.

[154] Ibid s 356. Examples, where cases have been heard on indictment, include participation in terrorism-related activities (*K v Children's Court of Victoria and Federal Agent Matthew Court* [2016] VSC 645).

[155] *D (a child) v White* [1988] VR 87, 93 (Nathan J).

[156] Children's Court of Victoria 'Annual Report 2018-19', 11. The Court heard a comparable number of criminal cases in the preceding year, with a total of 9,530 finalised or 29.6% of the Court's total finalised matters.

[157] *CYF Act*, s 360. The full range of options is detailed in Part 5.3 of the Act.

[158] Ibid ss 363 and 365.

[159] Ibid s 410. A youth residential centre order can only be made where the young person is under the age of 15 on the day sentencing. A youth justice centre order applies to a young person over the age of 15 on the day of sentencing – *CYF Act* s 412.

Unlike courts that deal with adult offenders,[160] the CCV ought not to have regard to general deterrence as a relevant sentencing factor.[161] In determining which sentence to impose on a child, the Court must, as far as practicable, regard the sentencing principles at subs 362(1) of the CYF Act, which are based on the welfare and justice models of sentencing.[162]

The welfare model is 'needs' based on the basis that it offers treatment and rehabilitation for the offender rather than punishment. The model is future-oriented[163] and based on the premise that offending is the product of external influences to the individual offender rather than a free moral choice.[164]

The justice model involves children being 'treated as largely rational, responsible and accountable for their actions'.[165] As such, the sentencing court 'should act as though deviance was the result of the offender's free moral choice' and impose a sanction that

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[160] *Sentencing Act 1991* (Vic), s 1(d)(i).

[161] *CNK v The Queen* (2011) 212 A Crim R 173.

[162] Judicial College of Victoria, 'Children's Court Bench Book', 29.1 (accessible at www.judicialcollege.vic.edu.au). See also s. 362(1) of the CYF Act, and Sentencing Advisory Council, 'Sentencing Children and Young People in Victoria', (2012), 52.

[163] Ibid 23, citing Arie Freiberg, Richard Fox and Michael Hogan, Sentencing Young Offenders, Sentencing Research Paper no. 11 (Australian Law Reform Commission, 1988), [165].

[164] Ibid 22.

[165] Judicial College of Victoria, 'Children's Court Bench Book' (Web Resource) <https://www.judicialcollege.vic.edu.au/eManuals/CHCBB/60153.htm>, 29, citing Arie Freiberg and Richard G Fox, *Fox & Freiberg's sentencing : state and federal law in Victoria*, (Thomson Reuters Professional Australia, 3rd ed, 2014) 928.

reflects the gravity of the offending.[166] Unlike the welfare model, the justice model centres on responding to past deeds.

The sentencing principles include the need to strengthen and preserve the relationship between the child and the child's family, the desirability of allowing the child to live at home, and allowing the child's education, training, or employment to continue without interruption or disturbance.[167] In addition, the Court must consider minimising stigma to the child resulting from a court determination and suitability of the sentence.[168] The Court must also ensure that the child is aware that they must bear responsibility for any action by them against the law; and consider the need to protect the community, or any person, from the violent or other wrongful acts of the child.[169]

The avoidance of stigma and the rehabilitation of an offender is essential in the context of this thesis. As the central line of enquiry in the thesis concerns the ability to assess when bullying behaviour is sufficiently serious to warrant a criminal law response, we should be hesitant to prosecute children when, as this thesis argues, the applicable laws are not sufficiently clear, leading to an ill-fitting framework for responding to bullying behaviour. Therefore, significant caution is necessary before a person is prosecuted for bullying, especially when the person being prosecuted is a child.

<u>The Koori Court:</u>

[166] Ibid.

[167] *CYF Act* s 362.

[168] Ibid.

[169] Ibid.

The Court also has a specialist Koori Court to deal with offending by indigenous children;[170] aiming to ensure 'greater participation of the Aboriginal community in the sentencing process of the Court through the role played in that process by the Aboriginal elder, respected person and others, to assist in achieving more culturally appropriate sentences for young Aboriginal persons.'[171] The Koori Court plays a significant role in addressing the over-representation of indigenous children in Victoria's youth justice system, particularly given the disproportionate number of those children being subject to supervision orders. For example, the Australian Institute of Health and Welfare reported that on an average day in 2018–19, in Victoria:

- Indigenous young people made up 2% of those aged 10–17 in the general population, but 16% of those of the same age under youth justice supervision.[172]
- Indigenous young people aged 10–17 were 11 times as likely as non-Indigenous young people to be under supervision (107 per 10,000 compared with 10 per 10,000).[173]

[170] *CYF Act* ss 517 and 518. See for further information, Bridget McAsey 'A Critical Evaluation of the Koori Court Division of the Victorian Magistrates' Court' 10(2) *Deakin Law Review* 654.

[171] *Children and Young Persons (Koori Court) Act 2004* (Vic) ('*Children and Young Persons (Koori Court) Act*'), s 1.

[172] Youth justice supervision can be either unsentenced (such as bail or remanded in custody) or post-sentence (such as parole or detention). See Australian Institute of Health and Welfare 'Youth Justice in Australia 2018-19)', Canberra, Australia, 2.

[173] Ibid.

- Indigenous over-representation was similar in detention at 11 times the non-Indigenous rate.[174]

Diversion:

Following a successful pilot program in 2015-16,[175] the *Children, Youth and Families Act* ('CYF Act') was amended in 2017, [176] providing a statutory diversion scheme for the Children's Court.[177] The scheme's express purpose is to divert children away from the criminal justice system where possible and appropriate, consistent with Rule 11 of the Beijing Rules.[178] In addition, the diversion scheme aims to reduce the stigma caused to a child by contact with the criminal justice system,[179] recognising that offending by a child should be responded to in a manner that acknowledges the child's needs and assists with rehabilitation.[180]

The Court's website states that a diversion order 'may contain a range of conditions for the child or young person. Conditions will be underpinned by the principles of diversion and targeted to promote reparation of harm caused by the offence/s…. The intervention will

[174] Australian Institute of Health and Welfare, 'Youth Justice in Australia 208-19 - State and Territory Factsheets – Victoria' (Web Page) <https://www.aihw.gov.au/reports/juv/132/youth-justice-in-australia-2018-19/contents/state-and-territory-factsheets/victoria>.

[175] Stuart Thomas, Marg Liddell and Diana Johns, *Evaluation of the Youth Diversion Pilot Program (YDPP: Stage 3),* Final Report (16 December 2016), RMIT University.

[176] *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017* (Vic), s 59.

[177] For an examination of options available before this time, see Jordan and Farrell, above n 121.

[178] *CYF Act* s 365C(a).

[179] Ibid s 365C(b).

[180] Ibid s 365C(d).

build on and strengthen a young person's existing relationships and interests, engaging them in the context of their family or carer and their community to promote positive change.'[181]

Examples of common diversion plan activities include giving a letter of apology to the victim, education-related intervention (such as support to improve attendance or reengage in education, training or employment), and engagement in a structured activity that promotes pro-social engagement (such as sport, cadets, music or art).[182] If a child completes a diversion program[183] to the Court's satisfaction, there is no requirement to enter a plea, and the Court must discharge the child without any finding of guilt.[184]

The data below shows continued growth in the number of cases referred to the Court's diversion program and a high percentage of children completing the program.[185] The

[181] Children's Court of Victoria, 'Youth Diversion' (Web Page), <https://www.childrenscourt.vic.gov.au/jurisdictions/criminal/youth-diversion>.

[182] Children's Court of Victoria 'Annual Report 2017-18', 21. There are also other forms of diversion activities that may be relevant and applicable to cyberbullying such as Youth Justice Conferencing, see e.g. Colette Langos and Rick Sarre, 'Responding to cyberbullying: the case for family conferencing' (2015) 20 (2) *Deakin Law Review*, 299.

[183] The *CYF Act* is mostly silent on the components of a diversion program, but for a reference to community service at s 356J. 'Diversion plans' are prepared by the Children's Court Youth Diversion Service of the Victorian Department of Justice and Community Safety (https://www.justice.vic.gov.au/justice-system/childrens-court-youth-diversion-service).

[184] *CYF Act* s 356I.

[185] For an in-depth analysis of the diversion scheme in Victoria, see Liberty Victoria's '*Justice Diverted Report (2018)'*, available at http://libertyvic.rightsadvocacy.org.au/wp-content/uploads/2018/05/Justice-Diverted-Report-FINAL.pdf/.

use of the diversion program will be examined later in the thesis under the argument for significant reform.

Financial year	Number of children referred (and as % of total criminal matters for the year)	% of successful completions
2016/17	751[186] (6.15%)	85[187]
2017/18	1404[188] (14.72%)	94[189]
2018/19	1408[190] (15.25%)	94[191]
2019/2020	1595 [192] (19.6%)	94[193]

Table 1 Number of children sent to the diversion program at the CCV by financial year.

2.5 Conclusion

As this chapter has shown, Australia has high internet access and smartphone ownership rates; and having an online presence has become a central part of an Australian

[186] Children's Court of Victoria, *Children's Court of Victoria Annual Report 2016-17*, 8.

[187] Ibid 16.Total number of criminal matters finalised in the year as 12,201 cases.

[188] Children's Court of Victoria, *Children's Court of Victoria Annual Report 2017-18*, 4.

[189] This information did not appear in the 2017-18 Annual Report and was sourced through email communication with the Children's Court Youth Diversion team at the Victorian Department of Health and Human Services.

[190] Children's Court of Victoria, *Children's Court of Victoria Annual Report 2018-19*, 6.

[191] Ibid.

[192] Children's Court of Victoria, Children's Court of Victoria Annual Report 2019-2020, 7.

[193] Ibid.

child's socialisation, with social media forming an integral part of this. Unfortunately, however, the growth of technology has also resulted in the growth of online harm.

Criminal law has the function of defining and deterring wrongful behaviour, but it must be used more sparingly for children. The youth justice framework aims to protect children from the criminal justice systems based on their still-developing capacity to comprehend wrongdoing. The rebuttable presumption of *doli incapax* requires prosecuting authorities to prove that a child knows, or out to know, that their behaviour is morally wrong.[194] Additionally, the youth justice framework has been developed to ensure that the criminal process is adapted to cater to children's unique needs; any punishment or sanction imposed by a court must consider the effect upon that child.[195]

[194] *RP v The Queen,* [8]-[9] (Kiefel, Bell, Keane, and Gordon JJ).

[195] See, for example *CYF Act* s 362.1.

Chapter Three – Bullying and cyberbullying

3.1 Introduction

Precise terms are valuable on many grounds, including directing research and policy and defining offence provisions. However, neither the Commonwealth nor Victorian legislation contain statutory definitions of what is meant by the terms 'bullying' and 'cyberbullying'. The term 'bullying' is generally understood in two contexts – children and industrial relations/workplace bullying.[196] This thesis focuses solely on bullying by and of children.

In 2011, the Federal Government Statement of Response to the Joint Select Committee on Cyber Safety's Inquiry accepted a recommendation to develop an agreed definition of cyberbullying and noted the following as a basis for drafting:

> Bullying is repeated verbal, physical, social or psychological behaviour that is harmful and involves the misuse of power by an individual or group towards one or more persons. Cyberbullying refers to bullying through information and communication technologies.[197]

[196] See for example, Anne O'Rourke and Sarah Kathryn Antioch ' Workplace bullying laws in Australia: Placebo or panacea?' (2016) 45(1) *Common Law World Review* 3; and Al-Karim Samnani and Parbudyal Singh '20 Years of workplace bullying research: A review of the antecedents and consequences of bullying in the workplace' (2012) 17(6) *Aggression and Violent Behaviour* 581.

[197] Australian Government, Joint Select Committee on Cyber-Safety*, High-Wire Act Cyber-Safety and the Young Government Statement of Response* (December 2011), 6.

The Statement of Response also noted the importance of a consistent, national definition for cyberbullying 'to be used by all Australian Government departments and agencies and (to) encourage its use nationally'.[198]

In late 2019, the Safe and Supportive School Communities (SSSC) Working Group of the Education Council[199] released the following definition of bullying to be used in all Australian schools ('the national schools' definition'):

> Bullying is an ongoing and deliberate misuse of power in relationships through repeated verbal, physical and/or social behaviour that intends to cause physical, social and/or psychological harm. It can involve an individual or a group misusing their power, or perceived power, over one or more persons who feel unable to stop it from happening.
>
> Bullying can happen in person or online, via various digital platforms and devices and it can be obvious (overt) or hidden (covert). Bullying behaviour is repeated, or has the potential to be repeated, over time (for example, through sharing of digital records). Bullying of any form or for any reason can have immediate, medium and long-term effects on those involved, including bystanders. Single incidents and conflict or fights between equals, whether in person or online, are not defined as bullying.[200]

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[198] Ibid 5 (Recommendation 2).

[199] The Education Council is a body established to provide advice to the Australian Council of Attorney Generals (COAG) on education issues (see the COAG Education Council Terms of Reference 2014, accessible at <http://www.educationcouncil.edu.au/site/DefaultSite/filesystem/documents/Key%20Documents/COAG%20Education%20Council%20ToRs.pdf>). The SSSC Working Group is a working group of the Education Council and includes representatives from all educational jurisdictions in Australia, including representatives from the National Catholic Education Commission, Independent Schools Council of Australia and the Australian Government Department of Education and Training.

[200] Victorian Department of Education and Training, 'What is Bullying?' (Web Page) <https://www.education.vic.gov.au/about/programs/bullystoppers/Pages/what.aspx?Redirect=1>. The definition was also used by the Qld Governments 'Bullying? No Way!' Task Force.

Despite enquiries being made to the Education Council, there were no detailed records of how the definition was agreed to. As will be detailed below, work was undertaken by Dan Olweus in the 1970s to develop a definition of bullying that consisted of four key elements – aggression, intention, repetition, and a power imbalance. However, little work followed this and many governments, academics and others tended to rely on ad-hoc or project-specific definitions of bullying.[201] This difficulty was highlighted in work conducted by Hinduja and Patchin:

> Some researchers use very broad definitions of cyberbullying that include every experience with any form of online harassment. Others focus only on specific types of harm – such as humiliation or threats to one's physical safety, without also including other forms like name-¬ calling and insults. Some researchers cover any and all mediums and venues through which cyberbullying can occur, while others may leave out a few technologies (such as webcams) or places (such as in online gaming networks). These definitional inconsistencies then lead to different measurements of the nature and extent of harassment in cyberspace, which at best provides an incomplete picture and at worst leads to misinformation and confusion.[202]

As Bauman argues, the 'purpose of a definition is to specify the *essence* of a term (its basic qualities) and to identify the necessary and sufficient conditions for something to be a member of the set being defined. A useful definition is clear and concise'.[203] Although the Education Council definition is more comprehensive than the one noted by the Federal Government Statement of Response to the Joint Select Committee on Cyber Safety's Inquiry

[201] See, for example, Sheri Bauman 'Why it Matters' in Bauman, Cross and Walker (eds) above n 37, 23.

[202] Sameer Hinduja and Justin W Patchin, Cyberbullying prevention and response expert perspectives (New York : Routledge, 2011), 15. See also, more generally, Bauman, Cross and Walker above n 37.

[203] Bauman, above n 201, 21.

(detailed above)[204], the definition does just what Bauman argues for. It provides a clear and concise definition, and 'modernises' the definition of bullying by building on Olweus' work and including and recognising the use of technology as a means of bullying. The definition also avoids many of the pitfalls detailed by Hinduja and Patchin by being flexible (i.e. the use of the term 'can' rather than 'is' or 'must be' when talking about the elements) and not confining certain behaviours to the categories of 'bullying' and 'cyberbullying'.

As is detailed below (and as recommended in the Federal Government Statement of Response to the Joint Select Committee on Cyber Safety's Inquiry), the need for a consistent and agreed definition of bullying has significant flow-on effects. This is not only within the school system for the Education Council's work but also has the potential to guide other areas such as academic work or government policy.

This thesis adopts and applies this definition, and this chapter analyses its essential elements.[205] In addition to filling a gap where there was previously no agreed definition about what was meant by the term, the definition also captures vital elements of bullying and cyberbullying discussed below. More importantly, it does so in clear, concise, and unambiguous language. The definition also forms the basis of anti-bullying campaigns and materials prepared by education departments in all Australian states and territories, and Australian children will be developing (or will already have) an understanding of what is

[204] Above, n 197.

[205] Earlier drafts of this Chapter undertook to propose model definitions of both 'bullying' and 'cyberbullying'; however, this thesis now argues that the quality of the national schools' definition has negated that need.

meant by the term bullying.[206] Accordingly, this thesis contends that it forms an excellent basis for academic and legal work regarding bullying.

As will be explored below, cyberbullying has features that have no real-world parallels, making it more than 'bullying through information and communication technologies'.[207] Elements such as repetition differ in an online context. Technology permits material to be widely distributed with ease, potentially leading to more harm being caused to victims and harmful behaviours becoming increasingly difficult to regulate or reduce.

A starting point for much of the literature on cyberbullying is the distinction between 'traditional' or 'offline' bullying and cyberbullying.[208] Work undertaken in Canada offered the following summation of some of the key differences between offline bullying and cyberbullying:

> Traditional bullying tends to take place in secluded places, like washrooms, hallways and school buses, where there is little adult supervision. The cyber world provides bullies with a vast unsupervised public playground, which challenges our established methods of maintaining peace and order — it crosses jurisdictional boundaries, is open for use 24 hours a day, 7 days a week, and does not require simultaneous interaction … The immediacy of online transactions encourages impulsive acts with no thought to the consequences, a behaviour pattern that is already common in many

[206] See for example, Victoria's Education Department: https://www2.education.vic.gov.au/pal/bullying-prevention-response/policy

[207] High Wire Inquiry Interim Report above n 71 .

[208] Michelle Ybarra et al, 'Defining and Measuring Cyberbullying Within the Larger Context of Bullying Behaviour' (2012) 51(4) *Journal of Adolescent Health* 53, 54.

> youths, and peer pressure may further promote harmful deeds that unfortunately have instant and powerful impact with no effective retraction possible.[209]

Further, some scholars note that the term has been defined in various, and often conflicting ways,[210] with some noting that there is still debate about the preferred form – 'cyberbullying' or 'cyber bullying'.[211]

This chapter examines the literature on bullying and cyberbullying, presenting reported prevalence and victimisation rates and contributes to the existing literature, and the thesis, by clarifying our understanding of what the relevant terms cover.

3.2 Terms

Clearly defined terms form the base for consistent empirical research and are also necessary for the rule of law to ensure that laws be accessible, clear, and predictable. For example, the fair warning rule provides, in part, that no one should be punished under the law unless it is sufficiently clear what conduct is forbidden.[212] Through a review of the literature, this section argues that the absence of defined terms has contributed greatly to confusion in research concerning perpetration and victimisation rates for bullying and cyberbullying. As Hinduja and Patchin found, there was significant variations in methodologies applied in existing research into cyberbullying, largely reflecting (amongst

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[209] A Wayne MacKay, (2012) '*Respectful and responsible relationships: There's no App for That*', The Report of the Nova Scotia Taskforce on Bullying and Cyberbullying', Canada, 12.

[210] Sofia Berne et al, 'Cyberbullying assessment instruments: A systematic review' (2013) 18(2) *Aggression and Violent Behavior* 320, 333.

[211] This thesis uses the form 'cyberbullying' as it is the most consistently used form in literature and is consistent with most Australian based research.

[212] *R v Rimmington* [2006] 1 AC 459, 482 (Lord Bingham), quoting *R v Clark (Mark)* [2003] 2 Cr App R 363, [13].

other things) the lens of the discipline undertaking the research,[213] The lack of settled definitions has also, arguably, contributed significantly to confusion as to how the law ought to apply to bullying and cyberbullying.

3.2.1 Definitions as a base for empirical research

From a research perspective, definitions guide the conceptual and theoretical work in a line of enquiry and form the basis for developing measurement instruments used in studies.[214] However, the absence of agreed definitions of what is meant by the terms 'bullying' and 'cyberbullying' presents significant challenges to research into those behaviours and account, at least in part, for significant variations in reported prevalence rates. Further, the absence of concise or central definitions makes it difficult to gather baseline data and develop effective measurement tools to quantify the prevalence of bullying and cyberbullying, [215] limiting the ability to compare and synthesise studies into bullying and cyberbullying.[216]

By way of example, a review undertaken in the USA of cyberbullying victimisation and offending rates across 27 peer-reviewed journals found that victimisation rates ranged from 5.5% to 72% of children reporting being victims of cyberbullying (the average across all studies was 24.4%). In contrast, cyberbullying perpetration rates ranged from 3% to 44.1%

[213] Justin W Patchin and Sameer Hinduja, Cyberbullying: An update and Synthesis of the Research, in Justin Patchin and Sameer Hinduja (eds), *Cyberbullying Prevention and Response* (Routledge, New York, 2012), 13.

[214] Sheri Bauman 'Why it Matters' in Bauman, Cross and Walker (eds) above n 37, 23.

[215] Marilyn Campbell, 'How Research Findings can Inform Legislation and School Policy on Cyberbullying' in Bauman, Cross and Walker (eds.) above n 37, 270.

[216] Justin W Patchin and Sameer Hinduja, 'Cyberbullying Among Adolescents: Implications for Empirical Research' (2013) 53(4) *Journal of Adolescent Health* 431, 431.

(with an average of 18%).[217] The researchers attributed the variations to the studies' methodologies, including, but not limited to, definitional issues.[218]

The variations in these rates support the proposition that definitional issues may affect data gathered by researchers, and there is a significant overlap between bullying and cyberbullying that may account for some variations. For example, Waasdrop and Bradshaw found in an American study that most cyberbullying victims also reported that they experienced at least one form of offline bullying.[219]

3.2.2 Definitions as a basis for the law

More relevantly for this thesis, understanding the meaning of the terms ‘bullying’ and ‘cyberbullying’ is essential for considering how the law ought to apply to the behaviours

[217] Justin W Patchin and Sameer Hinduja, Cyberbullying: An update and Synthesis of the Research, in Justin Patchin and Sameer Hinduja (eds), *Cyberbullying Prevention and Response* (Routledge, New York, 2012), 13. There was no discussion about the geographic location of all the studies examined.

[218] Justin W Patchin, *How many teens are actually involved in Cyberbullying?* (2012) Cyberbullying Research Centre https://cyberbullying.org/how-many-teens-are-actually-involved-in-cyberbullying. See also, Helen McGrath, Young people and technology: A review of the current literature (2nd edition), The Alannah and Madeline Foundation. Melbourne, Victoria (Undated); and Robert S. Tokunga, 'Following you home from school: A critical review and synthesis of research on cyberbullying victimization' (2010) 26 *Computers in Human Behaviour* 277.

[219] TE Waasdorp and CP Bradshaw, 'The Overlap Between Cyberbullying and Traditional Bullying' (2015) *Journal of Adolescent Health* 483. See also Danielle M Law et al, 'The changing face of bullying: An empirical comparison between traditional and internet bullying and victimization' (2012) 28(1) *Computers in Human Behavior* 226.

captured by the terms. The absence of a centralised definition makes it difficult to assess the legal frameworks available to address the problem.[220]

The Tasmanian Law Reform Commission recently noted that bullying is 'difficult to define and is particularly challenging to define for use in a legal framework'.[221] The Tasmanian Office of the Director of Public Prosecutions summarised the challenges presented by a lack of definition facing legal practitioners: 'the difficulty in defining bullying and the wide range of behaviours that are comprised in the term 'bullying' make it difficult to assess the current legal frameworks potentially available to address bullying'.[222]

Returning to the national schools' definition, the definition presents a robust set of drafting instructions for an offence provision. It clearly explains the essential features of an offence – the *actus reus* ('repeated verbal, physical and/or social behaviour'), the *mens rea* ('that intends to cause'), and a requisite level of harm ('physical, social and/or psychological harm'). A skilled legislative drafter can turn the definition into a clear statement of prohibited behaviour ('a person must not') and outline parliament's (and arguably societal) expectation in the form of an offence provision.[223]

3.3 Bullying

[220] Tasmania Law Reform Institute, *Bullying*, Final Report No. 22 (2016), 1 [1.1.2], 2 [1.1.7].

[221] Ibid 1.

[222] Office of the Director of Public Prosecutions, Submission to Tasmania Law Reform Institute, Bullying, 27 July 2015, 1 (cited at [1.1.7] of the Final Report).

[223] A baseline definition is provided at Chapter Seven of the thesis within the context of amending the Personal Safety Intervention Act (Vic).

This section further explores what is meant by the term 'bullying' and the kinds of behaviours captured by the term. The section also presents prevalence rates from Australia and other jurisdictions.

Bullying is an age-old problem and one that some view as synonymous with youth and rites of passage.[224] It is a complex problem[225] that morphs according to the times, the social mores and social context.[226] A 2007 survey of schools in 40 countries found that Australian primary schools were among those with the highest reported incidents of offline bullying globally.[227] Further, the Australian Covert Bullying Prevalence Study reported in 2009 that a quarter of a sample of 20,832 Australian students aged between 8 and 14 years reported being bullied every few weeks or more, with the highest prevalence rates reported by children aged 10-11 years.[228]

Bullying rates also vary according to age, with data showing that up to 70% of Australian children aged 12-13 had experienced forms of offline bullying behaviour in the past year, with 60% reporting being a victim of bullying in the prior month.[229] Similarly, earlier

[224] Susan P. Limber and Mark A Small, 'State Laws and Policies to Address Bullying in Schools' (2003) 32(3) School Psychology Review 445; *Cox v NSW*, [29].

[225] Marilyn Campbell, 'How Research Findings can inform legislation and school policy on cyberbullying' in Bauman, Cross and Walker (eds) above n 37, 262.

[226] Australian University Cyberbullying Research Alliance, Submission cited in The Parliament of Australia, Joint Committee on Cyber-Safety, *High Wire Act Cyber-Safety and the Young*, Interim Report (June 2011), 63.

[227] MO Martin, IVS. Mullis, and P Foy (2008), *TIMSS 2007 international science report* (Chestnut Hill, MA: International Association for the Evaluation of Educational Achievement (IEA)), 388-394.

[228] Dooley et al, above n 63.

[229] Australian Institute of Health and Welfare (2020) 'Australian Children', 364 (Commonwealth of Australia).

data from 2014 found that 60% of students in Years 4, 6 and 8 experienced at least one bullying-like behaviour in the same school term the survey was conducted.[230]

In 2019, a systematic review and meta-analysis of bullying and cyberbullying data identified at least 898 studies dealing with bullying and cyberbullying victimisation and perpetration rates.[231] In addition to the sheer volume of available data sets, the study found that for both victimisation and perpetration, cyber forms of bullying were less prevalent than offline bullying; noting that while pure cyberbullying was estimated to be much less prevalent than offline bullying, cyberbullying can overlap with offline bullying (i.e. some victims were subject to both online and offline forms of bullying by the same bully).[232] The study also called for improved measuring of bullying using a standardised instrument and for prevalence estimates to be collected regularly to assess change over time.[233]

3.3.1 Olweus' four key elements

Before the 1970s, there had been little or no systematic research into bullying until Dan Olweus defined bullying as aggressive behaviour with a deliberate intent to harm another.[234] The work also identified two additional characteristics that elevate bullying beyond 'mere aggression' – an imbalance of power between the parties and recognising that

[230] Ibid 367.

[231] Amarzaya Jadambaa et al, 'Prevalence of traditional bullying and cyberbullying among children and adolescents in Australia: A systematic review and meta-analysis', (2019) 53(9) *Australian & New Zealand Journal of Psychiatry* 878.

[232] Ibid 885.

[233] Ibid 886.

[234] Dan Olweus, *Aggression in the schools: Bullies and Whipping Boys*, (London, John Wiley & Sons, 1978).

the behaviour is repeated and ongoing over time.[235] Olweus' work provides the framework for the significant majority of literature and work in the bullying sphere and each element of his definition is identifiable in the national schools' definition, however it has to be adapted to the legal context.

3.3.1.1 Aggressive behaviour and intention to harm

Olweus' definition requires that bullying must involve an aggressive act, and that act must be intentional on the part of the aggressor.[236] Later work by Olweus provided further guidance, using the term 'negative actions' to describe an aggressive act - 'a student is being bullied or victimized when he or she is exposed, repeatedly and over time, to negative actions on the part of one or more other students'.[237]

> It is a negative action when someone intentionally inflicts, or attempts to inflict, injury or discomfort upon another – basically what is implied in the definition of aggressive behavior. Negative actions can be carried out by words (verbally), for instance, by threatening, taunting, teasing, and calling names. It is a negative action when somebody hits, pushes, kicks, pinches, or restrains another – by physical contact. It is also possible to carry out negative actions without use of words or physical contact, such as by making faces or dirty gestures,

[235] Dan Olweus, *Bullying at School: What We Know and What We Can Do,* (Malden, MA. Blackwell Publishing, 1993).

[236] Olweus' study in Bullies and Whipping Boys looked at mob bullying amongst male students and consisted mostly of physical violence.

[237] Dan Olweus, 'Bully/victim problems among schoolchildren: Basic facts and effects of a school based intervention program' in Debra J. Pepler and Kenneth Rubin (eds), *The development and treatment of childhood aggression'* (Erlbaum, Hillsdale, New Jersey, 1991). The concept of negative actions is credited as first appearing in Dan Olweus, *Mobbning – vad vi vet och vad vi kan göra* (Liber, Stockholm, 1986).

intentionally excluding someone from a group, or refusing to comply with another person's wishes.[238]

Olweus' requirement for both an aggressive act and intention on part of the aggressor closely aligns with the principle common law elements of a crime - the external or physical elements of the crime, and the fault element/requisite state of mind of the accused.

However, what Olweus describes as aggressive acts or 'negative actions' may not easily be placed within a criminal law framework. As will be explored in Langos' taxonomy later in this chapter, verbal actions (particularly those in Categories Three and Four of the taxonomy) are unlikely to warrant a criminal law response. These forms of negative actions can have varying criminal law responses, the clearest of which would be forms of assault responding to physical contact. The application of the criminal law to verbal or other non-physical negative actions is explored further in Chapter Five of the thesis. In particular, to the extent that online actions can be captured by s 474.17 of the Criminal Code, or how a combination of negative actions may be viewed as a 'course of conduct' for the purposes of s 21A of the Crimes Act.

At a base level, the behaviours described by Olweus as 'negative actions' may not of themselves amount to be matters that warrant criminalisation. Although the criminal law prohibits the making of certain threats,[239] it is questionable whether 'taunting, teasing or calling names' would on their own be considered criminal behaviour. However, it is when these behaviours are combined and/or may be repeated that bullying can be seen as comprising a course of conduct. More specifically, within a criminal law framework, there

[238] Dan Olweus, *Bullying at School : What We Know and What We Can Do*, (Malden, MA. Blackwell Publishing, 1993), 13.

[239] See for example the offences relating to making threats to kill or threats to inflict serious injury at sections 20 and 21 of the *Crimes Act 1958* (Vic).

needs to be a clear correlation between the acts done by the perpetrator and the underlying intention.

Whilst Olweus provided no guidance as to how the intention to cause harm can be measured, the element has been subject to some academic analysis, particularly in regards to its role in research.[240] For current purposes, intention is further explored through its meaning as an element of criminal law.

Intention (also referred to as *mens rea*) is a subjective fault element in criminal law. At its heart, intention focuses on an individuals will. The common law maxim *actus non facit reum nisi mens sits rea* provides, in summary, that 'an unwarrantable act without a vicious will is no crime at all'.[241] As Bronitt and McSherry note, intention relates to the accused's purpose being to bring about the results of consequences of their conduct.[242]

Intention is also a necessary fault element for s. 21A - the offence provision is drafted to cover the offender having an objective mental state,[243] or being reckless.[244] Although the text of s. 474.17 of the Criminal Code does not specify a fault element ('the person does so in a way (whether by the method of use or the content of a communication, or both) that

[240] See, e.g. Hannah J. Thomas et al, 'Integrating traditional bullying and cyberbullying: challenges of definition and measurement in adolescents -- a review' (2015) 27 (1) *Educational Psychology Review* 135.

[241] Sir William Blackstone, 'Commentaries on the Laws of England', 4 Comms 21, cited in Penny Crofts et al., *Waller and Williams Criminal law : text and cases* (LexisNexis Butterworths, Australia, 13th Ed, 2016), 35.

[242] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law,* (Law Book Co, 4th Ed, 2017), 209.

[243] *Crimes Act*, s 21A(3)(a).

[244] Ibid, s 21A(3)(b).

reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive'), s. 5.6(1) of the Criminal Code provides that intention is the requisite fault element. However, proving intention is a difficult task. As Bronitt and McSherry state:

> Where the fault element for a particular crime is subjective, the prosecution must prove beyond reasonable doubt that, at the time of the commission of the crime, the accused possessed the requisite state(s) of mind. This may often be a difficult task.
>
> In the absence of an admission or confession, it is impossible to know beyond reasonable doubt what the accused was thinking at the time of the commission of the crime.[245]

The alignment between these two elements of Olweus' definition with the physical and fault elements required by the criminal law lends the definition significant utility when exploring how or when the criminal law should be applied to bullying behaviour. The next two elements of Olweus' definition provide additional tests as to when bullying behaviour may more readily or reasonably be considered as warranting criminalisation.

The criminalisation of bullying requires significant consideration about how Olweus' definition can be translated into the criminal law physical and fault elements. As will be detailed below, there are many factors which need to be considered. The cases of Cox and Oyston will demonstrate that the specific attributes of the victim should be taken into account in developing a criminal law response to bullying. Therefore, aside from the central questions of the acts being done to the victim, consideration of the perpetrators' intention is also paramount – should the behaviour be criminalised if they did not wilfully intend to cause harm? This is particularly relevant in the case of Oyston, which centred around behaviours such as social exclusion, giggling and sniggering. Whilst these behaviours on their own may be insufficient to warrant criminalisation, engaging in them repeatedly could be sufficient to

[245] Ibid, 207.

show a course of conduct. It would then be necessary to examine the intention attached to the actions – was it an intentional infliction of harm, or was the perpetrator reckless about the consequences of their actions?

3.3.1.2 Repetition and imbalance of power

While a single action such as a punch may meet the threshold of aggressive behaviour and intention to harm, Olweus' model requires repetition of the behaviour(s) (i.e. on more than one instance) and an imbalance of power between the parties. Repetition involves actions by the bully rather than third parties. An imbalance of power may be social rather than physical and can relate to the bully's popularity or mental strength rather than physical size.[246]

The following simplified scenario illustrates the elements of repetition and power imbalance:

> Two boys, both aged 14, walk the same route from school each day. One is 180cm tall and muscular; the other is 160cm and of a slight build. The larger of the two regularly verbally taunts the shorter boy and beats him with his fists. The taunts and beatings illustrate a repetition of acts; the size differential illustrates an imbalance of power.

As will be explored below, the elements of repetition and power imbalance differ in a cyberbullying context.

[246] *Oyston v St Patrick's College*, [22]. Discussed in more detail below.

3.3.2 Forms and harm caused

Bullying occurs in three forms – physical, verbal, and social.[247] The example above clearly illustrates an example of physical and verbal bullying. The four elements are also present – aggression, intent to harm, repetition, and power imbalance. Social bullying can take many forms, including social exclusion – such as leaving someone out of a group or manipulating friendships.[248] Waasdorp found that verbal bullying was the most prominent form, with approximately 88% of bullying victims experiencing it. The study also showed that 53.3% of victims experienced relational/social bullying, and 38.4% experienced physical bullying.[249]

Bullying behaviours that target specific attributes of a victim may also be a relevant factor:

> Young people are not a homogenous group, and some researchers and practitioners have highlighted the particular vulnerability faced by young people who already face discrimination and/or marginalisation, such as young people with a disability, LGBTIQ+ and CALD young people, and young Aboriginal and Torres Strait Islanders. While there are obvious benefits in a supportive online community, the social vulnerability of being a part of a minority group can be magnified online.[250]

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[247] Bauman, in Bauman, Cross and Walker (eds) above n 37, above; Helen Mynard and Stephen Joseph, 'Development of the multidimensional peer-victimization scale' (2000) 26(2) Aggressive Behavior 169.

[248] Nicki R Crick and Jennifer K Grotpeter, 'Relational Aggression, Gender, and Social- Psychological Adjustment' (1995) 66(3) *Child Development* 710.

[249] Waasdorp and Bradshaw, above n 219.

[250] Australian Senate Legal and Constitutional Affairs Committee, 'Inquiry into the Adequacy of Existing Offences in the Commonwealth Criminal Code and state and territory criminal laws to capture

Despite the quote discussing online behaviour, there is significant evidence to show offline bullying occurring based on attributes[251] (actual or perceived) such as sexuality, being Aboriginal or Torres Strait Islander,[252] or being overweight.[253]

To provide insight into the plethora of behaviours comprising bullying and the harm experienced by victims (targets of bullying), two case studies are highlighted below.[254]

3.3.2.1 Case note: *Cox v State of New South Wales*

In *Cox,* the plaintiff asserted that the State failed to protect him from bullying on school grounds. The proceedings concerned an 'older student' (identified as 'TH') bullying Benjamin Cox, and Benjamin was between six and seven years of age at the time of the

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cyberbullying', Final Report (28 March 2018), 30. 'LGBTIQ+' means lesbian, gay, bisexual, transgender, intersex, queer and other/more. 'CALD' means culturally and linguistically diverse.

[251] Ken Rigby and Kaye Johnson, 'The Prevalence and Effectiveness of Anti-Bullying Strategies employed in Australian Schools, Adelaide', (2016) University of South Australia, 62 and 65.

[252] The Victorian Department of Education has drafted a range of material for responding to, and preventing, racist bullying at schools. See, for example, https://www.education.vic.gov.au/about/programs/bullystoppers/Pages/racistbullying.aspx.

[253] See for example Keith Berry, 'LGBT bullying in school: a troubling relational story', (2018) 67(4) *Communication Education* 502; Dione Paki, 'What do primary school principals from the Yamaji region or Mid West Education District say about their school's bullying prevention and management guidelines and practices and how they support the strengths and needs of Aboriginal students and their families?' (Masters Thesis, Edith Cowan University 2010); and Rebecca M Puhl, and Joerg Luedicke, 'Weight-Based Victimization Among Adolescents in the School Setting: Emotional Reactions and Coping Behaviors' (2012) 41(1) *Journal of Youth Adolescence* 27.

[254] There were no comparable published cases in Victoria, and these cases offer the strongest judicially documented examples of the range of bullying behaviour as of 30 June 2020.

bullying. However, the judgment does not disclose the older student's age, suggesting that there is a place for civil law when harm is inflicted by someone who lacks the capacity to commit an offence.[255]

The bullying behaviour described in the judgment correlates with all four of Olweus' elements; and included repeated, aggressive acts such as stealing items and shoving Benjamin into walls,[256] strangling,[257] threatening comments,[258] and knocking out a tooth.[259] Benjamin's mother reported the behaviour to the school on several occasions. The assault involving the loss of a tooth was reported to the local police, resulting in the police visiting the bully's home, and leading to further threats being made to Benjamin by TH.[260]

The school's failure to protect Benjamin from the bullying resulted in Benjamin suffering significant psychiatric harm, and the Supreme Court of NSW awarded damages of $1.5 million against the State. Justice Simpson noted the extent of the long-term harm caused as:

> His adolescence has been all but destroyed; his adulthood will not be any better. He will never know the satisfaction of employment. He will suffer anxiety and depression, almost

[255] *Cox v NSW,* [2] (Simpson J). It is presumed TH may, at most, have been subject to the presumption of *doli incapax*.

[256] Ibid [18].

[257] Ibid [25].

[258] Ibid [32].

[259] Ibid [40].

[260] Ibid [42], "It was funny how the police came to my house. And if they come again, I'll threaten to kill you."

> certainly, for the rest of his life. He is unlikely to form any relationships, romantic or platonic. He has no friends and is unlikely to make any.[261]

In addition to providing examples of the range of bullying behaviours, the case also illustrates the kinds of long-term psychiatric harm experienced caused by bullying.

3.3.2.2 Case note: *Oyston v St Patrick's College*

In *Oyston v St Patrick's College*, [262] proceedings commenced directly against a school for its failure to protect a student from bullying. The bullying occurred when Jazmin Oyston was in grades seven to nine, aged approximately 12 to 14 years.[263] The bullying began as social (giggling and sniggering at Jazmin in class) and verbal bullying (calling her a "slut" or "bitch"), with occasional elbowing, by a group of students described as the 'popular group'.[264] Those behaviours intensified in subsequent years.[265]

Jazmin became suicidal and required hospitalisation when experiencing a panic attack.[266] In 2005, Jazmin suffered depression and commenced self-harming.[267] She moved to another school at the start of grade 10, ending the bullying against her.[268]

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[261] Ibid [163].

[262] [2011] NSWSC 269.

[263] Ibid [78]-[79], (Schmidt J).

[264] Ibid [79] and [82].

[265] Ibid [85] and [91].

[266] Ibid [92].

[267] Ibid [96] and [108].

[268] Ibid [349].

It was held that the College had failed to follow proper policy, and therefore to protect Jazmin from harm, highlighting the need for schools to have effective policies in place to deal with allegations of bullying and the need to enforce those policies.[269]

3.4 Cyberbullying

Having examined the fundamental elements of bullying and the cases of *Cox* and *Oyston*, this section explores how offline bullying has morphed as a response to or result of ICT. The section also outlines key differences resulting from technological mediation before focussing on the kinds of behaviours captured by the term. In doing so, the section first outlines the seminal work undertaken by Dan Olweus' to define and capture the central elements of bullying. This is followed by a taxonomy of cyberbullying behaviours developed by Colette Langos, assessed by reference to harm and the relative merit of criminalisation. The section closes by providing an overview of the key social media and other electronic services that may be used to engage in cyberbullying behaviour,

Cyberbullying is a subset of aggression and accompanies developments in technology.[270] The first use of the term 'cyber bullying' (globally) appeared in the Canberra Times (Australia) in 1998,[271] and the term became popularised in 2003 following the launch of the website www.cyberbullying.ca by Canadian teacher Bill Belsey.[272] There has since been a significant growth in academic and public policy work examining various aspects of cyberbullying. However, there remains a lack of clarity as to its meaning.

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[269] Ibid [60].

[270] Charles E Notar, Sharon Padgett and Jessica Roden, 'Cyberbullying: A Review of the Literature' (2013) 1 *Universal Journal of Education Research* 1.

[271] Oxford University Press, 'Oxford English dictionary' (2000) *OED Online*.

[272] Bill Belsey had previously established the website <www.bullying.org> in 1999. See <http://www.billbelsey.com/?cat=13>.

Sabella et al. suggest that cyberbullying captures a range of behaviours from annoying or disappointing to severe, persistent, and pervasive attacks.[273] Lidsky and Garcia suggest that cyberbullying is 'an umbrella term that covers a wide variety of behaviors that fall into existing legal and linguistic categories, including extortion, threats, stalking, harassment, eavesdropping, spoofing (impersonation), libel, invasion of privacy, fighting words, rumor mongering, name-calling and social exclusion'.[274]

Although cyberbullying differs from offline bullying in many ways,[275] Hinduja and Patchin suggest that conceptually, there are a few necessary elements that:

> [a]lmost everyone can agree upon when specifying exactly what cyberbullying is. Most importantly, it involves using technology to bully another person… Second, it involves harm. The victim or target of the behaviour is negatively impacted (psychologically, emotionally, socially, etc.) by the incident. Also included in most definitions of cyberbullying is that the behaviour is repeated.[276]

The elements of power imbalance and repetition are much more difficult to define in a cyberbullying context. These distinctions may be factors that embolden people to engage in behaviours that they would not engage in offline. The use of ICT can make it significantly easier to engage in conduct and target a victim 24/7 – physical proximity and set timing are

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[273] Russell A. Sabella, Justin W Patchin and Sameer Hinduja, 'Cyberbullying myths and realities' (2013) 29(6) *Computers in Human Behavior* 2703, 2704.

[274] Lyrissa Barnett Lidsky and Andrea Pinzon Garcia, 'How not to Criminalize Cyberbullying', (2012) 77(3) *Missouri Law Review* 694, 718 .

[275] Simone Paul, Peter K. Smith, and Herbert H. Blumberg, 'Investigating Legal aspects of cyberbullying' (2012) 24(4) *Psicothema* 640, 641.

[276] Sameer Hinduja and Justin W Patchin, *Cyberbullying prevention and response expert perspectives* (New York: Routledge, 2011), 14.

no longer prerequisites for this kind of behaviour. The audience for online behaviour may be challenging to quantify, and third parties may also participate in harmful behaviour.[277]

Cyberbullying has been a recognised problem in Australia for many years, and Marilyn Campbell of the Queensland University of Technology has written extensively on the topic since 2005.[278] Additionally, in 2007, the Australian Institute of Criminology raised cyberbullying as part of their work on technology-based crimes:

> In recent years, a new form of bullying, including harassment targeting young users, has emerged which makes use of communication technologies such as email, text messaging, chat rooms, mobile phones, mobile phone cameras and social networking sites. Cyberbullying can also include online fights, denigration, impersonation, trickery and stalking … Cyberbullying will continue to be a problem.[279]

As noted above, using ICT means that cyberbullying consists of only social/relational and verbal bullying.[280] Relational and verbal bullying has historically been much more challenging to address than behaviours such as physical assault. The behaviours do not conform to clear criminal law offences, and options to address bullying have primarily been school-based. Almost 90% of bullying victims experienced verbal bullying, and over half

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[277] Colette Langos, 'Cyberbullying: The challenge to define' (2012) 15(6) *Cyberpsychology, Behaviour and Social Networking* 285.

[278] Marilyn Campbell, 'Cyber bullying: An old problem in a new guise?' (2005) 15(1) *Australian Journal of Guidance and Counselling* 68. Des Butler, also of QUT Faculty of Education, had also written extensively on the topic.

[279] Kim-Kwang Raymond Choo, *Future directions in technology-enabled crime 2007-09* (Canberra: Australian Institute of Criminology, 2007), 63.

[280] The exception being 'happy slapping' which a hybrid of offline and online behaviour. Langos defines happy slapping as involving 'the filming of a physical attack on a victim and the subsequent distribution of the film in order to humiliate the victim publically' – Colette Langos, 'Cyberbullying, associated harm and the criminal law' (PhD Thesis, The University of South Australia, 2013), 8.

experienced social bullying. Less than 40% of victims reported experiencing physical bullying, and there is a significant overlap between offline and online bullying.[281]

Similarly to offline bullying, Australian studies also reported large variations, with research showing victimisation rates for cyberbullying ranging from around 6% to over 40% of children.[282] Research published in 2009 suggested that prevalence rates in Australia were under 10%.[283] However, later research suggested that the best estimate, considering the methodology and timing of the various studies, of the prevalence of being cyberbullied over 12 months would be approximately 20% of young Australians.[284] Data published by the Australian Bureau of Statistics showed that in 2016-17, 14% of households connected to the internet with children aged 5-14 reported that a child had been subject to cyberbullying.[285]

Cyberbullying is aggressive and pervasive. Within the confines of an offline bullying model, behaviour such as taunting or harassing someone would ordinarily end when the

[281] Law et al, above n 219.

[282] Helen McGrath, above n 218.

[283] Dooley et al, above n 63.

[284] Ilan Katz et al, Research on youth exposure to, and management of, cyberbullying incidents in Australia Synthesis Report (June 2014) (SPRC Report 16/2014). Sydney: Social Policy Research Centre, UNSW Australia, 2.

[285] Australian Bureau of Statistics, *Household Use of Information Technology 2016-17* (28 March 2018). <http://www.abs.gov.au/ausstats/abs@.nsf/PrimaryMainFeatures/8146.0?OpenDocument> (n=99,000). The ABS defined cyberbullying as 'The use of technology to bully an individual or a group with the intent to cause harm. The intended harm may be social, psychological, or physical.' 'Bullying' itself is not defined in the glossary to the report. A further difficulty with the data is that a single household may have multiple children being subjected to bullying.

victim arrives home.[286] Online behaviours and acts change this and can be witnessed or contributed to by an unknown number of others, and victims often have limited or no control over the material or behaviours. Cyberbullying blurs the element of power imbalance – factors such as access to technology and the aggressor's popularity have a much more profound effect on a victim. Cyberbullying takes the residual behaviours that were difficult to respond to in offline bullying and magnifies them to become a significantly heightened form of aggression. Common assault[287] would have been the likely offence provision applying to 'sufficiently serious' physical bullying (should the offender not receive a caution). Cyberbullying has no such parallel harms, nor offence provision.

Attempts to establish a clear delineation or separation of behaviours may be difficult in practice, with many researchers finding that most cyberbullying victims also reported experiencing at least one form of offline bullying (either at the hands of the same bully or by another). For some young people, cyberbullying is an extension of offline bullying, and as such, the distinction between the two behaviours is artificial, as was noted in some submissions to the Parliamentary Committee Inquiry into Cyber Safety and the Young:

- 'Stop distinguishing between 'cyber' bullying and bullying in reality. It implies it is not real.'[288]
- 'Bullying is something unto itself: cyber bullying is not its own form; it's bullying, just using another outlet. We should be just as wary of it as normal bullying.'[289]

[286] Consideration must be given to the use of other communications means such as postal services or telephones to harass. Both of these methods of communication have provisions in the *Criminal Code* prohibiting their use to menace, harass or cause offence. This is relevant in the case of *Monis*, discussed later in the thesis.

[287] *Summary Offences Act 1966* (Vic), s 23.

[288] High Wire Act Interim Report, 66 (Male, aged 17).

[289] High Wire Act Interim Report, 66 (Female, aged 14).

This thesis uses the term ‘bullying’ to cover both online and offline bullying unless otherwise specified, and the law must recognise the full extent of harm (or potential for harm) caused by bullying in all its forms. Whilst cyberbullying is relatively new, and elements of the behaviour require a distinct response, it must still be viewed through the lens of overall bullying. The section below outlines the unique characteristics which differentiate online bullying and offline bullying.

3.4.1 Olweus’ elements in a cyberbullying context and other factors

As discussed above, Olweus’ definition of bullying features four elements – aggression, intention, repetition, and power imbalance. In addition, there are three primary forms of bullying behaviour – physical, verbal, and social. Adding the prefix ‘cyber’ to ‘bullying’ has brought with it several issues and complications as to how best to describe ‘cyberbullying’, further cyberbullying does not strictly conform to the indicators of bullying outlined above.

This thesis argues that the elements of intention and aggression remain the same in either online or offline behaviours – all forms of bullying are intentional and aggressive. However, the elements of power imbalance and repetition differ in the online context, as detailed below. There are also other factors in cyberbullying that need to be taken into account, including anonymity and the possible pervasive nature of cyberbullying.

3.4.1.1 Power imbalance

Unlike offline bullying, age or physical attributes are no longer clear indicators of a power imbalance in cyberbullying. Technological skills and access to technology are more relevant to the power imbalance in the online world. A bully’s popularity plays a more significant role in the power imbalance between a cyberbully and a victim. Research conducted by Pieschl found that being harassed by a popular person was more distressing than being harassed by an unpopular person - being targeted online by someone with 200

Facebook friends causes more distress than being bullied in front of a small group of people in the schoolyard.[290] Social media's nature means that a bully and their online network can post and disseminate information to a much larger audience online than there would be witnesses to offline interpersonal aggression, leading to an increased risk or likelihood of harm to the victim. Children with strong skills in the use of social media and other technologies can become powerful bullies. Whereas offline bullying generally required physical strength or some form of social dominance in a physical environment (i.e. plenty of witnesses or supporters), harm caused by online bullying can be much easier to inflict.

3.4.1.2 Repetition

Repetition also has a different meaning online as to offline bullying. As discussed in Chapter Two, children are very reliant on technology and social media for their socialisation. Social media platforms and hardware such as smartphones mean that growing numbers of children have unprecedented access to ICT and each other, and the social media services disseminate information instantly. Once the material is posted, it can be shared, saved, printed, or otherwise manipulated by an unknown number of others (depending on the relevant security settings in place). As a result, it may be impossible to contain information posted online, leaving victims with little recourse, and repetition may occur at the hands of others rather than the bully.

The participatory nature of internet culture, where sharing and spreading material is commonplace, lends itself to cyberbullying. McMahon argues that the ease with which a bystander can 'like' or 'share' cyberbullying material has no analogue for such re-

[290] Stephanie Pieschl et al, 'Relevant dimensions of cyberbullying — Results from two experimental studies' (2013) 34(5) *Journal of Applied Developmental Psychology* 241.

victimisation in offline bullying.[291] The multiplier effect of technology means that a single act by one person can easily be seen, commented on, or forwarded by an unknown number of others. By undertaking those actions, the third parties may be complicit in harming, and the element of repetition is no longer at the hand of the original aggressor.[292]

Bauman et al. also argue this position:

> ….we consider the criterion of repetition to be subsidiary, rather than core, in terms of defining bullying. The perspective of the outsider should be the ultimate consideration, relating also to intent to harm. A repeated action is a good indicator of intent to harm, especially if feedback is given by the victim or others to the perpetrator. But in some cases, a single act by a perpetrator might reasonably be expected to be repeated by others, and the perpetrator might reasonably be expected to know and even intend this. If you post an offensive comment on a website, you expect many others to see it. If so, then the case for calling this cyberbullying is strengthened.[293]

The nature of repetition online poses a significant regulatory challenge to the extent that repetition can be either at the hand of the perpetrator or through other (possibly unknown) actors. As noted above, Olweus' definition and the national schools' definition rely on the need for behaviour to be repeated or have the potential to be repeated. This is also highly relevant in regards to offence provisions such as stalking (discussed further in Chapter Five) that are based on elements such as engaging in a course of conduct.

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[291] Ciarán McMahon, 'Why we need a new theory of cyberbullying' (Working paper series #14.3.cb, Royal College of Surgeons in Ireland CyberPsychology Research Centre Dublin, Ireland, 2014) 10.

[292] Conversely, it may be inappropriate to presume that posting material on an online platform necessarily meets the repetition requirement – the offending act may lack any views or shares, and it may not even be seen by the intended target - Robert Slonje and Peter K Smith, 'Cyberbullying: Another Kind of Bullying' (2008) 49(2) *Scandinavian Journal of Psychology* 147.

[293] Peter K Smith, Cristian del Barrio and Robert S Tokunaga 'Definitions of Bullying and Cyberbullying: How useful are the terms?' in Bauman, Cross and Walker (eds), 35.

3.4.1.3 Anonymity

Some research suggests that the growth in cyberbullying may also be attributable to a somewhat mistaken belief in the community that the internet affords anonymity to its users.[294] Australia's National Plan on Cybercrime notes that 'the anonymity and reach of the internet can also magnify antisocial behaviours that exist in the offline world, such as bullying and harassment'.[295] The perception of anonymity can make it difficult to identify the elements of repetition and power imbalances (i.e. the question of *who* is doing the bullying).[296] However, Fenaughty found in a survey of 1673 students aged 12 to 19 that anonymous harassment was not associated with distress, reflecting that bullies may want their victims to know who they are[297] and that the anonymity of an aggressor is less of a concern than once believed.

Certain social features may be strong factors behind the desire for an aggressor to be known. For example, elements such as the number of friends or followers a bully may have can feed into the elements of power imbalance and repetition – an aggressive message from an anonymous individual with no common contacts/friends is unlikely to cause as much harm as a message from someone the victim knows and has common online

[294] Fabio Sticca and Sonja Perren, 'Is cyberbullying worse than traditional bullying? Examining the differential roles of medium, publicity, and anonymity for the perceived severity of bullying', (2013) 42(5) *Journal of Youth and Adolescence* 739.

[295] National Plan on Cybercrime, Canberra (2013), 5**Error! Bookmark not defined.**.

[296] John Fenaughty and Niki Harré, 'Factors associated with distressing electronic harassment and cyberbullying' (2013) 29(3) *Computers in Human Behavio*r 803, 803.

[297] Ibid 809. See also, Danielle M Law et al, above n 219, 227; and Heidi Vandebosch and Katrien Van Cleemput, 'Defining Cyberbullying: A Qualitative Research into the Perceptions of Youngsters' (2008) 11(4) *Cyberpsychology, Behavior and Social Networking* 499, 503.

connections. This finding is, however, not to say that anonymous communications are necessarily harmless.

3.4.1.4 Pervasiveness

While offline bullying primarily occurs in 'real-time' and in person, electronic aggression can occur anywhere and anytime - ICT's 24/7 nature means that aggressive behaviour goes beyond the schoolyard and school hours.

Pervasiveness was also a common theme in submissions to the High Wire Inquiry. For example, one 14-year-old female noted that 'Cyberbullying follows you everywhere and is at home, the one place your (sic) meant to feel safe.'[298] This theme is deeply connected to the idea that children use ICT and social media as a key form of socialisation, and the distinction between face-to-face interactions and online interactions for socialisation is becoming a largely artificial one.

3.4.1.5 Witnesses and bystanders

Many social media platforms allow the rapid dissemination of material and information on an unprecedented scale. As a result, children perceive public incidents (e.g. messages on a Facebook page) as more distressing than private or semi-private incidents (e.g. direct text messages or emails).[299] As noted above in the discussion regarding repetition, the role of witnesses and bystanders is another significant contributor to the harm caused by bullying behaviour. Early research suggests that witnesses and bystanders were more likely to join in cyberbullying than offline bullying[300] and become complicit in

[298] High Wire Act Inquiry Interim Report, above, 68 [3.30].

[299] Law et al, above n 219.

[300] Elizabeth Whittaker and Robin M Kowalski, above 36.

cyberbullying. However, research conducted by Batsiaensens et al. in 2014 suggested that a bystander may be more likely to help victims in more severe instances of cyberbullying.[301]

As online interactions continue, they are likely to draw in friends and bystanders from both sides. As exchanges (e.g. in response to a Facebook post) grow, the distinction between a bully and a bystander becomes blurred.[302] A 2012 study into 'actively targeted bystanders' explored what students did when they encountered cyberbullying material. Although most students (72%) did nothing to distribute the material further, 6% of students forwarded the material to the victim with the intention of further bullying them.[303] McMahon argues that there is simply no analogue for this re-victimisation in the playground,[304] and the line between witness/bystander and perpetrator is more blurred online than in an offline context.[305]

3.4.1.6 Review

[301] Sara Bastiaensens et al, 'Cyberbullying on social network sites. An experimental study into bystanders' behavioural intentions to help the victim or reinforce the bully' (2014) 31 *Computers in Human Behavior* 259, 260.

[302] Law et al, above n 219.

[303] Robert Slonje, Peter K Smith, and Ann Frisen, 'The nature of cyberbullying, and strategies for prevention' (2013) 29(1) *Computers in Human Behaviour* 26. The study noted that 13% of students showed or forwarded the material to the victim to assist them or limit the bullying incident.

[304] McMahon, above n 291, 11.

[305] Ibid. One of the few examples of traditional bullying 'inviting' participants is 'stacks on', where the victim is pinned to the ground and others are invited to stack on top of the bully and victim. There may be regional variations to the naming of the behaviour (the anecdote is based on childhood experience in Queensland).

The factors outlined above show a clear need to re-think Olweus' bullying elements within a cyberbullying context. Whilst the underlying elements of intention and aggression are common threads across offline and online bullying, the elements of repetition and power imbalance differ significantly. The pervasiveness of electronic communications and the role of bystanders and others add a further dimension to repetition and power imbalance. The nature of electronic communications means that actions such as a single post on a social media site can be significantly magnified and witnessed by far more people than a single schoolyard encounter.

3.4.2 Langos' taxonomy

Having explored Olweus' four elements within a cyberbullying context, consideration now turns to specific kinds of harmful online behaviours. As noted in Chapter One, the kinds of harms caused by bullying and cyberbullying can vary significantly from 'annoyance' through to suicidal ideation, and in more extreme cases result in suicide. Further, the harms can be short term or have significant long term impacts as was the case for Benjamin Cox.

As part of a significant body of work examining cyberbullying, harm, and the criminal law, Langos applied von Hirsch and Jareborg's conceptual framework[306] to assess the harm to determine the severity of punishment and categorised a range of behaviours covered by the general term 'cyberbullying' and provided a model based on the concept of harm. Each category contains defined behaviours and Langos' view on whether the behaviours warranted a criminal law response.[307]

As Langos argues, von Hirsch and Jareborg's framework 'grades the seriousness of conduct based upon the degree to which a person's living standard is encroached upon

[306] Andrew von Hirsch and Nils Jareborg, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11(1) *Oxford Journal of Legal Studies* 1.

[307] Langos, above n 45.

when an individual interest is impeded.'[308] Langos then adapted the framework to the cyberbullying context to determine whether only some forms of cyberbullying warrant criminalisation based on the potential harmfulness of the conduct, noting that a 'victim's living standard, and hence the quality of life, will be affected to varying degrees depending on the extent of the intrusion upon the victim's interest.'[309] Of particular relevance to Langos' work were the individual interest dimensions (within the living standard) that are impacted by cyberbullying – physical integrity, freedom from humiliation, and privacy/autonomy.[310]

The four categories discussed below capture a broad range of cyberbullying behaviours and align them with criminalisation's desirability. This thesis argues that behaviours described in Category One warrant criminalisation and are mostly stand-alone offences in Victoria. However, Categories Two and Three's behaviours are of most interest in this thesis's discussion because their seriousness level is less clear.

Category One

[308] Ibid 151.

[309] Ibid.

[310] Ibid 152.

According to Langos, category one is the most serious and includes denigration,[311] denigration by sexual or intimate image,[312] and cyberstalking.[313] Langos suggests that these behaviours may require criminal sanctions.[314]

As the most serious category, some of these behaviours are an offence in Victoria. Responding to an inquiry into sexting in 2013,[315] the Victorian Parliament introduced laws to prohibit the distribution of intimate images by, and of, young persons.[316] Further, amendments to s 21A of the Crimes Act in 2003 to capture the use

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[311] Ibid 55. Langos suggests that 'denigration' can occur either overtly, where the victim knows or suspects the identity of the perpetrator, or covertly, where the identity of the perpetrator is concealed, and there are several manifestations of this conduct. This includes the example in the footnote directly below.

[312] Ibid 56. Langos defines 'denigration' by way of an image of a sexual or intimate nature as involving the dissemination of an image of a sexual (depicting the subject engaging in a sexual act) or intimate (depicting the subject's genital or anal area, or using a toilet) nature which identifies the subject (shows the subject's face, or otherwise identifiable features) and is disseminated without the subject's consent.

[313] Ibid 53. Langos defines 'cyberstalking' as involving intense harassment and denigration that includes threats or creates significant fear.

[314] Ibid 169-171.

[315] Law Reform Committee, Parliament of Victoria, *Inquiry into Sexting* (2013). Sexting was defined as 'the creating, sharing, sending or posting of sexually explicit messages or images via the internet, mobile phones or other electronic devices by people, especially young people' – Report, page ix. ('Sexting Report').

[316] *Summary Offences Act 1966* (Vic), Div. 4A 'Observation or visual capturing of genital or anal region and distribution of intimate images' (as amended by the *Crimes Amendment (Sexual Offences and Other Matters) Bill 2014* (Vic)). Section 245 of that Act makes the distribution of an intimate image an offence.

of ICT firmly place 'cyberstalking' within the remit of that offence provision.[317] Langos rightly argues that these behaviours are sufficiently serious to warrant prosecution as stand-alone offences. These behaviours may also form part of a course of conduct describable as cyberbullying. There may also be consequences under various laws prohibiting the making and distribution of child pornography that could apply to the distribution of sexual or intimate imagery of or by minors.[318] This thesis agrees with Langos that many of these behaviours may fall within the ambit of criminal law.

Category Two

Category Two behaviours include masquerading or impersonation,[319] outing and trickery,[320] making indirect threats and denigration through non-sexual or non-intimate

[317] *Crimes (Stalking) Act 2003* (Vic).

[318] See, for example, the offence provisions at ss 68, 69 and 70 of *Crimes Act 1958* (Vic) prohibit the production, procurement or possession of child pornography. 'Child pornography' is defined at section 67A of the *Crimes Act* as 'a film, photograph, publication or computer game that describes or depicts a person who is, or appears to be, a minor engaging in sexual activity or depicted in an indecent sexual manner or context'. There are also Commonwealth offence provisions, such as those at s 57A of the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Cth) prohibiting the distribution of child pornography by electronic means, or Div 273 of the *Criminal Code Act* (Cth) that prohibits, amongst other things, accessing, distributing or soliciting child pornography material using a carriage service .

[319] Langos, above n 45. Langos defines 'masquerading' or 'impersonation' involving the perpetrator pretending to be the target and sending an offensive message(s) that appear to come from the target.

[320] Ibid 61. Langos defines 'outing' and 'trickery' as tactics often applied together and involve a situation where the perpetrator manipulates the victim into disclosing information or making statements that the perpetrator then publicizes in order to embarrass the target.

images. The category also includes long-term harassment[321] and long-term verbal denigration.[322] Langos proposed that a good reason exists to criminalise these behaviours, but a state should approach criminalisation cautiously.[323]

Unlike Category One, there is no clear legal response to these behaviours. For example, using a platform such as Facebook to publicly 'out' someone as being gay may be considered denigration or outing,[324] but the behaviours may be insufficient on their own to warrant or elicit a legal response. Further, name-calling may amount to long-term harassment and verbal denigration.

Category Three

Category Three behaviours include short-term harassment, short term verbal denigration, and long-term exclusion. Langos proposed approaching criminalisation with utmost caution given the lesser gravity of harm associated with these forms of behaviour.[325]

Like Category Two, there is no clear legal response to these as standalone behaviours. However, as part of a course of conduct, the overall effect may be harmful.

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[321] Ibid 52. Langos defines 'harassment' as involving repeatedly sending offensive messages to a target.

[322] Ibid 165. Langos suggests that significant harm can generally be associated with typical instances of long-term 'harassment' given the persistent nature of the conduct, whereas short-term 'harassment' is likely to result in mild harm, given the shorter duration of the conduct.

[323] Ibid 169-171.

[324] Ibid 61. For a fictionalised version of the impact of the threat of being 'outed', see for example Becky Albertalli, 'Simon vs. the Homo Sapiens Agenda' (Balzer + Bray, 2015), which was subsequently released as the film 'Love Simon' (20th Century Fox, 2018).

[325] Ibid 169-170.

There will be a need to examine and assess the pattern of behaviours and their impact on the victim. These behaviours may be more likely to occur in person rather than online.

Category Four

This category, which Langos classed as the least serious, includes short term exclusion and short-term verbal denigration. Following Langos' view, these behaviours are those that the law has described as 'mere affronts' and are insufficient to be subject to criminal action.[326]

This thesis agrees with Langos' analysis and argues that the verbal and social behaviours described at Categories Two to Four of the taxonomy remain problematic in that there is no clear legal response to those behaviours as individual actions (such as short-term verbal abuse and exclusion). Langos' work demonstrates the broad range of harm causing behaviours that are covered by the term cyberbullying, and the categorisation of behaviours from most serious to least serious also shows that the line of 'sufficiently serious' behaviour may rest somewhere in categories two or three and may even consist of a combination of behaviours from two or more of the categories. This work is of significant value to the discussion of legal responses in Part B of this thesis.

3.4.3 The growth of social media

Since the early 2000s, there has been significant growth in the availability and variety of social media.[327] There is growing evidence showing that social media and other cyber interactions are a vital feature in children and youth's socialisation; interactions between

[326] Ibid 169-170, 172.

[327] Also commonly referred to as 'social network sites'.

people are becoming more and more technology-reliant.[328] Mishna argues that adults, including legal practitioners, need to recognise the importance of online interactions for children and young persons' socialisation.[329]

As will be discussed in Chapter Four, the Australian Government's eSafety response primarily deals with social media and content posted on those services. This is particularly so in the cyberbullying provisions of the *Enhancing Online Safety Act* (Cth). Accordingly, some of the key features of the most popular or highly used social media services are outlined below.

The number of global users for the leading social media is in Table 1, below, and a discussion of their key features follows. As will be discussed below, specific social media have a minimum age requirement, therefore, it is impossible to genuinely identify how many users are children or fall below the minimum age requirement where accounts are created contrary to those requirements.

As the largest social media service by a significant margin, this part details the key features of Facebook and provides a shorter overview of other relevant services.

[328] Mishna, Saini, and Solomon, above n 35, 1226. See also Katie Davis, 'Young people's digital lives: The impact of interpersonal relationships and digital media use on adolescents' sense of identity' (2013) 29 *Computers in Human Behaviour* 2281.

[329] Mishna, Saini, and Solomon, ibid, 1226.

Platform	2013	2015	2020
Facebook[330]	1.23b[331]	1.59b[332]	2.6b[333]
Twitter[334]	271m[335]	320m[336]	330m[337]
ask.fm[338]	127m[339]	150m[340]	32.8m[341]
Snapchat	60m[342]	100m[343]	314.6m[344]
TikTok/Douyin[345]	-	-[346]	800m[347]

[330] Facebook (Web page) www.facebook.com.

[331] Jemima Kiss, *Facebook's 10th Birthday: From College Dorm to 1.23 bn* users (4 February 2014) The Guardian, http://www.theguardian.com/technology/2014/feb/04/facebook-10-years-mark-zuckerberg. Monique Ross, *Facebook Turns 10* (4 February 2014), ABC News (Australia), <http://www.abc.net.au/news/2014-02-04/facebook-turns-10-the-social-network-in-numbers/5237128>.

[332] Facebook 'Company Info', (Web Page, accessed on 25 April 2016), <http://newsroom.fb.com/company-info/>.

[333] Dan Noyes, 'Top 15 valuable Facebook statistics', Zephoria, <https://zephoria.com/top-15-valuable-facebook-statistics/> accessed on 10 May 2020 (data as of 3 May 2020).

[334] Twitter (Web Page) <www.twitter.com>.

[335] Twitter, 'Our Company', (Web Page accessed on 24 August 2014) <https://about.twitter.com/company>.

[336] Ibid accessed on 25 April 2016.

[337] Salman Aslam, 'Twitter by the Numbers: Stats, Demographics & Fun Facts', *Omnicore*, (Web Page, data as of 19 May 2019) <https://www.omnicoreagency.com/twitter-statistics/, accessed on 10 May 2020>.

[338] Askfm (Web Page) <www.askfm>.

Table 2 The number of users for the leading social media.

3.4.5.1 Facebook

Facebook was founded in February 2004, and by December of that year, it had more than a million active users on its network. The platform expanded rapidly, and by December 2017, it had 2.13 billion active monthly users, with over 90.5% of users accessing the platform on mobile devices.[348] It is the largest social network[349] globally, with approximately

[339] Askfm 'About our company' (Web Page, accessed on 24 August 2014)) <http://askfm/about/safety/about-company>.

[340] Ibid accessed on 25 April 2016.

[341] Ibid accessed on 10 May 2020.

[342] Alyson Shontell, 'The Truth About Snapchat's Active Users (The Numbers The Company Doesn't Want You To See)', Business Insider (Web Page, 10 December 2013) <https://www.businessinsider.com/snapchat-active-users-exceed-30-million-2013-12?r=AU&IR=T>.

[343] J Clement, 'Snapchat - Statistics & Facts', *Statista*, (Web Page, 7 February 2020) <https://www.statista.com/topics/2882/snapchat/>.

[344] *Statista,* 'Number of Snapchat users worldwide from 2018 to 2023', Statista, (Web Page) <https://www.statista.com/statistics/626835/number-of-monthly-active-snapchat-users/>.

[345] 'TikTok' is the global name of the Chinese app 'Douyin'.

[346] There is no data as the app was launched in 2016.

[347] Brandon Doyle, 'TikTok Statistics' *Wallaroo Media,* (Web page, accessed July 2020) <https://wallaroomedia.com/blog/social-media/tiktok-statistics/ (estimated at July 2020)>.

[348] Facebook 'Company Info', (Web Page, accessed July 2020), <http://newsroom.fb.com/company-info/>.

[349] The terms 'social networks' and 'social media' are somewhat interchangeable (Facebook mostly refers to itself as a 'network').

83.6% of active users residing outside of the USA and Canada. Research published by Sensis in 2020 showed that 89% of surveyed social media users in Australia had a Facebook account, making it Australia's most popular social media service by a significant margin.[350]

Facebook's terms of service prohibit users under the age of 13 or the minimum legal age in their country from using their products.[351] However, as will be detailed later in the thesis, there are growing numbers of complaints made to the eSafety Office where the victim has a social media account and is below the minimum age; suggesting a lack of verification or enforcement of that requirement.[352] In addition, Facebook's terms and conditions include provisions dealing with breaches of its 'Community Standards,[353] including prohibitions on bullying[354] and harassment.[355]

As the largest social media platform, some of Facebook's central features warrant highlighting. The following are some of its key features:

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[350] Yellow, 'Yellow Social Media Report 2020', 11 <Social Media Report 2020 - Yellow>. The other major social media services were YouTube (54%), Instagram (45%), LinkedIn, Pinterest and Twitter (20% each), Snapchat (19%) and Tik Tok (7%).

[351] Facebook, 'Terms of Services' (Web Page) <https://www.facebook.com/legal/terms>.

[352] See for example, Mary Aiken 'The Kids Who Lie About Their Age to Join Facebook', *The Atlantic,* (Web Article) <https://www.theatlantic.com/technology/archive/2016/08/the-social-media-invisibles/497729/> for how this may impact cyberbullying.

[353] Facebook, 'Terms of Service', Provision 4.2 'Account suspension or termination'.

[354] Facebook, 'Community Standards – Safety – Bullying (Web Page) <https://www.facebook.com/communitystandards/safety/bullying>.

[355] Facebook, 'Community Standards – Safety – Harassment' (Web Page) <https://www.facebook.com/communitystandards/safety/harassment>.

A '*Profile'* is a person's account, providing self-selected details about them. The profile owner can control the level of information available, such as their date and place of birth, current residency, and relationship status.

The '*News Feed*', formerly known as a '*wall'*, is a continually updating list of stories in the middle of a user's home page and includes status updates, photos, videos, links, app activity and likes from people, pages, and groups that a user follows on Facebook.[356]

'*Post*' includes making comments and adding media to your own News Feed or to another person you are '*Friends*' with on Facebook or a page you are following. Additionally, depending on the user's security settings, other third parties (i.e. not "Friends") can post on a user's News Feed.

A '*Like*' is a positive response to a Post. Initially, it was depicted as a 'thumbs up' symbol. However, users now have a range of responses, such as '*Love*' and '*Sad*'. In addition, users can click on the relevant symbol to discover who has Liked (or other) a post, for example:

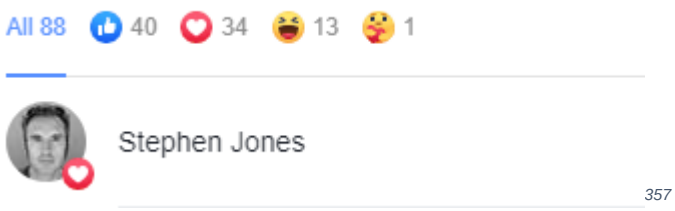

Figure 2 Illustration of Facebook response options.

[356] Facebook 'Help Centre – How News Feed Works' (Web Page) <https://www.facebook.com/help/1155510281178725/?helpref=hc_fnav>.

[357] The figure shows a total of 88 responses, consisting of 40 'Likes', 34 'Loves', 13 'Hahas' and 1 'Care' responses. The author of the thesis is shown as having responded with 'Love' to the post.

Users can also '*Share*' posts on their News Feed or on that of another user. Depending on the security settings applied, another user can share a post widely without the original user's explicit consent.

Facebook has other platforms, such as Messenger, which allows users to communicate directly rather than through posts.

3.4.5.2 Twitter

Twitter was created in March 2006 and initially enabled users to post text (called 'tweets') of up to 140 characters, which was subsequently expanded to 280 characters,[358] and users could also load videos and other media to their tweets. Most tweets are publicly accessible; however, only registered users may post tweets. Twitter users can also 'follow' specific users, re-tweet posts, and elect to use 'hashtags' to label or search for content using specific words.[359]

By 2016, an estimated 80% of Twitter users accessed their accounts on mobile devices, and users generated over 500 million tweets each day. [360] Twitter requires users to

[358] Aliza Rosen 'Tweeting Made Easier' (Twitter Blog 2017) <https://blog.twitter.com/official/en_us/topics/product/2017/tweetingmadeeasier.html>.

[359] For example, #doughnuts would show users all tweets featuring that hashtag, presumably being text or photographs concerning doughnuts: <https://twitter.com/search?q=%23doughnuts&src=typed_query>.

[360] Twitter, 'Our Company' (Web Page accessed on 25 April 2016) <https://about.twitter.com/company>. The Twitter website has since stopped posting similar data, and data on third party sites show great variations.

be at least 13 years old before having an account,[361] and its Help Centre provides information about online abuse and options for reporting abuse.[362]

3.4.5.3 ask.fm

ask.fm started in 2010, operating a platform for publicly asking and responding to questions, claiming in 2006 that the website posted over 20,000 questions per minute.[363] It 'aims to be a safe, fun and engaging place for learning more about yourself and exploring the social world around you'.[364] Whilst not one of the most extensive social media services, it is perhaps one of the more controversial and has been the subject of negative media coverage after some users died by suicide after placing questions on the site. [365]

[361] Noting that the age varies by jurisdiction, see <https://help.twitter.com/en/using-twitter/parental-consent>.

[362] Twitter, 'About online abuse' (Web Page) <https://help.twitter.com/en/safety-and-security/cyber-bullying-and-online-abuse>.

[363] ask.fm, 'About askfm' (Web Page accessed on 25 April 2016) <http://about.askfm/about/>.

[364] Ibid.

[365] Rob Cooper, 'Mothers Campaign to Close AskFM', *Daily Mail Australia* (19 November 2013) accessed at <http://www.dailymail.co.uk/news/article-2509874/Mothers-campaign-close-Ask-fm-daughter-Izzy-Dixs-suicide.html>; Jim Edwards, 'Askfm and Teen Suicides', *Business Insider* (13 September 2013) accessed at <http://www.businessinsider.com.au/askfm-and-teen-suicides-2013-9>.

As a response to this, its terms of use were significantly bolstered to prohibit conduct that harasses or bullies, trolls[366], or encourages self-harm.[367] Membership is open to people over the age of 13 or the age of majority of the country in which they reside,[368] meaning membership is limited to persons aged 18 years or older in Australia.[369] Mechanisms exist for reporting and reviewing problematic posts or questions,[370] although as Table 1 shows, the number of users has decreased drastically since 2015.

3.4.5.4 *Snapchat*

Snapchat was founded in 2011 and is an image-based application for sharing pictures and videos. One of the distinguishing features of Snapchat is that the media was initially designed to disappear after viewing, leading to a perceived 'destruction' of evidence. The platform has 6.85 million users in Australia.[371]

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[366] In simple terms, a social media troll is someone who purposely says something controversial in order to get a rise out of other users (see for example – James Hanson 'Trolls and Their Impact on Social Media', University of Nebraska- Lincoln (Web Page) < https://unlcms.unl.edu/engineering/james-hanson/trolls-and-their-impact-social-media>). The case of *R v Hampson*, discussed later in the thesis involves trolling behaviour.

[367] ask.fm, 'Terms of Use' (Web Page accessed on 27 September), <http://about.askfm/legal/en/terms.html>.

[368] Ibid Clause 2.

[369] See for example, *Age of Majority Act 1977* (Vic), s 3.

[370] ask.fm, 'How to report violations in questions or answers, including bullying' (Web Page) <https://support.askfm/hc/en-us/articles/115008832788-How-to-report-violations-in-questions-or-answers-including-bullying->.

[371] Mansoor Iqbal, 'Snap Inc. Revenue and Usage Statistics (2020)', *Business of Apps* (Web Article) <https://www.businessofapps.com/data/snapchat-statistics/#1>.

3.4.5.5 *TikTok/Douyin*

TikTok launched in China as Douyin in 2016, allowing users to load short videos. Reported data shows that about half of its 800 million users use the Chinese platform. Since its global release, the app has had significant uptake and was one of the most downloaded applications in Apple's application store in 2018 and 2019.[372] By 30 April 2020, the application had been downloaded over two billion times across Apple and Android devices,[373] highlighting the significantly dynamic nature of social media.

3.4.4 Other aspects of social media and other electronic services

A key aspect to consider is that social media are not static – they develop and change to stay relevant in a competitive market, and memberships fluctuate accordingly. For example, despite statistics posted by Facebook, evidence in 2014 showed its use was on the decline while other platforms such as Tumblr were on the rise;[374] however, the trend reversed, and Facebook continued to be the largest social media site. Site operators respond accordingly and provide additional features such as Facebook Messenger to

[372] Andrew Hutchinson, 'TikTok Maintains High Download Rankings, But Questions Remain About Longer Term Viability', *Social Media Today* (Web Article) <https://www.socialmediatoday.com/news/tiktok-maintains-high-download-rankings-but-questions-remain-about-longer/561251/>.

[373] Craig Chapple, 'TikTok Crosses 2 Billion Downloads After Best Quarter For Any App Ever' *SensorTower* (Web Article, 29 April 2020) <https://sensortower.com/blog/tiktok-downloads-2-billion>.

[374] Parmy Olson, 'Facebook Was The One Network People Used Less In 2014', Forbes (Web Article, 27 January 2015), <http://www.forbes.com/sites/parmyolson/2015/01/27/facebook-active-users-decline/#30870b44411b> .

compete with communications tools such as Viber and WhatsApp.[375] In March 2020, Viber had over 1.17 billion registered users,[376] and WhatsApp had 2 billion active users.[377] It should be noted that whilst Instagram and WhatsApp remain standalone applications, they have both been acquired by Facebook.[378]

Cyberbullying can also occur in many other forms of electronic services, such as online gaming, and this was an issue raised in the government's Online Safety Reform Discussion Paper:

> It is clear, from research and the experience of the eSafety Commissioner in administering the current scheme, that cyberbullying is no longer occurring on a single platform, and certainly not just on the larger social media services. Bullying, abuse and harassment occurs across a range of platforms and services of various sizes and types including:
>
> › gaming, game streaming and game chat services (like Twitch, Fortnite and Discord);
>
> › messaging apps (like WhatsApp, Kik, WeChat, Viber, GroupMe, Jott and Tango);
>
> › 'confessional' platforms (like Tellonym and Whisper); and

[375] Viber (<http://www.viber.com/en/>) and WhatsApp (<https://www.whatsapp.com/>) are both real time messaging services that rely on an internet connection rather than just telephone use to communicate with other users. Their most basic feature is that each allows messages to be sent, and calls to be made, to users anywhere globally at no cost so long as the users have internet connection available (e.g. by free Wi-Fi).

[376] Statista, 'Number of unique Viber user IDs from June 2011 to March 2020' (Web Report) <https://www.statista.com/statistics/316414/viber-messenger-registered-users/>.

[377] Statista, 'Number of monthly active WhatsApp users worldwide from April 2013 to March 2020' (Web Report) <https://www.statista.com/statistics/260819/number-of-monthly-active-whatsapp-users/>.

[378] See AV Ramzeen, '72 Facebook Acquisitions – The Complete List (2020)!', Techywise Internet Marketing (Web Page, 17 June 2019) <https://www.techwyse.com/blog/infographics/facebook-acquisitions-the-complete-list-infographic/> .

› social connection sites (like Yubo, Holla, MeetMe and Monkey).[379]

The expansion to include these features blurs how to describe or define social media and other electronic communication methods. For example, in 2015, the Supreme Court of the Australian Capital Territory (ACT) directed a jury to acquit a defendant because Facebook Messenger's use in the transmission of pornography to a minor was not 'using electronic means' as then defined in the ACT's *Crimes Act*.[380] At that time, s 66 of that Act defined 'electronic means' narrowly as 'using email, internet chat rooms, SMS messages and real time audio/video',[381] The decision led to the ACT Parliament repealing the definition in 2018,[382] highlighting an example of when existing criminal law cannot adequately respond to evolving ICT.

Regulating and responding to these technologies is a daunting task, complicated by the global nature of internet usage and jurisdictional issues. As the Explanatory Report to the Council of Europe's Convention on Cybercrime states, 'new technologies challenge existing legal concepts. Information and communications flow easily worldwide, and borders are no longer boundaries to this flow.'[383]

It is also necessary to consider how social media is perceived in the broader community. Given the growth of ICT, primarily amongst adolescents, Lindsay et al. suggest that the mainstream community's reaction to social media has tended to emphasise the more high-profile risks associated with social media use such as cyberbullying and sexual

[379] Department of Infrastructure, Transport, Regional Development and Communications, 'Online Safety Reform Discussion Paper' (11 December 2019), 28.

[380] *The Queen v Tamawiwy (No. 3)* [2015] ACTSC 303, [17] (Refshauge ACJ).

[381] *Crimes Act* 1900 (ACT), s 66(6).

[382] *Crimes Legislation Amendment Act 2018* (ACT), s 11.

[383] Explanatory Report to the Convention on Cybercrime, 23 November 2001, Council of Europe, [6].

grooming.[384] Media reports also tend to refer to bullying 'on Facebook', and headlines tend to focus on delivery mode rather than the actual act of aggression.[385] In turn, these reports led to a call for more regulation and legal responses to technology-based offences — as Bishop argues, the media of the day often drive the appetite for introducing legislation to react to 'moral dilemmas'.[386]

Users of technology, including children, can contact others regardless of geographic or other boundaries.[387] While offline bullying primarily occurs in real-time and in person, electronic aggression can be executed anywhere and anytime.[388]Unlike offline bullying, online social interactions can also be more visible – they may be published to a potentially

[384] David F. Lindsay et al, 'Understanding legal risks facing children and young people using social network sites', (2011) 61(1) Telecommunications Journal of Australia 1, 9.

[385] See, for example: Vanessa Allen, 'Victory over cyber bullies: Legal first as High Court orders Facebook to reveal trolls who tormented mother for defending X Factor Star', *Mail Online* (UK), (online, 8 June 2012), <http://www.dailymail.co.uk/news/article-2156365/Nicola-Brookes-victim-internet-trolls-wins-High-Court-backing-reveal-identities-targeted-her.html>; and James Meikle, 'Teenager issued with harassment warning over tweets sent to Tom Daley ', *The Guardian*, (online, 1 August 2012). <http://www.theguardian.com/sport/2012/jul/31/teenager-arrested-tweets-tom-daley>.

[386] Jonathan Bishop, 'The art of trolling law enforcement: a review and model for implementing flame trolling legislation enacted in Great Britain (1981-2012)' (2013) 27(3) *International Review of Law, Computers and Technology* 301, 302.

[387] Grace Chi En Kwan and Marko M Skoric, 'Facebook bullying: An extension of battles in school' (2013) 29(1) *Computers in Human Behaviour* 16; Donna Cross *Bullying that Follows you Home and Further: What can be done to protect children?,* Edith Cowan University Research Week Conference Paper (17-21 September 2012), Edith Cowan University.

[388] Danielle M Law et al, 'The changing face of bullying: An empirical comparison between traditional and internet bullying and victimization' (2012) 28(1) *Computers in Human Behavior* 226.

wider audience than an offline social group, potentially leaving a permanent record.[389] The nature of online interactions also has the consequent potential to affect users for some time into the future, with some victims reliving the trauma caused by the bullying.[390]

3.5 Conclusion

This chapter has shown that defining bullying and cyberbullying is crucial to ascertaining victimisation and perpetration rates. Bullying is a complex social phenomenon, and cyberbullying requires a changed understanding of the central concepts of power imbalance and repetition. As argued above, power is no longer a reference to physical or mental strength, and repetition is no longer purely in the hands of the original aggressor.

References to bullying cover a broad range of behaviours and the range of platforms that can be used along with the number of users of those platforms continue to grow. As more and more children and young people use online platforms as their key method of socialisation, the need to understand those platforms and respond to potentially harmful behaviours on those platforms will also continue to grow.

As Langos' taxonomy shows, these behaviours range from sexual denigration through an intimate image or stalking (which are offences in Victoria) to short-term exclusion and verbal denigration (not offences in Victoria). As will be argued later in the thesis, the law needs to be capable of dealing with the ambiguity associated with behaviours in Categories Two Three, and that response may or may not be the criminal law. Whilst some behaviours,

[389] David F. Lindsay et al, above n 384.

[390] 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.

such as those at Category One, are most likely behaviours which should be criminalised, there is also a strong case to be wary of overcriminalisation.

Part B of the thesis addresses the specific regulatory challenges in responding to cyberbullying.

Part B: A doctrinal analysis of legal responses to cyberbullying

Chapter Four – Non-criminal law responses to cyberbullying

4.1 Introduction

This Part undertakes a doctrinal analysis of the legal responses to cyberbullying. Criminal law is typically a response of last resort, and a central argument in this thesis is that criminal law should not be engaged against children unless other approaches to curbing harmful behaviour are insufficient or inappropriate. Suggestions that only 'sufficiently serious' cyberbullying incidents become subject to criminal law imply that other ways should be utilised to respond to less serious incidents.

This lack of legal clarity about appropriate responses to cyberbullying poses significant challenges, affecting victims of bullying and also legal practitioners when advising clients about responses to cyberbullying:

> Each day, we send legal advice outlining the applicable terms of use and the relevant civil, administrative, quasi-criminal and criminal legal options. Unfortunately, what we currently see is mostly an inability to enforce these terms and laws. Reports to schools are often ineffective, reports to social media sites are often rebuffed and reports to the police often go unaddressed. Whereas an enterprising (and affluent) adult might send a cease and desist letter drafted by a lawyer, apply for an urgent injunction, initiate defamation proceedings, or take out a restraining order if circumstances permit, a vulnerable child is left to watch the

> number of followers on a hate page increase by the minute and wonder why children are encouraged to report bullying if nothing is going to be done about it.[391]

This chapter examines three available non-criminal law responses to cyberbullying in the state of Victoria. The chapter does not consist of an exhaustive analysis of all non-criminal law responses, such as reporting the behaviour to schools or issuing cease and desist letters.[392] Instead, the chapter focuses instead on formal legal remedies. It begins by examining the application of tort law as a response to offline bullying in the cases of *Oyston* and *Cox*, discussed in the previous chapter. The cases show that injunctions and damages can redress the harm caused by bullying, but ultimately it is argued that private law remedies in tort are time-consuming and complex responses to cyberbullying.

Secondly, consideration moves to the Victorian personal safety intervention order regime, established under the *Personal Safety Intervention Order Act 2010* (Vic) ('*PSIO Act*'). In addition to examining the regime and its ability to respond to bullying behaviours, empirical data shows a significant growth in the numbers of children applying for or being subject to PSIOs.

The chapter concludes by examining the eSafety cyberbullying framework established by the *Enhancing Online Safety Act 2015* (Cth) ('*eSafety Act*'), including its key features and illustrating its application using empirical data.

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[391] The National Children's and Youth Law Centre and the Social Policy Research Centre, Submission 24 to the Australian Senate Environment and Communications Legislation Committee, *Inquiry into the Enhancing Online Safety for Children Bill 2014 and Enhancing Online Safety for Children (Consequential Amendments) Bill 2014*, 4.

[392] Ibid.

4.2 Tort

The long-established position that a school owes a duty of care to its students[393] extends to protecting students from harm caused by other students.[394] The duty applies to schools and school authorities, and if their response to harm falls below the standard of reasonable care they may be liable for damages in tort.[395]

The *Cox* and *Oyston* cases (summarised earlier) affirmed the availability of civil redress against schools and school authorities when bullying behaviour occurs between students. The cases also detail the various past and future harms experienced by the victims and quantify those harms in the form of damages, illustrating that harm caused by bullying (and, by extension, cyberbullying) can have significant future consequences.

[393] *William v Eady* (1893) 10 TLR 41; *Ramsay v Larsen* (1964) 111 CLR 16; *Commonwealth v Introvigne* (1982) 150 CLR 258.

[394] *Trustees of the Roman Catholic Church for the Diocese of Canberra and Goulburn v Hadba* (2005) 221 CLR 161.

[395] Des Butler (2007) 'Civil Liability for cyber bullying in schools: A new challenge for psychologists, schools and lawyers' in Moore, K (Ed.) *Proceedings Psychology making an impact: the Australian Psychological Society 42nd Annual Conference*, Brisbane, Qld, 52; Des Butler, Sally Kift and Marilyn Campbell, Cyber Bullying in Schools and the Law: Is There an Effective Means of Addressing the Power Imbalance?, *ELaw Journal: Murdoch University Electronic Journal of Law* (2009) 16(1); Amy Dwyer and Patricia Easteal, Bullying in Australian Schools: The question of negligence and liability, (2013) 38 *Alternative Law Journal* 2. See also, Petra Spyrou, 'Civil liability for negligence: An analysis of cyberbullying policies in South Australian schools' (2015) *UniSA Student Law Review* 1(1), 34.

4.2.1 *Cox v State of New South Wales* [2007]

In *Cox*, the state of NSW failed to protect a student, Benjamin Cox, from bullying on school grounds. The statement of claim sought damages under five heads of damages, including non-economic loss and future economic loss.[396] The Court ruled in Benjamin's favour and was extremely critical of the State and the school's failure to protect Benjamin:

> … the defendant made no attempt to explain the conduct of the school authorities or to show that they acted reasonably in all of the circumstances. And the evidence establishes to my satisfaction that the school's responses to Mrs. Cox's repeated reports was dismally inadequate. The staff made no attempt to deal with a serious problem. In ignoring the behaviour of TH they grossly failed in their duty to the plaintiff.[397]

Although the decision did not reveal the final sum of damages, some reports suggested damages in the vicinity of $1.5 million.[398] In deciding on the quantum of damages for non-economic loss, Justice Simpson noted the extent of the long-term harm caused. In addition to affirming a school authority's duty to protect a student from bullying, the case also highlights difficulties in obtaining a solution to bullying. As noted earlier, Benjamin's mother reported the ongoing behaviour on several occasions (to the school, the Department of Education, and the Police), some of which resulted in more aggressive bullying.

4.2.2 *Oyston v St Patrick's College* [2011]

The case of *Oyston* involved proceedings commenced directly against a school rather than the relevant school authority for its failure to protect a student from bullying, presumably based on it being a private school and having more access to funds.[399] Despite

[396] *Cox v State of NSW*, [161].

[397] Ibid [83].

[398] Des Butler (2007) 'Civil Liability for Cyberbullying in Schools', above n 395, 2.

[399] [2011] Aust Torts Reports 82-086 (Schmidt J) ('Oyston').

various parties making repeated complaints to the school,[400] the school took no action to protect Jazmin from the perpetrators' behaviour. Evidence showed the College's failure to implement effective policies to deal with bullying, and the Court made it clear that the College had failed to deal with known bullies whose conduct needed to be brought to a halt, resulting in the College's breach of its duty of care to Jazmin.[401] The Court summarised the duty owed to Jazmin as:

> In this case, that bullying at school may result in harm, including psychiatric injury, was not controversial. Such a risk is not only foreseeable, on the evidence, it was foreseen by the College; it being well understood that such a risk was so significant that it required the College to take active steps to protect its students from bullying by other students. That approach appears to have become a common one amongst both Government and non-Government schools in this State. There was no issue that a reasonable person in the College's position, would have taken steps to protect a student such as Ms Oyston, from the risks which bullying posed. Whether the steps taken from time to time were adequate to ensure that the duty was met, was in issue.[402]

The court ruled in Jazmin's favour and awarded damages of $116,296.60 plus interest.[403] On appeal, the New South Wales Court of Appeal noted that the duty of care owed to Jazmin 'did not require the College to ensure that its students were protected from bullying but only to take reasonable steps to that end.'[404] However, the Court did not comment on what steps the school needed to have taken to limit bullying behaviour, implying that the bully's friends may have continued the aggressive behaviours:

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[400] Ibid [53].

[401] Ibid [304].

[402] Ibid [15], [66].

[403] *Oyston v St Patrick's College* [2013] NSWCA 135, [4]. On appeal, damages were increased to $162,207.34 - *Oyston v St Patrick's College (No 3)* [2013] NSWCA 324.

[404] Ibid [6] (Tobias AJA with MacFarlan JA and Barrett JA agreeing) (added emphasis).

> It would be inappropriate at this point to comment upon whether the steps which ought to have been taken (short of expulsion) would have brought the bullying of the appellant to an end and, if so, when. Expulsion would obviously have brought to an end bullying by the individual student who was expelled, but what effect it would have had on that student's friends is another matter.[405]

The case affirmed the need for schools to proactively address the harm caused by bullying by and to their students.

4.2.3 The effectiveness of tort as a response to cyberbullying

Despite the availability of damages, tort law offers a limited response to victims of bullying and cyberbullying. Litigation is costly and carries the risk of adverse cost orders and proceeding against schools or school authorities can create an automatic imbalance of power. They may have access to greater resources, despite model litigant policies in most Australian jurisdictions that bind government schools and agencies to act fairly in the conduct of litigation (but not private schools and organisations).[406] Further, tort law is reactive – although applicants can apply for injunctive relief, tort generally aims to place the injured person in the position they would have been in had the harm not been committed.[407]

Civil litigation can also be protracted. In the *Oyston* case, the bullying behaviour occurred between 2002 and February 2005 and the statement of claim was filed in 2007.[408] The hearing occurred over six months, and the decision was handed down in April 2011,

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[405] Ibid [157].

[406] See for example Department of Justice (Victoria) 'Guidelines on the State of Victoria's obligation to act as a model litigant' (Web Page) <https://www.justice.vic.gov.au/justice-system/laws-and-regulation/victorian-model-litigant-guidelines>; and the *Legal Services Directions 2017* (Cth), app B.

[407] *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39 (Lord Blackburn).

[408] *Oyston*, 1.

more than six years after the bullying behaviour had ceased.[409] The *Cox* case commenced almost 12 years after the bullying had occurred as the true extent of the psychological harm did not manifest itself for many years following the bullying incidents.

Although a theoretical possibility, tort does not offer a 'quick fix' remedy and is not a viable solution in most cases. In addition to the practical impediments (such as cost), tort does not involve condemnation of conduct in the way that the criminal law does. On that basis, tort is not explored further in this thesis.

4.3 Intervention Orders

Intervention orders, such as personal safety intervention orders (PSIO) in Victoria, can offer a significant degree of protection from a broad range of prohibited behaviours to an affected person. Although this section focuses on Victoria's PSIO regime, parallel schemes in other jurisdictions offer similar protections.[410]

Proceedings seeking intervention orders are ordinarily civil in nature and require matters proven on the balance of probabilities rather than the criminal standard of beyond

[409] Other matters, such as the volume of cases that settle without proceeding to hearing were explored during research but the inclusion of such a discussion was deemed to detract from the key issue being discussed.

[410] Alphabetically by jurisdiction - Australian Capital Territory, Personal Violence Orders (*Domestic Violence and Protection Orders Act 2008* (ACT)); NSW, Apprehended Personal Violence Orders (*Crimes (Domestic and Personal Violence) Act 2007* (NSW)), Northern Territory, Personal Violence Orders (*Personal Violence Restraining Orders Act 2016* (NT)); Queensland, Restraining Order or Peace and Good Behaviour Order (*Criminal Code 1899* (Qld), and the *Peace and Good Behaviour Act 1982* (Qld)); South Australia, Intervention Orders (*Intervention Orders (Prevention of Abuse) Act 2009* (SA)), Tasmania, Restraint Order (*Justices Act 1959* (Tas)); Western Australia, Violence Restraining Order or Misconduct Restraining Order (*Restraining Orders Act 1997* (WA)).

reasonable doubt. As detailed below, police involvement is not a prerequisite to applying for a PSIO. Therefore, an affected person does not have to rely upon Victoria Police to apply for an order on their behalf.

4.3.1 The *Personal Safety Intervention Orders Act 2010* (Vic)

The *PSIO Act* establishes a regime that is both proactive and reactive to protect the safety of persons who are subject to a range of prohibited behaviours. This section examines the key features of the *PSIO Act*, how they can be applied to combat cyberbullying, and empirical data on the total number of PSIOs granted.

The *PSIO Act* provides a regime for an 'affected person' who has experienced prohibited behaviour or stalking to apply for a PSIO. The term 'prohibited behaviour' covers various behaviours, including harassment, assault, and making serious threats. [411]

Harassment is defined as a course of conduct by a person towards another person that is demeaning, derogatory or intimidating and includes such conduct carried on, by, or through a third person.[412] The Act gives examples, including: 'A makes derogatory taunts to B, including racial taunts or taunts about B's sexual orientation or gender identity' and 'A encourages another child to taunt B.'[413] The latter example makes it clear that the Victorian Parliament intended children to be covered by the regime.

[411] *PSIO Act* s 5. The definition also lists sexual assault and property damage or interference to property as prohibited behaviours.

[412] Ibid s 7.

[413] Ibid.

Some prohibited behaviours constitute offences under the *Crimes Act*. For example, 'assault'[414] and 'making a serious threat'[415] are defined by reference to the relevant provisions of the *Crimes Act*. 'Stalking' is defined in similar terms in the *Crimes Act;*[416] however, the Victorian Parliament intended to narrow the definition of stalking for PSIOs on the basis that the term 'stalking' had developed broad connotations under the former legislative scheme:

> Under the *Stalking Intervention Orders Act 2008* the only ground for an intervention order was stalking. As such, it became a "catch all" provision for other types of behaviour that, although they came within a broad reading of the definition of stalking, were not necessarily pursuit-type stalking. It is intended that only pursuit-type stalking will be covered by the term "stalking" under this Bill.[417]

[414] 'Assault' is defined by the *Crimes Act* to mean the direct or indirect application of force by a person to the body of, or to clothing or equipment worn by, another person where the application of force is without lawful excuse; and with intent to inflict or being reckless as to the infliction of bodily injury, pain, discomfort, damage, insult or deprivation of liberty and results in the infliction of any such consequence (whether or not the consequence inflicted is the consequence intended or foreseen).

[415] Ibid s 9. Section 20 of the *Crimes Act* provides that a person who, without lawful excuse, makes to another person a threat to kill that other person or any other person intending that that other person would fear the threat would be carried out; or being reckless as to whether or not that other person would fear the threat would be carried out is guilty of an indictable offence. Section 21 provides that a person who, without lawful excuse, makes to another person a threat to inflict serious injury on that other person or any other person intending that that other person would fear the threat would be carried out; or being reckless as to whether or not that other person would fear the threat would be carried out is guilty of an indictable offence. The maximum penalties that may be imposed are terms of imprisonment of, respectively, 10 years and 5 years maximum.

[416] The offence of stalking is explored in detail in Chapter Five of the thesis.

[417] Explanatory Memorandum, Personal Safety Intervention Orders Bill 2010 (Vic), 5.

The Magistrates' Court of Victoria (MCV) suggests that pursuit-type stalking would involve behaviours such as a party repeatedly following, telephoning or sending messages (including SMS, email), loitering or keeping an individual under surveillance and any other repeated behaviour towards another party making that person fear for their safety.[418] The use of electronic communication platforms to send repeated messages or engage in 'other repeated behaviour' places cyberbullying within the Court's definition of pursuit-type stalking (and thus the PSIO regime).

Where possible and appropriate, the *PSIO Act* suggests mediation be employed to resolve disputes[419] without recourse to making an order. Despite PSIOs being civil, the Act provides a two-step regulatory approach whereby breaching a PSIO becomes a criminal offence.[420] To that extent, aspects of the PSIO regime draw parallels with the United Kingdom's Anti-social Behaviour Order (ASBO) regime.[421] A discussion on the features and merits of this 'two-step prohibition' appears below and later in the thesis.[422]

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[418] Magistrates' Court of Victoria, Guideline for Assessing Suitability for Mediation (Guidelines issued under section 34 of the *PSIO Act* 2010), Magistrates Court of Victoria.

[419] *PSIO Act* pt 3 div 2.

[420] Ibid s 100.

[421] The ASBO regime was effective in England, Wales and Scotland between 1998 and 2014 (*Crime and Disorder Act 1998* (UK)). Their use in England and Wales was repealed in 2014, but they continue to be used in Scotland (*Anti-Social Behaviour, Crime and Policing Act 2014* (UK)).

[422] No further analysis of the behaviours covered by an ASBO occurs as such orders capture behaviours beyond what is captured by a PSIO. For an analysis of the application and issues associated with the ASBO regime, see for example: Anna Di Ronko and Nina Peršak, 'Regulation of incivilities in the UK, Italy and Belgium: Courts as potential safeguards against legislative vagueness and excessive use of penalising powers?', (2014) 42(4) *International Journal of Law, Crime and*

4.3.2 Applications for a PSIO

The *PSIO Act* confers jurisdiction on both the Family Division of the CCV and the MCV where the affected person, the protected person or the respondent is a child when making the application.[423] Once a court makes an order, the 'affected person' becomes a 'protected person'.

The regime permits the making of intervention orders against children aged 10 and above. However, if the respondent is a child, the application should, if practicable, be dealt with by the CCV.[424] An affected person, their guardian or a police officer can make the application.[425] If the affected person is a child (the Act does not prescribe a minimum age for an affected person), their parent may make an application; any other person with the child's parent's written consent or the court's leave. If the affected person is 14 years of age or above, they may apply themselves with the court's leave.[426]

As detailed in Figure Three below, the number of applications for intervention orders has shown an increase of over 40% from 2013 to 2019, indicating a strong demand for the protection afforded by them. It is also important to note that neither court charges an

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Justice 340; Andrew Cornford, 'Criminalising Anti-Social Behaviour', (2012) 6(1) *Crim Law and Philosophy* 1; Adam Crawford, 'Criminalizing Sociability through Anti-social Behaviour Legislation: Dispersal Powers, Young People and the Police', (2009) 9(1) *Youth Justice* 5.

[423] Ibid s 103(1). Applications to the Children's Court are subject to the *Children's Court (Personal Safety Intervention Order) Rules 2011* (Vic). Applications to the Magistrates' Court are subject to the *Magistrates' Court (Personal Safety Intervention Order) Rules 2011* (Vic).

[424] *PSIO Act* s103(2).

[425] Ibid s 15.

[426] Ibid. Section 4 of the *PSIO Act* defines a 'child' to be a person under the age of 18.

application fee, so financial resources do not impede making an application, minimising access to justice concerns.[427]

The nature of intervention orders has also evolved. In the second half of 1995, when the governing legislation required a familial relationship between the affected person and the respondent, there were a total of 480 hearings for stalking intervention orders.[428] The development and enactment of specific legislation to target a broader range of prohibited behaviours led to more flexibility,[429] resulting in 11,752 applications for intervention orders being made in the financial year 2012/13 as detailed below.

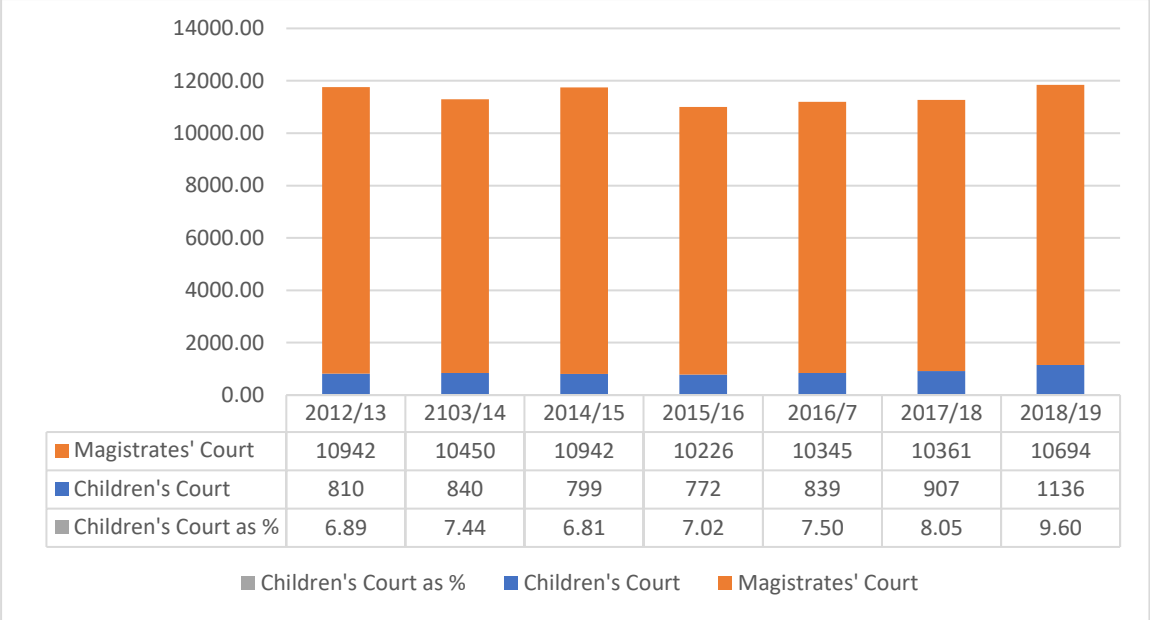
The number of applications finalised annually by the relevant courts in the period 2012-2020 is detailed in the table below:[430]

[427] *Magistrates' Court (Fees) Regulation 2012* (Vic), reg 6. The Children's Court of Victoria does not charge application fees. There are provisions in the *CYF Act* requiring Registrars to collect proscribed fees; but there are none proscribed for the purposes of the *PSIO Act*.

[428] Prior to 2008, applications were made under s 4 of the former *Crimes (Family Violence) Act 1987* (Vic).

[429] *Stalking Intervention Orders Act 2008* (Vic); followed by the *PSIO Act*.

[430] Data sourced from Annual Reports published by the respective courts.



	2012/13	2103/14	2014/15	2015/16	2016/7	2017/18	2018/19
Magistrates' Court	10942	10450	10942	10226	10345	10361	10694
Children's Court	810	840	799	772	839	907	1136
Children's Court as %	6.89	7.44	6.81	7.02	7.50	8.05	9.60

Figure 3 Personal safety intervention order applications finalised by courts in Victoria 2012-2020.

The data above shows evident growth in the number of applications made to CCV in the period 2012-2019. This growth is most evident as a percentage of overall applications.[431] Making an application does not necessarily guarantee that the court will make the order. The respondent can contest the application, or the court may not grant an order. During the period 1 July 2014 to 30 June 2017, the CCV made intervention orders 60% of the time,[432] and the MCV made intervention orders in about 50% of cases.[433]

As applications by or on behalf of a child can be heard at both the MCV and the CCV, the numbers reported by the CCV represent the bare minimum number of applications

[431] Note that the figures at that Children's Court are the minimum number of applications made by or on behalf of a child given that the Magistrates' Court of Victoria also has jurisdiction.

[432] Children's Court of Victoria, 'Annual Report 2016-17' (2017), above n 186, 44.

[433] Magistrates' Court of Victoria, Annual Report 2015-16, (2016), Department of Justice, Victoria, 82-83.

where the affected person or the respondent is a child (the total number of applications made to the MCV by or on behalf of children is not made publicly available).

4.3.3 The orders that a court can make

A PSIO can offer significant protection for victims of both offline and cyber forms of bullying as a court can include any conditions that appear 'necessary or desirable' in the circumstances.[434]

A PSIO can also be issued to specifically address behaviour between students. For example, where a court is asked to make an order prohibiting the respondent from being on school premises, or within a specified distance from the school premises, or prohibits the respondent from being within a specified distance of the protected person, the court must consider whether that condition may prevent the respondent attending the school at which they are a student or wish to become a student.[435]

Importantly, from a rule of law perspective of putting a person on notice that their behaviour may be problematic or criminal, a court must explain the purpose, terms and effect of a final order to the respondent and the protected person (whoever is before the court or both).[436] The court must also explain the consequences and penalties that may follow if the respondent fails to comply with the terms of the final order, [437] including the fact

[434] *PSIO Act* s 67(1).

[435] Ibid s 74(1).

[436] Ibid s 76(1)(a).

[437] Ibid s 76(1)(b).

that contravening an order is a criminal offence. A final order is a civil order of the court, and the protected person cannot permit contravention of the final order.[438]

4.3.4 Contravening an order

Contravention of an order is an offence, punishable as a Level 7 offence, meaning a two years maximum term of imprisonment, a fine of 240 penalty units ($39,652.80 on 1 July 2020[439]), or both. The existence of an offence provision for contravening an order lends a further 'moral voice' to the intervention order scheme. Data provided by the Crimes Statistics Agency Victoria shows a relatively low level of prosecutions (~5% of the total number of PSIOs made[440]) for contravening a PSIO, suggesting that they may be a highly effective tool to counter prohibited behaviours, including behaviours that may be described as bullying and cyberbullying. The low level of prosecutions for contravening a PSIO may also indicate that the orders are not regularly breached and operating as intended to prevent harm and harmful behaviour.

4.3.5 Effectiveness of the regime as a response to cyberbullying

The regime offers significant benefits for bullying victims, presuming the alleged perpetrator is known to them. Permitting applications to be made directly to the court, rather than through Victoria Police, empowers bullying victims to seek solutions independently and quickly to prevent further harm from occurring. The growth in the number of applications made to the CCV is evidence of significant uptake.

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[438] Ibid s 76(1)(c). A slightly varied obligation is imposed by s 40 of the Act when a court makes an interim order.

[439] Penalty units are updated annually on 1 July – see *Monetary Units Act 2004* (Vic), s 8.

[440] The CCV heard a total of 218 cases for breaching a PSIO between 2012 and 2017, accounting for about 5.4% of PSIOs made during that period.

From a rule of law perspective, one of the key benefits is that a court must explain the content of an order to its subject and address the consequence of breaching that order (i.e. possible criminalisation). In addition, given issues such as impulse control, there is a greater risk that children are captured in the youth criminal justice system, which needs to be mitigated. Therefore, having the law explained to a child (including the consequences attached to contravening an order) serves as an important educational tool to minimise future harm and further involvement in the criminal justice system.

Although the regime can offer a high level of protection for a victim, there is a significant risk for an offender with these 'two-step prohibitions'. As Crawford notes, a two-step prohibition operates on a three-incident timeline:

> … (i) the qualifying behaviour or presence …; (ii) the civil order or direction (to do or not do certain things); and (iii) the breach of the order or direction which gives rise to criminal sanctions. Most criminal wrongdoing has only one temporal location at which the *mens rea* and *actus reus* come together. Second, unlike other civil orders such as injunctions (breach of which is a *civil* offence), breach of a 'two-step' prohibition is a *criminal* offence. Third, the possibility of criminal sanctions arises only in respect of future conduct, not in relation to the conduct that gave rise to the order in the first place. The conduct that breaches the direction, under all other circumstances, may constitute legal behaviour.[441]

Breaching a civil order, including a PSIO, can result in prosecution and amount to contempt of court.[442] A PSIO serves as a segue between civil and criminal law, and this presents a risk of over-criminalisation for young people who may contravene an order. This risk is especially problematic when the behaviour in question may not be subject to criminal law. Within the context of this thesis, the line at which bullying and cyberbullying becomes a criminal matter may be established as to when a court order prohibiting the behaviour is contravened (i.e. rather than a substantive criminal law provision).

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[441] Adam Crawford, 'Criminalizing Sociability through Anti-social Behaviour Legislation: Dispersal Powers, Young People and the Police' (2009) 9(1) *Youth Justice* 5, 14.

[442] *Legal Services Board v Forster (No 2)* [2012] VSC 633, [43].

Given that about 10% or more of PSIOs are issued concerning a child subject (either as the protected person or as the person whose behaviour is covered by the order), Chapter Seven of the thesis advocates for an additional level of protection called a ‘Stop Bullying Order’, which focuses on the need to limit the exposure of children to the criminal justice system.

4.4 Office of the eSafety Commissioner

Before the 2013 federal election, the Australian Liberal Party released its 'Policy to Enhance Online Safety for Children' (the Policy). The Policy focused on cyberbullying and set out three key proposals:

i. establishing a Children's eSafety Commissioner;
ii. developing an effective complaints system, backed by legislation, to quickly remove harmful material from large social media sites; and
iii. examining existing Commonwealth legislation to determine whether to create a new, simplified cyberbullying offence.[443]

Regarding the proposed cyberbullying offence, the Policy stated that it was:

> important that Australians clearly understand that such conduct is an offence but that any penalties are appropriate, especially when children offend. The Coalition would assure that any legislation includes a broad range of sentencing options where the offender is a minor, such as counselling, restorative justice, community-based orders and probation.[444]

Some aspects of the Policy were hardly ground-breaking, and establishing a statutory office held clear parallels to the High Wire Inquiry exploring 'the merit of

[443] Australian Liberal Party, ‘Enhancing Online Safety for Children Policy’ (2013).

[444] Ibid 6.

establishing an Online Ombudsman to investigate, advocate and act on cyber-safety issues'.[445]

The Department of Communications released a Discussion Paper in 2014 to canvas the election commitments detailed in the Enhancing Online Safety for Children Policy.[446] The Paper also noted some criticism of the 'existing offence provision' (being s 474.17), including that it was too general and not designed to cover cyberbullying specifically. Further, it argued (and this thesis agrees) that the maximum penalty was disproportionate for most cyberbullying cases, particularly those committed by minors. An offence with a comparatively minor maximum penalty would provide a better option for less serious forms of conduct.[447] However, in August 2014, the government surprisingly announced the discontinuation of work on the proposal to create a new criminal offence for cyberbullying:

> The researchers concluded that several factors might undermine the effectiveness of a purely legal approach in changing the behaviour of cyberbullies. Because young people have reduced impulse control compared to adults; because they tend not to be aware of relevant laws; and because historically there have been few criminal convictions for cyberbullying; extra criminal provisions may have a limited impact.[448]

[445] High Wire Inquiry, terms of reference, above n 71, item a(viii).

[446] Department of Communications (Cth), 'Enhancing Online Safety For Children (Discussion Paper)', (2014), Canberra, Australia.

[447] Ibid 22.

[448] Referring to Ilan Katz et al, *Research on youth exposure to, and management of, cyberbullying incidents in Australia Synthesis Report* (June 2014) (SPRC Report 16/2014). Sydney: Social Policy Research Centre, UNSW Australia, 19.

> There were mixed views among stakeholders as to whether and how the existing laws should be changed and what deterrence effect a change would have – although there was significant support for a more simplified legal framework. [449]

Flowing on from this work, the Commonwealth Parliament established the Office of the Children's eSafety Commissioner in 2015[450] to operate a complaints scheme to rapidly remove material from social media services and other relevant electronic services where that material is directed at an Australian child.[451] This section outlines and critiques the key provisions dealing with the cyberbullying complaints scheme. It demonstrates the volume of complaints made to the Office and explores available enforcement options and remedies. Parliament's stated intent was that the proposed rapid removal scheme would provide a mechanism for cyberbullying victims to have material removed from social media sites where the market (i.e. social media) fails to provide recourse for victims without seeking redress through the criminal justice system.[452] The section concludes with an outline of New Zealand's harmful digital communications regime as a best practice model.

[449] Paul Fletcher, Parliamentary Secretary to the Minister of Communications, during a speech presented to the National Centre Against Bullying Conference 6 August 2014: http://paulfletcher.com.au/speeches/portfolio-speeches/item/1107-national-centre-against-bullying-conference-wednesday-august-6-2014.html.

[450] Reflecting the original remit of the office, the Act was originally named the '*Enhancing Online Safety for Children Act 2015*'.

[451] Ibid s 3. The *eSafety Act* defines a 'child' as a person under the age of 18, and 'Australian child' as 'a child who is ordinarily resident in Australia'.

[452] Explanatory Memorandum to the Enhancing Online Safety for Children Bill 2014 (Cth), 45.

4.4.1 Cyberbullying material directed at an Australian child

The complaints scheme relies on a test of whether the material is 'cyberbullying material directed at an Australian child'. Section 5 of the *eSafety Act* defines this to be material provided on social media or relevant electronic service that is directed to an Australian child; and a reasonable person would conclude that it is likely that the material was intended to have an effect that was 'seriously threatening, seriously intimidating, seriously harassing, or seriously humiliating to that child'.[453] The effect may be due to the material being accessed by, or delivered to, that child. It may also be as an indirect result of the material being accessed by, or delivered to, one or more other persons.[454] The Act defines an Australian child as a person under the age of 18 who is ordinarily resident in Australia.[455]

The 'cyberbullying material directed at an Australian child' test was developed after considering sources including workforce bullying laws, the New Zealand Harmful Digital Communications Bill,[456] and 'academic research on the normative definitions of cyber-bullying'.[457] In theory, Australia's *eSafety Act* was an opportunity to demonstrate best practice in legislating against cyberbullying. However, as argued below, this is not the case.

The test in s 5 of the Act imposes a high threshold and limits the ability to make a complaint to the Commissioner. 'Material' is defined broadly and includes text, data, visual

[453] *eSafety Act* s 5(1).

[454] Ibid s 5(2).

[455] *eSafety Act* s 4.

[456] As it then was. The Australian and New Zealand laws were drafted at a comparable time.

[457] Paul Fletcher, Parliamentary Secretary to the Minister for Communications, 'House of Representatives Official Hansard', Commonwealth of Australia (3 December 2014), 14040.

images, or any other form.[458] A 'social media service' is defined to mean an electronic service whose sole or primary purpose is to enable online social interaction between two or more end-users, allows end-users to link to, or interact with, some or all the other end-users, and allows end-users to post material on the service.[459] A 'relevant electronic service' covers a range of services that enable end-users to communicate with other end-users through email, instant messaging, SMS or MMS, chat services.[460]

Another challenging criterion within s 5 as it relates to cyberbullying material, is the requirement that a reasonable ordinary person would conclude that the material is likely to have the effect on the Australian child of seriously threatening, intimidating, harassing, or humiliating the Australian child (added emphasis). While the Explanatory Memorandum to the enacting Bill indicates an intent that the terms 'threatening', 'intimidating', 'harassing' and 'humiliating' have their ordinary meaning,[461] it gives no guidance on assessing the *seriousness* of those behaviours or why the term 'serious' became a fundamental requirement of the provision. As noted in Chapter One, the Australian government gave no elaboration or guidance about the requirements of what was meant or defined as 'serious' in this context.

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[458] *eSafety Act* s 4.

[459] Ibid s 9.

[460] Ibid s 4 - 'relevant electronic service' means any of the following electronic services - a service that enables end-users to communicate, by means of email, with other end-users; an instant messaging service that enables end-users to communicate with other end-users; an SMS service that enables end-users to communicate with other end-users; an MMS service that enables end-users to communicate with other end-users; a chat service that enables end-users to communicate with other end-users; a service that enables end-users to play online games with other end-users; an electronic service specified in the legislative rules.

[461] ES to the Enhancing Online Safety for Children Bill 2014 (Cth), cl 5.

In 2018, the Office stated that the EM '… makes clear that material must be more than merely "offensive or insulting" to be considered cyberbullying material. The age and characteristics of the child will also be relevant, as will the sensitivity of the material and the number of times it has been viewed or shared.'[462]

4.4.2 Social media and relevant electronic services

The Act's cyberbullying powers depend upon whether the material is posted on a social media service or a 'relevant electronic service', aligning with the Australian Parliament's power to legislate on 'postal, telegraphic, telephonic, and other like services'.[463] A distinguishing feature of the *eSafety Act* complaints scheme is the two-tier classification of social media services. The Parliamentary Secretary to the Minister for Communications explained the reason for the two-tier scheme in his second reading speech:

> The two-tier scheme in the Bill allows for a light touch regulatory scheme in circumstances where the social media service has an effective complaints scheme and it is working well; but it enables the government to require cyber-bullying material targeted at an Australian child be removed in circumstances where a social media service does not have an effective and well-resourced complaints system.[464]

The Act provides that the provider of a social media service may apply to the Commissioner for the declaration of the service as a Tier 1 social media service,[465] and the Commissioner is required to maintain the Register of Tier 1 Social Media Services (and make available on the Commissioner's website).[466] As of April 2019, there were 10 services

[462] The Senate Legal and Constitutional Affairs References Committee, AECL Report' above n 27, 26.

[463] Australian Constitution s 51(v).

[464] The Hon Paul Fletcher MP, Parliamentary Secretary to the Minister for Communications, House of Representatives Hansard, 3 December 2014, pp 14038–14039.

[465] *eSafety Act* s 23(1).

[466] Ibid s 28.

listed as Tier 1 services on the Commissioner's website, including ask.fm, Snapchat, Twitter, and Yahoo!7.[467]

The Commissioner may request that a Tier 1 social media service remove cyberbullying material;[468] however, the service is not obligated to comply. Material is 'removed' from a social media service, relevant electronic service or designated internet service if the material is neither accessible by nor delivered to any of the end-users in Australia using the service.[469] In terms of sanctions, if the Commissioner is satisfied that a Tier 1 social media provider has not complied with a request to take down material under s 29 of the Act, the Commissioner may prepare a statement to that effect; and publish the statement on their website.[470]

In contrast to the Tier 1 opt-in process, the relevant Minister must declare a Tier 2 social media service.[471] On 7 October 2015, the Minister for Communications declared Google+, YouTube, Facebook and Instagram to be Tier 2 social media services.[472] Division

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[467] Office of the eSafety Commissioner, 'Social Media Partners' (Web Page) <https://www.esafety.gov.au/about-us/consultation-cooperation/working-with-social-media>. The other listed Tier 1 services are airG, Roblox, Yubo, Flickr and musical.ly.

[468] *eSafety Act* s 29.

[469] Ibid s 8.

[470] Ibid s 39. The Commissioner may also revoke a Tier 1 social media service declaration (s 25) or recommend to the Minister that a service be declared as a Tier 2 social media service (s 31).

[471] Ibid s 30.

[472] *Enhancing Online Safety for Children (Tier 2 Social Media Services) Declaration 2015* (Cth) s 4. The Declaration has not been amended, however the consumer/personal version of Google+ was shut down in April 2019 (see Google, 'Frequently asked questions about the Google+ shutdown', <https://support.google.com/googlecurrents/answer/9217723?hl=en>).

3 of the *eSafety Act* establishes a differing regime for takedown notices in that the Commissioner may issue a 'social media service notice' requiring taking down material within 48 hours.[473] Failure to comply with a social media service notice attracts a civil penalty of 100 penalty units ($21,000)[474] or may result in a formal warning.[475]

The term 'relevant electronic service' covers the field with other forms of digital services (such as email); however, the Act does not provide a process for removing material from services other than a tiered social media service. Instead, the poster of the cyberbullying material (i.e. the 'end-user' of the relevant service) may be subject to an end-user notice issued under s 42 of the Act.

4.4.3 Cyberbullying complaints

Complaints may be made by, or on behalf of, an Australian child where he or she is the target of cyberbullying material provided on a particular social media service or relevant electronic service.[476] As noted above, the cyberbullying material in question (for the purposes of s 5 of the Act) would likely have a seriously threatening, intimidating, harassing, or humiliating effect on the Australian child.[477]

If a complaint concerns material that is or was previously provided on a tiered social media service, the Australian child (or complainant) must first make a complaint under the

[473] *eSafety Act* s 35.

[474] Ibid s 36.

[475] Ibid s 37.

[476] Ibid s 18.

[477] Ibid s 5.

relevant service's complaint scheme.[478] The Commissioner's investigation powers are quite broad as the Act permits an investigation to be conducted as the Commissioner thinks fit,[479] and obtain information from such persons and make such inquiries as they think fit.[480] In 2018, the Office had a staff of approximately 78 people, four of whom were tasked with investigating cyberbullying complaints.[481]

4.4.3.1 Reports made to the Office

The data published by the Office differentiates between 'complaints about serious cyberbullying' and 'reports'. The differentiation suggests that a 'report' becomes a 'complaint' after making an assessment applying the test at s 5 of the Act.

In its first year of operation, the Office dealt with 186 complaints about 'serious cyberbullying,'[482] growing to 690 complaints in the 2019-20 financial year.[483] Data from annual reports show the volume and nature of complaints:[484]

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[478] Ibid ss 18(4) and 18(5). There is no equivalent provision where the cyberbullying material is provided via other relevant electronic services or non-tiered social media services.

[479] Ibid s 19(2).

[480] Ibid s 19(3).

[481] Senate Legal and Constitutional Affairs Committee, 'Adequacy of Existing Cyberbullying Laws' Official Committee Hansard (9 February 2018 – Canberra), 73.

[482] Office of the eSafety Commissioner*, Office of the eSafety Commissioner, Office of the eSafety Commissioner Annual Report 2015-16* (Report, 2016), 112.

[483] Office of the eSafety Commissioner, *Office of the eSafety Commissioner Annual Report 2019-20* (Report, 2020), 210.

[484] The Annual Reports reported the kinds of behaviours as eight categories. Only the three most prominent categories are reported here.

- 2015-16: 186 Complaints.[485] Most targets were aged 12 to 16, and 71% were female.[486] The majority of complaints were in the categories of 'nasty comments and/or serious name calling' (73%), followed by 'offensive or upsetting pictures or videos' (28%) and 'threats of violence' (22%).[487]
- 2016-17: 305 complaints.[488] Most targets were aged 12 to 16, and 63% of the targets were female.[489] The majority of complaints were in the categories of 'nasty comments and/or serious name calling' (68%), followed by 'threats of violence' (26%) and 'offensive or upsetting pictures or videos' (21%).[490]
- 2017-18: 409 complaints.[491] Most targets were aged 12 to 16, and 67% of the targets were female.[492] However, there was a significant spike in the number of targets aged 14 (about 23%).[493] The majority of complaints were in the categories of 'nasty

[485] Office of the eSafety Commissioner, *Office of the eSafety Commissioner Annual Report 2015-16* (Report, 2016), 122.

[486] Ibid 123.

[487] Ibid 124.

[488] Office of the eSafety Commissioner, *Office of the eSafety Commissioner Annual Report 2016-17* (Report, 2017), 115.

[489] Ibid 116.

[490] Ibid 127.

[491] *Office of the eSafety Commissioner, Office of the eSafety Commissioner Annual Report* 2017-18 (Report, 2018), 121.

[492] Ibid 122.

[493] Ibid 121.

comments and/or serious name calling' (63%), followed by 'threats of violence' (21%) and 'offensive or upsetting pictures or videos' (27%).[494]

- 2018-19: 531 complaints.[495] 71% of targets were aged between 13 and 17, with reports of targets as young as four years of age.[496] 64% of targets were female.[497] The majority of complaints were in the categories of 'nasty comments and/or serious name calling' (61%), followed by 'offensive or upsetting pictures or videos' (26%), and 'fake account and impersonation' (22%).[498]
- 2019-20: 690 complaints.[499] 76% of targets were aged between 13 and 17, with reports of targets as young as six years of age.[500] 61.3% of targets were female.[501] The majority of complaints were in the categories of 'nasty comments and/or serious name calling' (56%), followed by 'offensive or upsetting pictures or videos' (23%), and 'fake account and impersonation' (16%).[502]

[494] Ibid 123.

[495] Office of the eSafety Commissioner, *Office of the eSafety Commissioner Annual Report 2018-19* (Report, 2019), 204.

[496] Ibid.

[497] Ibid 205.

[498] Ibid 206. For completeness, 'threats of violence' accounted for 17% of complaints in 2018-19.

[499] Office of the eSafety Commissioner, *Office of the eSafety Commissioner Annual Report 2019-20*, 210.

[500] Ibid 211.

[501] Ibid 205.

[502] Ibid 212. In the interests of completeness, 'threats of violence' accounted for 15% of complaints in 2018-19.

The data shows a clear pattern of young women/girls being the target of cyberbullying (66.25% of complaints, averaged between 2015-2019). This finding suggests that further research may be desirable to ascertain whether young women are more likely to engage in or be victims of cyberbullying or whether they are more likely to report the behaviour to the eSafety Office. In terms of complaint types, nasty comments and serious name calling accounted for 66% of complaints, and offensive or upsetting pictures or videos accounted for 25% of complaints. Some complaints consisted of more than one type of behaviour.[503]

Each year also saw a growth in the number of children themselves reporting matters to the Office and a corresponding decrease in parents making reports. In the financial year 2015-16, about 25% of complaints came from a child.[504] This figure has risen each year, with 43% of complaints being made by children in 2016-17,[505] 44% in 2017-18[506] and 47% in 2018-19.[507]

Worryingly, the data does show complaints on behalf of children as young as four. Despite policies such as Facebook requiring that users be at least 13 years of age, this

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[503] Office of the eSafety Commissioner*, Office of the eSafety Commissioner Annual Report 2017-18*, 206.

[504] *Office of the eSafety Commissioner Annual Report 2014-15*, 123. Parents accounted for making almost 60% of complaints during that year.

[505] *Office of the eSafety Commissioner Annual Report 2016-17*, 116. Parents accounted for making about 43% of complaints during that year.

[506] *Office of the eSafety Commissioner Annual Report 2017-18*, 122. Parents accounted for making about 41% of complaints during that year.

[507] *Office of the eSafety Commissioner Annual Report 2018-19*, 205. Parents accounted for making about 41% of complaints during that year.

information shows that eligibility checks for social media accounts (and other platforms) are either non-existent or not rigidly enforced. As a result, children under the minimum age requirements of social media services may be excluded from accessing help from those services, having breached the service's terms and conditions, thereby limiting their ability to make a complaint under the eSafety Act.

Geographically, the spread of complainants showed a close correlation to Australia's population by state or territory. NSW had the highest number of targets[508] (33%), followed by Victoria (20%) and Queensland (17%).[509]

4.4.3.2 Enforcement

The cyberbullying provisions of the *eSafety Act* contain no criminal offences, and the Commissioner's enforcement powers focus on civil penalty regimes as provided for in the *Regulatory Powers (Standard Provisions) Act 2014*.[510]

Social media services

As noted above, the Commissioner may give a social media service notice requiring a Tier 2 social media service to remove material from the service within 48 hours,[511] and a

[508] 'Targets' is the terminology used by the Office of the eSafety Commissioner in their reports.

[509] *Office of the eSafety Commissioner Annual Report 2017-18*, 122.

[510] The Commissioner's powers to respond to cyberbullying material should not be confused with other powers conferred on the Commissioner, such as non-consensual sharing of intimate images under pt 5A of the *eSafety Act*. As the name of the *Regulatory Powers (Standard Provisions) Act 2014* suggests, these are the 'standard' enforcement powers that apply to many Commonwealth agencies.

[511] *eSafety Act* s 35.

failure to comply with the notice is subject to a civil penalty of up to $21,000.[512] The penalty level is negligible compared to prohibitions under other online regulation schemes such as the *Interactive Gambling Act*, which provides penalties in the range of 5,000 to 7,500 penalty units ($1,050,000 to $1,575,000).[513] Given that Facebook's global revenue in 2018 was US $55.8 billion,[514] a maximum penalty of AU $21,000 has little or no deterrent effect. Civil penalties also require a court order to be enforceable,[515] adding an opportunity for the Tier 2 social media services to contest the giving of a penalty order.

The Commissioner may also issue a formal warning to the relevant Tier 2 social media service,[516] seek an enforceable undertaking[517] or apply to a relevant court for an injunction.[518] However, as of March 2018, the Commissioner had yet to use their formal powers or issue any civil penalties, stating 'it has not yet considered this to be appropriate'.[519]

[512] Ibid s 46.

[513] See for example, the *Interactive Gambling Act 2001* (Cth), s 15A.

[514] Facebook, 'Annual Report Pursuant to the Securities Exchange Act of 1934, 2018' (www.facebook.com) (2018), 65.

[515] *Regulatory Powers (Standard Provisions) Act*, pt 4, div 2.

[516] *eSafety Act* s 37.

[517] Ibid s 47.

[518] Ibid s 48. The Commissioner powers to apply for an injunction are detailed at pt 7 of the *Regulatory Powers (Standard Provisions) Act*, particularly s 121 which provides for applications concerning restraining or performance injunctions.

[519] The Senate Legal and Constitutional Affairs References Committee, 'Adequacy of existing offences', above n **Error! Bookmark not defined.**, 6. There had been no reports of civil penalty

End-user notices

Section 41 of the *eSafety Act* refers to giving a person who posts cyber-bullying material targeted at an Australian child an 'end-user notice'. Under s 42 of the Act, an end-user notice requires the end-user (i.e. the cyberbully) to take all reasonable steps to ensure the removal of the material from the service within the notice period specified in the notice and refrain from posting any cyberbullying material targeting an Australian child.

The Act does not feature any other responses, such as restorative justice or counselling, canvassed in the Enhancing Online Safety Policy to address cyberbullying. Whilst the Commissioner can direct an end-user to apologise to an Australian child who has been a target of their material, the overall lack of powers conferred on the Commissioner is a significant impediment to addressing cyberbullying.

The Act does not mandate a minimum age at which a user can be given an end-user notice, and a failure to comply with an end-user notice may result in the Commissioner issuing a formal warning[520] or applying to the Federal Court of Australia or Federal Circuit Court of Australia for an injunction requiring the end-user to comply with the notice.[521] The use of injunctions as an enforcement tool is problematic, especially where the respondent may be a child. This issue is considered further in section 6.2.1 of this thesis.

orders being given in the Office of the eSafety Commissioner's annual reports for 2018-19 and 2019-20.

[520] *eSafety Act* s 44. Neither the Act or the ES to the Enhancing Online Safety for Children Bill 2014 provide clarity about the role of a formal warning or sanctions for continued breach.

[521] Ibid s 48(3), see also pt 7 of the *Regulatory Powers (Standard Provisions) Act*.

As of March 2018, the Commissioner had not issued any end-user notices, stating that the cases handled by her office had not warranted such an intervention.[522]

4.4.3.3 Referral of matters to law enforcement agencies

Under s 92 of the *eSafety Act*, the Commissioner may refer matters to law enforcement agencies when they are satisfied that material is of a 'sufficiently serious nature to warrant referral'. What is meant by that term is not detailed in the Act, although the provision mirrors language in the *Broadcasting Services Act 1992* (BSA).[523] Although the provision covers 'material', it would appear that the legislative drafter inserted the term to reflect the Commissioner's powers concerning Schedules 5 and 7 of the BSA.[524]

The Office has stated that 'around ten per cent of matters are referred to the police', noting it was its understanding that none of those referrals resulted in the police charging a child with an offence.[525]

4.4.4 Effectiveness of the cyberbullying provisions

This thesis argues that the *eSafety Act* erroneously focuses on the behaviour of specific social media services rather than the actions of a cyberbully. Unlike the model

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[522] The Senate Legal and Constitutional Affairs References Committee, 'Adequacy of existing offences', above n 250, 7. There has been no reports of end-user notices being given in the annual reports for 2018-19 and 2019-20.

[523] *Broadcasting Services Act 1992* (Cth), sch 5, cl 40. See also sch 7, cl 69.

[524] Those schedules deal with prohibited internet content. Those functions were conferred on the Australian Communications and Media Authority before the commencement of the *eSafety Act*.

[525] Office of the eSafety Commissioner 'Submission to the Parliamentary inquiry into the adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying' (2018), 3.

proposed in the Enhancing Online Safety Policy, there is insufficient focus on the concept of bullying and elements such as restorative justice. Put simply, there is no connection or interaction between an alleged bully and the eSafety Office other than the option of issuing an end-user notice, and the Act fails to condemn bullying behaviour. If it was truly intended to address cyberbullying, the provision at s 5 of the Act should be drafted to begin with 'A person must not….' and proscribe a sanction for non-compliance.[526]

When the Office was established, the *eSafety Act* confined the Commissioner's powers to dealing with cyberbullying against an Australian child and the online content provisions in Schedules 5 and 7 of the BSA. However, by the end of 2015, the Minister for Communications had conferred additional functions on the Office to deal with family and domestic violence issues.[527] There was also initial instability within the Commissioner's role with Alastair MacGibbon, Australia's first eSafety Commissioner vacating his role as Commissioner in the first year of the Office's operation.[528]

In 2017, the Act was renamed the *Enhancing Online Safety Act 2015* to 'reflect the broader role for online safety that the Commissioner has that goes beyond online safety for

[526] This can be contrasted with the wording at s 44B of the *eSafety Act* that commences with 'A person (the first person) must not post, or make a threat to post, an intimate image of another person (the second person)', which was added in 2018.

[527] *Enhancing Online Safety (Family and Domestic Violence) Legislative Rules 2015* (Cth).

[528] Office of the Prime Minister, Australia, 'Launch of Australia's Cyber Security Strategy' (Media Release, 21 April 2016) Sydney, Australia.

Australian children.'[529] Further amendments in 2018 inserted provisions and responsibilities relating to the non-consensual sharing of intimate images.[530]

The renaming of the Act and broadening its scope represent a significant shift from the Enhancing Online Safety for Children Policy. The relevant provisions of the Act focus more on regulating social media services than responding to cyberbullying as a behavioural issue. This thesis argues that the drafting of s 5 of the *eSafety Act* and the interpretation of the provision may confine the Commissioner's powers too narrowly, resulting in the investigation of less than 10% of reports to the Office as complaints. The necessity that the effect on the Australian child is seriously threatening, seriously intimidating, seriously harassing, or seriously humiliating also sets a higher threshold for harm than that required by s 474.17 of the Criminal Code, as discussed in the next chapter.

By way of contrast, s 21 of the Act goes into detail to outline the basic online safety requirements for a social media service. There is an expectation that the service's terms of use must contain a provision that prohibits end-users from posting cyberbullying material on the service or a provision that may reasonably be regarded as such.[531] The service must also have a complaints scheme under which end-users of the service can request the removal of cyberbullying material that breaches the terms of use,[532] and they must also have a contact person for the purposes of the Act.[533]

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[529] Explanatory Memorandum, Enhancing Online Safety for Children Amendment Bill 2017, note to Clause 2.

[530] *Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Act 2018* (Cth).

[531] *eSafety Act* s 21(1)(a).

[532] Ibid s 21(1)(b).

[533] Ibid s 21(1)(c).

The tiered social media service structure limits the bulk of the Commissioner's enforcement powers to four social media services – Facebook, Google+,[534] Instagram and YouTube. Arguably, those services would advise the poster of material that they were compelled by law to remove material, rather than risk reputational damage for overly controlling content on their platforms (i.e. making government the 'bad' actor rather than the platform themselves). As noted in Chapter Three, the kinds of electronic platforms on which cyberbullying can occur are vast and are not confined to the four social media services determined by the Minister.

One of the other challenging features of the Act is the limited powers to compel Tier 1 social media services and other relevant electronic services. The latter category also includes smaller social media services that have not opted into the tiered scheme. With limited enforcement powers (being the subject of a notice published on the Commissioner's website or in the case of a social media service being the subject of a recommendation to be declared a Tier 2 service), the Act lacks a strong and clear message that cyberbullying is not acceptable. Although the intention for the Act was to provide a 'safety net' when social media services failed to take down material, in its current form it may only have a limited impact on overall levels of cyberbullying behaviour. This thesis argues that the fact that the Commissioner had not issued any end-user notices in the first four years of operation suggests that that aspect of the scheme is ineffective in addressing cyberbullying as a behavioural issue - the person who posts cyberbullying material may not even be aware that the relevant service has removed their material at all. Conceivably, there may be counterarguments such as issuing an end-user notice was not necessary or difficult to issue

[534] As noted above, Google+ became defunct on 2 April 2019. (Google Announcement - https://support.google.com/googlecurrents/answer/9195133)

against children. However, these arguments have not been expressed publicly during reform and review processes.[535]

4.4.5 Best practice – New Zealand's *Harmful Digital Communications Act 2015*

The Australian government openly and widely stated that its eSafety regime was intended to reflect developments in New Zealand at that time. Despite having legislation that specially prohibited harassment,[536] New Zealand passed the *Harmful Digital Communications Act 2015* [537] (*HDCA*), responding to a growth in the level of harmful digital communications, particularly against children.[538] Thus a solution was sought to address an overall growth in the volume of online harm reported in the country.[539]

Unlike the Australian Bill (which sought to establish a 'safety net' by way of a statutory take-down scheme), the purpose of the *HDCA* was to more broadly deter, prevent,

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[535] There have been both a Senate Inquiry and a Statutory Review into the operation of the eSafety cyberbullying provisions. These are addressed in more detail in Part C of the thesis.

[536] The *Harassment Act 1997* (NZ) provides that a person harasses another person if he or she engages in a pattern of behaviour that is directed against that other person, being a pattern of behaviour that includes doing any specified act to the other person on at least 2 separate occasions within a period of 12 months; and the Act contains civil and criminal remedies to respond to the harassment.

[537] *Harmful Digital Communications Act 2015* (NZ) ('HDCA') (date of assent 2 July 2015).

[538] Section 12 of the *Harassment Act 1997* (NZ) prohibits the making of restraining orders against persons under 17.

[539] The *HDCA* was introduced following a comprehensive examination into the adequacy of the existing sanctions and remedies available to address harmful digital communication in New Zealand. See Law Commission, *Ministerial Briefing Paper, Harmful Digital Communications: The adequacy of the current sanctions and remedies* (August 2012, Wellington, New Zealand).

and mitigate harm (defined to mean 'serious emotional distress'[540]) caused to individuals (being children and adults) by digital communications; and provide victims of harmful digital communications with a quick and efficient means of redress.[541]

Available remedies:

In addition to establishing a similar take-down scheme to the Australian model,[542] the *HDCA* provides a range of civil and criminal remedies to address the harm caused by digital communications.

The District Court of New Zealand[543] may, on application, make a number of orders including taking down or disabling material; that a person ceases or refrains from the conduct concerned; that they do not encourage other persons to engage in similar communications towards the affected individual; and that a person publishes a correction or

[540] *HDCA* s 4.

[541] Ibid s 3.

[542] Section 7 of the HDCA provides for the appointment of an approved agency to undertake the functions specified at s 8 of the Act. The Approved Agency in New Zealand is a body corporate known as Netsafe (netsafe.org.nz).

[543] The District Court of New Zealand has a broader remit and jurisdiction than an Australian court of summary jurisdiction such as the Magistrates' Court of Victoria. It is comprised of a general division to hear civil and criminal matters, the Family Court, the Youth Court, and the Disputes Tribunal (*District Court Act 2016* (NZ), s 9).

an apology.[544] Failure by a natural person to comply with an order is an offence punishable by imprisonment for a term not exceeding six months or a fine not exceeding NZ $5,000.[545]

The *HDCA* also makes it a criminal offence 'if a person posts a digital communication with the intention that it cause harm to a victim; posting the communication would cause harm to an ordinary reasonable person in the victim's position and posting the communication causes harm to the victim.'[546] The final criterion adds a level of protection from the risk of legal paternalism – there is no offence unless the victim experiences harm.

In determining whether a post would cause harm, a court may take into account any factors it considers relevant, including the extremity of the language used; the age and characteristics of the victim; whether the digital communication was anonymous, was repeated, was true or false; the extent of circulation of the digital communication; and the context in which the digital communication appeared.[547] These are all significant factors addressed earlier in the thesis.

The *HDCA* also contains communication principles detailed in Chapter Seven of this thesis as part of the argument for reform. The Act also protects online content hosts where they receive a complaint and follow procedures set out at s 24 of the Act, including notifying the author of the online content that a complaint has been made.

Application of the HDCA:

[544] *HDCA* s 19(1).

[545] Ibid s 21(2)(a). The maximum penalty for a body corporate is a fine not exceeding $20,000 NZD (s 21(2)(b)). As of 31 May 2021, NZD $5000 was approximately AUD $4700.

[546] Ibid s 22. The maximum penalty for a natural person is a term of imprisonment not exceeding two years or a fine not exceeding $50,000 NZD; or for a body corporate, a fine not exceeding $200,000 NZD (s 22(3)).

[547] Ibid sub 22(2).

Data obtained from Netsafe, the 'approved agency' for the purposes of the HDCA,[548] shows continued growth in the number of reports made to it in the period 2016 to 2020 (noting the HDC function began on 21 November 2016).

	2016-17*	**2017-18**	**2018-19**	**2019-20**
HDC reports	1,174	2,465	3,377	3,394
HDC qualifying reports	106	170	212	116
Qualifying reports as a % of HDC reports received.	9.0%	6.9%	6.3%	3.4%

Table 3 Total number of HDC reports received by Netsafe 2016-2020.

Despite the availability of a range of remedies, the volume of qualifying complaints remains relatively low, in line with the volume of complaints investigated by the eSafety Office.[549] The correlation between the increased number of reports and the decrease in the percentage of cases classed as 'qualifying reports' may warrant further consideration (but is outside the scope of this thesis).

[548] Ibid s 7. Section 8 of the HDCA details the powers and functions of the 'approved agency' and include receiving and investigating complaints concerning harm caused by digital communications. See <www.netsafe.org.nz> for further details of their work.

[549] Source of data, communication with Netsafe and annual reports published by Netsafe. The Netsafe, *Netsafe Annual Report 2017-18* (Report, 2018) stated that 'A qualifying HDC report is assessed as having met the threshold of an offence under the HDCA', 20.

Despite concerns such as a low level of 'qualifying reports and geographic bias,[550] this thesis argues that the overall regime established by the *HDCA* offers a best practice approach to dealing with harmful digital communications and forms a strong model for an Australian response to cyberbullying.[551] The *HDCA* also applies to harmful communications more broadly, such as harassment, and offers more flexible remedies for harmful communications beyond cyberbullying. More importantly, the HDCA addresses harmful behaviour at the hands of the alleged wrongdoer. In addition to having comparable take down provisions to the Australian regime, the HDCA contains strong criminal and civil law responses. The existence of statutory civil law actions addresses the gap in Australia that victims of bullying may be left with little to no recourse when an alleged offender is not subject to prosecution, or where the victim's harm or resources fall short of those required to commence an action in tort.

4.5 Conclusion

This chapter has shown that, of the three approaches, the PSIO regime in Victoria may offer a better level of protection and remedy to a bullying victim as it provides both reactive and pro-active solutions to bullying behaviour in all its forms. A PSIO may be obtained at no cost, with no involvement by Victoria Police; further, the subject of the order must have the details and contents of the order explained to them, including the consequences of contravening an order. This requirement is a significant element of the rule of law – a subject is required to be told by a court of law that future conduct (i.e. breaching

[550] Stuff.co.nz, 'South Islanders overrepresented as almost 200 cyberbullying cases end up in court' (Web Article) <https://www.stuff.co.nz/national/crime/101356403/south-islanders-overrepresented-as-almost-200-cyber-bullying-cases-end-up-in-court>. During a review on 31 May 2021, the article appears to have been removed from Stuff's website.

[551] As will be detailed later in the thesis other models such as the Harassment Acts in the other common law jurisdictions of the UK, Singapore and South Africa have been reviewed and considered.

an order) is prohibited, and there are potential criminal law consequences for engaging in that future conduct.

Tort law does not offer a proactive and timely response. Although tort may provide financial compensation by way of damages, civil law processes are costly and time-consuming and, therefore, often ineffective in offering timely relief for victims/plaintiffs. On that basis, tort law is not discussed further in this thesis as the nature of cyberbullying lends itself to the need for an expedited response.

Despite being designed to respond to cyberbullying, the high level of harm required by the *eSafety Act* constrains its cyberbullying framework. That is, a reasonable person would conclude that the cyberbullying material was intended to have an effect that was seriously threatening, intimidating, harassing, or humiliating an Australian child (added emphasis).[552] The seriousness threshold is significantly higher than the criminal law harm threshold for the offence provisions discussed in the following chapter, and the focus on social media services also limits the utility of the eSafety cyberbullying framework. Furthermore, excluding material sent by other ICT forms such as email, text messages or broadly through popular online games such as Minecraft or Fortnite is problematic and does not provide a platform-neutral response. This thesis strongly suggests that these limitations are reflected in the low number of complaints made and able to be actioned by the eSafety Office.

Data published by the eSafety Office offers valuable insight into the kinds of problematic online behaviour in the Australian community that needs addressing. The data aligns with other published statistics showing that bullying can be gendered. More young women and girls are the target of cyberbullying, and the behaviour is more likely than not to focus on nasty words, name calling or the use of offensive or upsetting pictures or videos.

[552] *eSafety Act*, s 5.

These behaviours also align clearly with Langos' taxonomy, placing them within Categories Two and Three (the 'grey area' of seriousness).

By way of contrast, the PSIO regime captures a range of behaviours, including harassment, based on a course of conduct and does not require that behaviour be solely online or offline. A PSIO can thus capture bullying in both of its forms. Further, applications can be made directly to the relevant court, thereby empowering victims of bullying to seek appropriate orders to prevent (further) harm caused by bullying. The empirical data presented in the chapter show two key trends – a growth in the number of applications made where the affected person is a child and the significant number of applications made directly to the court than through Victoria Police.

Finally, a court must explain the terms of a PSIO, including the consequences of breaching an order. This requirement is significant to the rule of law.

The eSafety regime was subject to ongoing review when the thesis was submitted for examination, and many of the issues addressed in this Chapter may be subject to significant change.

Having examined these three options, Chapter Five undertakes an examination of the criminal laws that may apply to cyberbullying.

Post-examination note: *Online Safety Act 2021*

The *Enhancing Online Safety Act 2015* (Cth) was repealed on 24 July 2021,[553] following the enactment of the *Online Safety Act 2021* (Cth). The Online Safety Act passed both Houses of Parliament on 23 June 2021 and received Royal Ascent on 23 July 2021, placing it outside the timing of the thesis being prepared for examination.

In summary, the *Online Safety Act*:

[553] *Online Safety (Transitional Provisions and Consequential Amendments) Act 2021* (Cth), s3.

- retains and replicates certain provisions in the Enhancing Online Safety Act 2015, including the non-consensual sharing of intimate images scheme; specifies basic online safety expectations;
- establishes an online content scheme for the removal of certain material;
- creates a complaints-based removal notice scheme for cyber-abuse being perpetrated against an Australian adult;
- broadens the cyber-bullying scheme to capture harms occurring on services other than social media;
- reduces the timeframe for service providers to respond to a removal notice from the eSafety Commissioner;
- brings providers of app distribution services and internet search engine services into the remit of the new online content scheme; and
- establishes a power for the eSafety Commissioner to request or require internet service providers to disable access to material depicting, promoting, inciting or instructing in abhorrent violent conduct for time-limited periods in crisis situations.[554]

Of particular interest to this thesis is the fact that the 'serious' threshold remained in the definition of 'cyberbullying material targeted at an Australian child'.[555]

[554] Parliament of Australia, Parliamentary Business, Bills and Legislation, Online Safety Bill 2021: https://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=r6680

[555] *Online Safety Act 2021*, s 6.

Chapter Five – Criminal law responses to cyberbullying

5.1 Introduction

This chapter begins with a theoretical discussion of when criminal law is an appropriate response to undesirable behaviour, focusing on bullying and cyberbullying. It then examines criminal law responses to cyberbullying through the lens of two specific criminal offence provisions. Firstly, the offence of using a carriage service to menace, harass or cause offence contrary to s 474.17 of the Commonwealth Criminal Code is examined, followed by the offence of stalking, contrary to s 21A of the Victorian Crimes Act. The offences appear in order of maximum penalty, with the less serious offence discussed first.

The offences cover a variety of acts and behaviours which are key attributes or features of cyberbullying. The offence at s 474.17 of the Criminal Code offence is grounded in ICT use and requires a carriage service (e.g. telephones, social media, or email).[556] The nexus between the use of ICT and the causing of harm (in the form of menacing, harassing or offensive behaviour) has led some sections of government to a presumption that s 474.17 is the most appropriate offence provision applicable to cyberbullying.[557] The offence carries a maximum penalty of three years' imprisonment.

By contrast, s 21A of the Crimes Act makes it an offence to engage in a course of conduct intending to cause physical or mental harm to the victim or arousing apprehension in the victim for their safety or of any other person. The offence of stalking covers online and

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[556] As noted earlier, a 'carriage service' has the meaning provided in the *Telecommunication Act 1997* (Cth) – 'a service for carrying communications by means of guided and/or unguided magnetic energy'.

[557] See for example, submissions by the Australian Federal Police and the Department of Communication and the Arts to the 'Senate Legal and Constitutional Affairs References Committee', Parliament of Australia, *Adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying*).

offline behaviours and can apply as a response to bullying in all its forms. The offence carries a maximum penalty of 10 years' imprisonment.

The application of each offence provision is illustrated in two ways. Firstly, case law outlines the behaviour captured by the offence provisions. Secondly, after examining the caselaw concerning the offence provisions, empirical data demonstrate their respective application. The data serves several purposes, and draws a connection between the formal and substantive criminalisation of the behaviour captured by the offence provisions.

The section presents two sets of data for each offence – alleged offender incidents (AOI) and prosecutions. AOI data shows the total number of reports to or investigation by Victoria Police and is contrasted with the number of proceedings at the CCV. The correlation between AOIs and prosecutions also illustrates the role of police discretion, discussed in Chapter Two. There is a sharp decline in the number of AOIs involving children progressing to prosecution, and the number of AOIs give a clearer understanding of the likely volume of offenders and offending behaviour in the community.

The final data set has been sourced from three of Australia's largest state jurisdictions (NSW, Queensland, and Victoria), illustrating the application of s 474.17 in the period 2005-2013. The date range aligns with data presented by the Australian government that there had been 308 prosecutions made under s 474.17 during that period. Based on the number of matters prosecuted by the Commonwealth DPP, this data formed part of the scope concerning the size of the problem to be addressed by developing the eSafety framework. This specific data set disproves the assertion mentioned earlier in the thesis about Australia's total number of prosecutions conducted under s 474.17 being 308 with eight children prosecuted.[558] This data set makes an important contribution to the literature on cyberbullying because the inaccurate statement made by the government has been relied

[558] Enhancing Online Safety Discussion Paper, Department of Communications, Canberra (2014).

upon and published by bodies such as the Australian Law Reform Commission[559] and in academic journals such as the Australian Criminal Law Journal.[560] The issue of reliance on inaccurate data as a basis for developing a regulatory response to cyberbullying will be addressed further in Chapter Six.

The other data presented in this chapter is subject to a caveat. The data illustrates the total number of prosecutions under the relevant provisions, rather than representing cases that may be rightly classified or described as bullying or cyberbullying. The broad drafting of the provisions catches other behaviours. As noted in Part A, there are no specified offences in Australia for engaging in bullying or cyberbullying, which directly impacts the ability to collect accurate data. On that basis, the total number of prosecutions may also capture other behaviours such as child exploitation (in the case of s 474.17).

5.2 Bullying and cyberbullying as a criminal behaviour

In 2016, the Tasmanian Law Reform Institute considered whether a criminal justice response to bullying was appropriate, noting that the imposition of criminal liability is the most punitive response to bullying.[561]

The application of criminal law to children adds a further dimension to when cyberbullying warrants criminalisation. In addition to showing a *prima facie* case for state regulation and that the criminal law offers the best regulation method, it is necessary to consider whether the criminal law is the best method of regulating children's behaviour.

[559] Australian Law Reform Commission, Serious invasions of privacy in the digital era : Final Report (Commonwealth of Australia, 2014), 306 [15.42].

[560] See, for example, Clive Turner, 'The vagaries of construction of the carriage service offence in s. 474.17 of the Commonwealth Criminal Code (Australia)' (2016) 40(1) *Criminal Law Journal* 32.

[561] Tasmanian Law Reform Institute, Bullying, Final Report No 22, above n 220, 20.

Children are afforded some protection from the criminal law by applying *doli incapax* or its incorporation into Australian statute. They are also protected in the criminal justice system by having courts and processes which recognise and address their specific vulnerabilities. However, the criminalisation of children is a severe step and one that should be a last resort.

Within the theoretical frameworks outlined above, this thesis argues that criminal law should play a role in addressing cyberbullying behaviour. This role is particularly so given the deficiencies identified in Chapter Four – tort can be cumbersome and expensive, a PSIO only offers a certain level of protection before a criminal sanction may be imposed, and the shortcomings of the eSafety cyberbullying regime.

As Langos' taxonomy makes clear, the behaviours at category one warrant criminalisation; and, as noted, may already be standalone offences. Bullying is a composite set of behaviours, and as such, many of the actions in categories two to four of the taxonomy may warrant a criminal response where the overall harm caused through a combination of those behaviours cannot be addressed through non-criminal law mechanisms.

The indictable offence provisions explored later in this chapter address behaviour that causes a high level of harm, particularly considering the maximum penalty attached to stalking (particularly when compared to the maximum penalty attached to comparable offences in other jurisdictions). The growing number of PSIOs granted by the courts leads to the possibility of a third offence provision – breach of an order, attracting a two-year maximum penalty. Regulating and prohibiting behaviour considered to be bullying or harassment is increasingly by way of criminal law. Despite a range of sentencing options available to the CCV, charging children with indictable offences remains problematic and undesirable, leading to a dilemma – there is potentially very harmful conduct, but children do it. Responding to this conduct requires a balance between the rights of the victim and the rights of the accused, and criminal law may or may not be the most appropriate mechanism.

As noted in Chapter Two, the criminal law should only be invoked where supported by convincing justifications; and when labelling conduct as wrongful and labelling those it convicts as culpable wrongdoers, the state should get it right. Chapter Four explored non-criminal law frameworks or approaches that may address the harm caused by bullying behaviour, illustrating the capacity of PSIOs to prevent bullying and cyberbullying. However, this protective framework is only available at the Victorian state level and does not necessarily have parallel provisions in other Australian jurisdictions. At the Commonwealth level, the framework provided by the *eSafety Act* manages to capture only a limited amount of online material. The statutory cyberbullying provisions only apply to material hosted on social media (e.g. Facebook), and it entrenches the high threshold requirement that the material must have a 'serious' effect on the Australian child in question.[562] Neither approach provides an ideal solution to bullying and cyberbullying – the PSIO regime carries a risk of criminalisation for what may be low-level behaviour; the eSafety regime does not (as administered) adequately respond to the act of cyberbullying by the bully.

The discussion below examines bullying and cyberbullying through three theoretical lenses - the fair warning principle, the harm principle, and the moral limits of the criminal law.

5.3 Using a carriage service to menace, harass or cause offence

In 2004, a range of telecommunications offence provisions from Part VIIB of the *Crimes Act 1914* (Cth) were moved and inserted into the Commonwealth Criminal Code prohibiting the use of communications technologies in the commission of those relevant offences.[563] Many of the provisions reflected a broader government response to the

[562] *eSafety Act* s 5.

[563] The Commonwealth's power to make criminal laws is confined by the Australian Constitution. All offences in Part 10.6 necessitate the use of a carriage service and the Commonwealth has no broad anti-harassment statute beyond those enacted to comply with international obligations such as the

increasing use of ICT in committing offences against children, such as using a carriage service for child pornography material or child abuse material.[564] Other amendments targeted other problematic online behaviours such as grooming.[565]

In addition to moving the existing telecommunications offences from Part VIIB, the offence provisions were also updated to account for changes to ICT and terminology,[566] noting that the telecommunications environment had changed substantially since 1989, both in terms of the regulatory environment and the technology available.[567] They also updated references to ICT, including mobile telephones and the internet, and physical elements of relevant offences were updated from 'telecommunications services' to 'carriage service', ensuring that the provisions could capture most forms of communication technology.[568] Broadening the offence to cover the use of a carriage service has given it relevance and application to cyberbullying.

Racial Discrimination Act 1975 (Cth) ('*Racial Discrimination Act*') or the *Sex Discrimination Act 1984* (Cth) ('*Sex Discrimination Act*').

[564] *Criminal Code Act* sub-d D of div 473.

[565] Explanatory Memorandum, Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No. 2) 2004 (Cth), 2.

[566] By way of the *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No. 2) 2004* (Cth). See, Explanatory Memorandum, Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No. 2) 2004 (Cth), 4.

[567] Explanatory Memorandum to the Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No. 2) 2004, 2.

[568] See for example the differences between the former 85ZE in the *Crimes Act 1914* (Cth) and section 474.17 of the *Criminal Code*.

Relevantly, s 474.17 prohibits using a carriage service in a way that a reasonable person would regard as being, in all the circumstances, menacing, harassing or offensive:

> **474.17 Using a carriage service to menace, harass or cause offence**
>
> (1) A person commits an offence if:
>
> (a) the person uses a carriage service; and
>
> (b) the person does so in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.
>
> Penalty: Imprisonment for 3 years.

The section below examines the elements in para 474.17(1)(b). It is worth noting that none of the reported cases involved bullying or cyberbullying by a child. Most matters were on appeal from a court of summary jurisdiction. However, all of the cases are relevant as they reflect Olweus' four elements – aggression, repetition, an imbalance of power, and an intention to harm (although not necessarily all four simultaneously).

The provision is a clear contrast to s 85ZE of the *Crimes Act 1914* (Cth), the predecessor to s 474.17, which made it an offence for a person to intentionally use a carriage service supplied by a carrier with the result that another person <u>was</u> menaced or harassed.[569] To that extent, s 474.17 is more legally paternalistic in that it captures behaviours that have the capacity, but not the effect, of menacing, harassing or causing offence (i.e. by judging the behaviour on an objective/reasonable person standard).

[569] *Crimes Act 1914* (Cth), s85ZE(1) (added emphasis).

The section below explores the features and elements of the offence provision and some key criminal procedure and sentencing issues. That is followed by a discussion about the applicability of the offence to bullying and cyberbullying by children.

5.3.1 Features and elements of the offence

Method of use or content of a communication

Section 474.17 applies to the method of use of the carriage service, the communication content, or both. Regarding 'method of use' the relevant Explanatory Memorandum (EM) states:

> The inclusion of 'whether by the method of use or the content of a communication, or both' is intended to clarify the type of use of a carriage service that the offence covers. 'The method of use' refers to the actual way the carriage service is used, rather than what is communicated during that use. The continual making of unwanted telephone calls to a particular person would fall into this category.[570]

The EM goes on to state that 'examples of the type of use of a carriage service the proposed offence may cover include use that would make a person apprehensive as to their safety or well-being or the safety of their property, use that encourages or incites violence, and use that vilifies persons on the basis of their race or religion.'[571]

In *R v Ogawa*, the defendant was charged under s 474.17 for sending 83 emails during 18 hours to various email addresses at the Federal Court of Australia and making 176 phone calls to registries and the Federal Court's chambers over six days.[572] The Queensland

[570] Explanatory Memorandum to the Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No. 2) 2004, 33.

[571] Ibid 34.

[572] *R v Ogawa* [2009] QCA 307 ('*R v Ogawa*'), [9]. The defendant also faced two charges for threatening to kill a person, contrary to s 474.15 of the *Criminal Code*.

Court of Appeal rejected arguments that s 474.17 was directed primarily to the communication content rather than the method of using the carriage service. This view affirmed that Parliament expressly included the words 'whether by the method of use or the content of a communication, or both' in the provision to capture both behaviour and content.[573]

The Court held that the 'jury were entitled to have regard to the quantity and frequency of telephone calls in the context established by the vituperative emails.... and to conclude on that basis that reasonable persons would regard frequent and apparently random telephone calls made in that context as harassing. The jury were entitled to conclude that the appellant must have understood that her calls were, because of their quantity and frequency, unwelcome and unwanted by the recipients.'[574]

Other successful prosecutions under the method of use aspect of the offence include calling a victim 45 times over two hours and sending four messages via Facebook calling the victim a 'slut' and threatening them;[575] calling a former partner 25 times during a period spanning midnight to 8 pm followed by sending eight text messages;[576] and making over 30 abusive phone calls to the office of a body corporate over one business day, repeating the behaviour five days later.[577]

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[573] Ibid [128] (Keane JA with Chesterman JA and Jones J agreeing).

[574] Ibid [129]. The trial judge sentenced the appellant to six months of imprisonment on each charge to be served concurrently, [4].

[575] *McManus v Bakes* (2014) ACTSC 297 ('*McManus v Bakes*').

[576] *Young v Wilson* (2015) TASSC 16 ('*Young v Wilson*'). The court imposed a penalty of three months' imprisonment.

[577] *Cox v Commissioner of Police* (2013) QDC 278 ('*Cox v Commissioner of Police*').

The content of a communication limb refers to 'what is communicated during the use of the carriage service. For example, an email making threats may be considered menacing use of a carriage service.'[578] The kinds of behaviours captured by the content requirement have included abusing police force members during repeated phone calls[579] and making direct threats to victims.[580] In *Wantling v Commissioner of Police*, the Queensland District Court found that 'taking into account the standards of morality, decency and proprietary generally accepted by reasonable adults these words "you fucking bitch" and "you fucking fat bitch" would be regarded by reasonable persons as being in all the circumstances, offensive.'[581]

Behaviour covered by making direct threats to the victim included making two telephone calls to a staff member of the Queensland Department of Education and Training, which contained threats of violence[582] and threatening communications from one housemate to another.[583] In addition, many cases feature an alleged breach of s 474.17 combined with charges under state or territory criminal offences.[584] However, it is not clear from the

[578] Explanatory Memorandum to the Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No. 2) 2004, 33.

[579] *Wantling v Commissioner of Police* (2014) QDC 126 ('*Wantling v Commissioner of Police*').

[580] *Crowther v Sala* (2007) QCA 133 ('*Crowther v Sala*'); *R v Hooper; ex parte Cth DPP* (2008) QCA 303 ('*R v Hooper; ex parte Cth DPP*').

[581] *Wantling v Commissioner of Police*, [63].

[582] *Crowther v Sala*.

[583] *R v Hooper; ex parte Cth DPP*.

[584] See for example *R v Whitlow* (2009) VSCA 103 ('*R v Whitlow*') which combined charges for making threats under s 474.17 of the Criminal Code and charges for causing injury under the *Crimes Act*.

decisions dealing with making a threat how a prosecution under s 474.17 is distinguishable from the offence at s 474.15 of the Code, which prohibits using a carriage service to make a threat.[585]

Communications, however, need not be directed to a specific person. For example, in *R v Hampson*,[586] the defendant subscribed to tribute pages on Facebook following the murders of two children in Queensland and made numerous posts on each of those pages. The use of Facebook as a broadcasting platform was a significant factor in assessing the offensiveness of the behaviour:

> In the other cases, the carriage service was used to convey the menacing, harassing or offensive material directly to the recipient – by phone call, text message, email, or (as occurred in Agostino) messages posted on the recipient's personal profile site on Facebook, (such messages are not generally able to be seen by the public at large.) What the applicant in the present case did was not merely post the extremely offensive material to be received by an individual, or small group of people… The fact that this seriously offensive material was publicly broadcast in this way is clearly one of the circumstances to which regard must be had in determining the objective response of a reasonable person.[587]

The posts in question included extreme references to paedophilia and child murder. As a result, Hampson was charged with two counts under s 474.17 of the Code for using a carriage service in an offensive way and two charges relating to the distribution and

[585] The *Crimes Act* also prohibits making threats, including threats to kill (s 20) and threat to inflict serious injury (s 21). Threatening a victim can also form part of a course of conduct amounting to stalking (s 21A).

[586] *R v Hampson* (2011) QCA 132 ('*R v Hampson*')

[587] Ibid [54] (Daubney J).

possession of child exploitation material.[588] At first instance, the defendant was convicted and sentenced to the maximum of three years imprisonment on each of the two charges under s 474.17 with release after 12 months.[589] The sentencing judge's assessment of the objective degree of offensiveness of the conduct was scathing – 'one can only judge your conduct as being depraved... No right-thinking member of the community could fail to be outraged by that sort of conduct.'[590]

The Hampson case also illustrates how the courts interpret and apply the provision's objective nature and what amounts to offensiveness. On appeal, Muir JA expressed the view that the appellant's offending was not within 'the worst category of cases which [the penalty of three years' imprisonment] is prescribed' and the sentences greatly exceeded those normally imposed for breaches of s 474.17(1).[591]

The offensive limb of the offence also captures the use of a carriage service to discuss or participate in child exploitation – either in the form of grooming a child or adults engaging in file-sharing or discussion – as an offensive use of a carriage service.[592] Again,

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[588] One charge was laid for distributing child exploitation material under s228C of the *Criminal Code 1899* (Qld), and another for knowingly possessing child exploitation material under s228D of the *Criminal Code 1899* (Qld).

[589] The penalties for the distribution and possession of child exploitation material were 12 months' imprisonment and 2 years' probation for each count.

[590] *R v Hampson*, [35] (cited by Muir JA).

[591] Ibid [39] (Muir JA). No reference was made as to what his Honour considered to be the sentence 'normally imposed'.

[592] *R v Murray Colin Stubbs* (2009) ACTSC 63 ('*R v Murray Colin Stubbs*'); *R v Paul James* (2011) NSWDC 185 ('*R v Paul James*'); *Rodriguez v The Queen* (2013) VSCA 216 ('*Rodriguez v The Queen*').

this is particularly relevant for some of the behaviours at Category One of Langos' taxonomy – denigration by way of a sexual or intimate image in the course of cyberbullying behaviour.

The provision has also responded to 'novel' or developing forms of offences that use ICT, including the case of *The Queen v Daniel McDonald and Dylan Deblaquiere*[593] (the "ADF Skype" case) involving the use of Skype (an internet-based communication platform) to transmit footage of sexual activity without the female partner's knowledge. Deblaquiere (and other Australian Defence Force cadets) viewed the footage remotely via a Skype live stream. The defendants were charged with offences under s 474.17 and indecency offences under s 60 of the *Crimes Act 1900* (ACT).[594]

Menacing, harassing or offensive

The construction of s 474.17 also requires that the use of the carriage service be regarded by a reasonable person as menacing, harassing or offensive, and the Criminal Code offers guidance about interpreting the term 'offensive'. Section 473.4 provides an inclusive list of matters to consider in determining whether reasonable persons would regard material, or a particular use of a carriage service, as being, in all the circumstances, offensive for Part 10.6 of the Code (telecommunications services). These matters include the standards of morality, decency and propriety generally accepted by reasonable adults; the literary, artistic, or educational merit (if any) of the material; and the general character of the material (including whether it is of a medical, legal, or scientific character).[595]

[593] *The Queen v Daniel McDonald and Dylan Deblaquiere* (2013) ACTSC 122 ('*The Queen v Daniel McDonald and Dylan Deblaquiere*').

[594] The defendants were released on a 12-month recognisance with no conviction recorded.

[595] The provision was based on s 11 of the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ('*Classification (Publications, Films and Computer Games) Act*').

In 2012, the High Court undertook a rigorous analysis of what amounted to an offensive communication. The primary appellant, Monis, initially faced charges in the District Court of New South Wales for using a postal service in an offensive way, contrary to s 471.12 of the Code. Section 471.12 is in almost identical language and terms to the offence provision concerning using a carriage service at s 474.17. The provision makes it an offence for a person to use a postal or similar service in a way, whether by the method of use or the content of a communication, or both that a reasonable person would regard as being, in all the circumstances, menacing, harassing or offensive. Monis' de-facto partner, Amirah Droudis, was also an appellant. In summary, the offending behaviour included sending letters to the families of members of the Australian Defence Force that had died whilst serving their country.

The High Court's analysis built on the proposition that within the bounds of its ordinary meaning, the term 'offensive' used objectively 'covers a range of imputed reactions by one person to the conduct of another. It may describe conduct which would cause transient displeasure or irritation and also conduct which would engender much more intense responses.'[596]

One of the most frequently cited passages dealing with offensiveness stems from the judgment of Kerr J, in *Ball v McIntyre*, and requires an assessment of what the relevant offence provision requires *:*

> Conduct which offends against the standards of good taste or good manners, which is a breach of the rules of courtesy or runs contrary to commonly accepted social rules, may well be ill-advised, hurtful, not proper conduct. People may be offended by such conduct, but it may well not be offensive conduct within the meaning of the section.[597]

[596] *Monis v The Queen; Droudis v The Queen* ('Monis'), 126 [57] (French CJ).

[597] *Ball v McIntyre* (1966) FLR 237, 241 ('*Ball v McIntyre*').

To that extent, Chief Justice French held that it is not a purpose of the term 'offensive' in s 471.12 to proscribe uses of postal or similar services which convey insults or slights or which are likely to engender hurt feelings, and it is not a purpose of the offence created by s 471.12 to secure civility or courtesy in communications which use postal or similar services.[598] At the lower end of the range, offensive communication might refer to communication that might cause upset to a person or cause mere insult or hurt to a person's feelings.[599]

The plurality of the Court examined the meaning of the word 'offensive' within the context of the provision:

> … the grouping of the three words and their subjection to the same objective standard of assessment for the purposes of the offences in s 471.12 suggests that what is offensive will have a quality at least as serious in effect upon a person as the other words convey. The words "menacing" and "harassing" imply a serious potential effect upon an addressee, one which causes apprehension, if not a fear, for that person's safety. For consistency, to be "offensive", a communication must be likely to have a serious effect upon the emotional well-being of an addressee.[600]

Of particular relevance to this thesis is the Chief Justice's comment that the meaning of 'offensive' as used in s 471.12 related to behaviour 'in the higher ranges of seriousness' (added emphasis).[601] This view was also prominent in the joint judgment of Justices Crennan, Kiefel and Bell, who held that 'the protection intended to be provided by provisions such as s 471.12 relates to a degree of offensiveness at the higher end of the spectrum,

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[598] *Monis*, [43] (French CJ).

[599] Ibid [289] (Crennan, Kiefel and Bell JJ). French CJ also suggested that '[M]enacing conduct can be offensive. So too can harassing conduct.' [42].

[600] Ibid [310] (Crennan, Kiefel and Bell JJ).

[601] Ibid [43] (French CJ).

although not necessarily the most extreme.'[602] Their Honours ruled that the purpose of a charge of offensive behaviour is not to punish those who differ from the majority, and in order to be offensive, the behaviour would usually 'be calculated to wound the feelings, arouse anger, resentment, disgust or outrage in the mind of a reasonable man.'[603]

The Court declined to comment on the kinds of responses deserving prosecution, noting that 'it would not seem necessary to go further by attempting to describe what level of emotional reaction or psychological response might be thought likely to be generated by a seriously offensive communication. It might be necessary to do so when directing a jury charged with finding whether the offence is made out.'[604]

The Queensland District Court soon applied the narrow interpretation of offensiveness to a matter prosecuted under s 474.17 in March 2013:

> In order to be "offensive" the particular communication must be likely to have a serious effect upon the emotional well-being…. it is not sufficient if the use would only hurt or wound the feelings of a recipient. Additionally, the communication must be capable of causing real emotional and mental harm, distress or anguish to the recipient.[605]

The application of the narrow interpretation sets a high behavioural threshold for the offence under s 474.17. However, the failure to provide examples of behaviours that amount to 'the most extreme' end of the offensiveness spectrum supports the argument in this thesis that what amounts to sufficiently serious behaviour remains unclear. In addition, a high standard makes the application of s 474.17 to bullying more challenging. While the standard

[602] Ibid [336] (Crennan, Kiefel and Bell JJ).

[603] Ibid [303] (Crennan, Kiefel and Bell JJ).

[604] Ibid [337] (Crennan, Kiefel and Bell JJ).

[605] *Starkey v Commonwealth Director of Public Prosecutions* (2013) QDC 124 ('*Starkey v Commonwealth Director of Public Prosecutions*'), [5] (Dorney DCJ).

helps draw a clear line of when bullying is sufficiently serious to warrant criminalisation, the line may be higher than most people would consider an appropriate response to bullying behaviour.

By way of contrast, there is limited guidance on what amounts to behaviours that menace or harass. The Code itself offers no guidance about interpreting the terms. Therefore courts may apply common law approaches such as the literal or purposive approach[606] and give the words of a statutory provision the meaning that the legislature intended them to have.[607] In the matter of Monis, Justices Crennan, Kiefel and Bell held there was no barrier to reading down the term 'offensive' to 'apply to a narrower category of offensive communications than would be the case if attention were directed only to the wider meaning of the word "offensive".'[608]

The Macquarie Dictionary defines 'menace' to include "something that threatens to cause evil, harm, injury, etc.; a threat" and "a nuisance".[609] The term 'harass' is defined to mean "to trouble by repeated attacks, incursions, etc., as in war or hostilities; harry; raid" and

[606] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd ("Engineers Case")* (1920) 28 CLR 129 ('*Amalgamated Society of Engineers v Adelaide Steamship Co Ltd ("Engineers Case")*'), 161-2.

[607] *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 ('*Project Blue Sky v Australian Broadcasting Authority*'), 384 (McHugh, Gummow, Kirby and Hayne JJ).

[608] *Monis*, [333] (Crennan, Kiefel and Bell JJ). See also Hayne J at [161].

[609] *Macquarie Dictionary Online*, 2016, Macquarie Dictionary Publishers, an imprint of Pan Macmillan Australia Pty Ltd, www.macquariedictionary.com.au. In *Monis*, Hayne J referred to terms as defined in The Oxford English Dictionary.

"to disturb persistently; torment."[610] As defined in the Macquarie Dictionary, those terms would encompass a broad range of behaviours that may include bullying and cyberbullying.

Reasonable person

Chief Justice French highlighted the objective nature of the reasonable person requirement in the case of *Monis*, highlighting the need to view the circumstances of allegedly offensive conduct through objective eyes rather than apply potentially subjective reactions to specific individual attitudes or sensitivities.[611] His Honour further noted that the requirement also 'places in the hands of the Court, mediated by the emotional reactions of imaginary reasonable persons, a judgment as to whether the content is within or outside the prohibition.'[612]

Recklessness:

Section 5.6 of the Code provides that where an offence provision does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element. Section 5.4 of the Code provides that a person is 'reckless with respect to a circumstance if he or she is aware of a substantial risk that the circumstance exists or will exist and having regard to the circumstances known to him or her, it is unjustifiable to take the risk'.[613]

The question of whether taking a risk is unjustifiable is one of fact. If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge, or recklessness will satisfy that fault element. A person is reckless with respect to a result if:(a)

[610] Ibid.

[611] *Monis*, [44] (French CJ).

[612] Ibid, [63].

[613] *Criminal Code*, s 5.4.

he or she is aware of a substantial risk that the result will occur; and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk. To that end, the requirement that an accused be capable of forming an awareness of a substantial risk is a limiting aspect of the provision and has implications as to whether a child accused would be capable of forming this awareness.

Proof of recklessness concerning s 474.17 involves the prosecution establishing beyond a reasonable doubt that the defendant was aware of a substantial risk that reasonable persons would regard their use of a carriage service as being in all the circumstances offensive, menacing or harassing. The prosecution would also have to prove that it was unjustifiable to take the risk because of the appellant's circumstances.[614]

5.3.2 Criminal procedure and sentencing

Given the broad construction of s 474.17, the provision captures a wide range of behaviours. The Australian Federal Police's have above echoed this view - 'The AFP considers that section 474.17 of the *Criminal Code* is more than adequate to facilitate prosecution of cyber-bullying cases where appropriate. Rather than being "too general", the AFP considers that the breadth of section 474.17 is its strength, capturing a wide range of behaviours in a rapidly evolving online environment.'[615]

The bulk of prosecutions conducted under s 474.17 are heard summarily by lower courts, leading to a lack of clearly identifiable court precedent, and the Victorian Court of Appeal raised this issue in the case of *Rodriguez v The Queen*:

> The plea was conducted on the basis that there was no superior court authority expressly dealing with the approach to sentencing under s 474.17 of the Code. We have not found any

[614] *Criminal Code* s 5.4. See also *Wantling v Commissioner of Police*, [69].

[615] Australian Federal Police, 'Submission by the Australian Federal Police to the Department of Communications Enhancing Online Safety for Children Discussion Paper' March 2014, para 14.

> such authority. The Commonwealth Director has confirmed that they do not have any table of higher court sentences for this offence. Nor is there any Sentencing Snapshot published for this offence.[616]
>
> The respondent referred the sentencing judge to three County Court decisions on s 474.17… It is unclear what sort of sentences are usually imposed for this offence in the Magistrates' Court, where the bulk of such offenders are apparently dealt with.[617]

Most appellate cases reviewed for this thesis consisted of decisions involving multiple offences, with charges brought under s 474.17 accounting for only one of several charges against defendants.[618] Superior courts heard less than 1% of cases involving prosecutions under s 474.17 in either their original or appellate jurisdictions.[619]

The lack of guidance, particularly regarding sentencing, can be partly attributed to jurisdictional provisions in the Commonwealth Crimes Act.[620] Section 4J of that Act provides that indictable Commonwealth offences punishable by imprisonment for a period not exceeding 10 years may, unless the contrary intention appears, be heard and determined with the prosecutor's consent and the defendant by a court of summary jurisdiction. As the

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[616] *Rodriguez v The Queen,* [46] (Warren CJ and Redlich JA).

[617] Ibid [47].

[618] For example, in *Grewal v Di Camillo*, the defendant was charged with unlawful assault under the *Crimes Act* and charges under s 474.17.In *Young v Wilson*, the defendant faced one charge for using a carriage service to harass another person contrary to s 474.17 of the *Criminal Code* 1995 (Cth), six charges of breaching a Police Family Violence Order contrary to s 35(1) of the *Family Violence Act* 2004 (Tas), and one offence of common assault contrary to the *Police Offences Act* 1935 (Tas), s 35(1).

[619] Initial inquiries with Court Services Victoria indicated that very few cases (<1%) were heard under the offence provisions on indictment at a superior court. On that basis, the data sets presented in this chapter show cases heard summarily as they capture over 99% of prosecutorial action.

[620] *Crimes Act 1914* (Cth).

offence is punishable by imprisonment for a period not exceeding five years, a court of summary jurisdiction such as the MCV can only impose a sentence of imprisonment for a period not exceeding 12 months or a fine not exceeding 60 penalty units, or both per offence.[621]

The operation of s 19AC of the Commonwealth *Crimes Act* further requires that where a court of summary jurisdiction convicts a person for a federal offence and the aggregate term of imprisonment for the federal offences does not exceed three years, then the court must make a single recognisance release order in respect of that sentence and must not fix a non-parole period.[622]

It should be noted that matters involving children are subject to relevant youth sentencing provisions.[623] Although the sentencing provisions above apply to adult offenders, the provisions highlight the limit on the availability of substantive or qualitative data about offending behaviours. This limitation is compounded when researching offending by children. When combined with a statutory restriction on the publication of proceedings at the CCV,[624] the lack of qualitative data limits the ability to undertake an informed assessment of whether

[621] Ibid s 4J(3)(a). I.e. if a person faces three charges under s 474.17, the maximum penalty would be three years' imprisonment, a fine totalling 180 penalty units, or both.

[622] *Crimes Act* (Cth), s 19AC(1). At courts of summary jurisdiction, this would require at least four charges to be proven and the maximum penalty of 12 months per charge to be imposed. This means that in practice, in instances where a single charge is brought against a defendant, a court of summary jurisdiction must make a recognizance release order.

[623] See for example the discussion on sentencing at CCV, above at 2.4.3.

[624] *CYF Act*, s 534.

cases involving child offenders genuinely fit within Olweus' bullying model. This issue may be a valuable opportunity for further research in this area.[625]

5.3.3 Application to bullying by children

As outlined in Chapter Two, bullying behaviour is behaviour that may menace or harass the victim. Some of the language or behaviours engaged in as bullying activity (such as racist or homophobic comments) may also cause offence. The requirement that a carriage service be used in the commission of an offence creates a clear nexus between behaviour and technology, making it applicable to cyberbullying.

The use of a carriage service limits the offence provision and thus only responds to online bullying. As outlined earlier in the thesis, most bullying incidents involve a combination of online and offline bullying.

Further, the reasonable person test in the provision is problematic if, or when, a victim is a young person or a child. There is a contrast between a reasonable person, ordinarily considered a sufficiently robust adult, and a young person's sensitivities. As noted in Chapter Two, cyberbullying can involve targeting sensitive characteristics such as a thirteen-year-old struggling with their sexuality being more susceptible to mental harm from homophobic bullying than others. It also arguable that children may lack the necessary impulse control when engaging in potentially harm causing behaviour. These factors link

[625] See for example, Michelle Sibenik, 'A Critical Analysis of the Applications of Anti-Stalking Legislation in Victoria, Australia', (2018) Thesis, Doctor of Philosophy, Monash University. Dr Sibenik's thesis undertakes a detailed qualitative analysis of stalking cases at the Country Court of Victoria. Any research into cases at the Children's Court of Victoria would, at a minimum, require permission from the Court and necessary ethic committee clearance.

heavily to the presumption of *doli incapax* and the need to safeguard children from being found criminally liable.

The case of *Monis* made it clear (via the postal provision) that the effect of menacing, harassing, or causing offence must be at the higher end of seriousness, which has the capacity of limiting the applicability of the provisions, and it is unclear if such a level of seriousness would apply to the majority of bullying by children. Whilst there may be cases that meet the threshold and requirements of s 474.17 (e.g. where there is a significant power imbalance and the content and nature of the communications would consist of threats, racism or homophobic insults), it may well be true that the significant majority of cases would fall short of that threshold.

Despite this, the data presented in section 5.5 below shows an apparent growth in the number of cases involving children in Victoria. The growth matches that of ICT, as outlined in Chapter Two. As the usage of ICT grew, the number of proceedings has accordingly grown. However, this may also be attributable to a range of other factors, such as police or prosecutorial practices and social or political pressure to address the emergence of cyberbullying.

Section 474.17 prohibits behaviour which a reasonable person would regard as being, in all the circumstances, menacing, harassing or offensive,[626] although its application is confined to acts involving the use of a carriage service. For this thesis, the provision provides a plausible criminal law response to online forms of bullying behaviour (i.e. cyberbullying). The provision is broadly drafted and can, as detailed above, capture a broad range of behaviours that could readily be described as bullying. The inclusion of recklessness as a fault element also broadens its application - as discussed in Chapter

[626] *Criminal Code* s 474.17(1)(b).

One, youth awareness of cyberbullying being an offence was high. However, the knowledge of which specific laws applied (if any) was low.

Despite the high threshold formulated by the High Court in Monis (albeit for a related by somewhat parallel offence), the offence provision provides an available criminal law response to cyberbullying by children even if that is confined to behaviour considered to be at the higher end of offending. The next section explores the offence of stalking.

5.4 Stalking

Stalking is, in general terms, repeated behaviour by a person or group of people that puts another in fear for their own safety (or that of another), or where the repeated behaviour causes mental or physical injury. Stalking is a composite offence and can consist of many acts,[627] and s 21A of the Victorian *Crimes Act* makes it an offence to engage in a course of conduct with the intention of causing physical or mental harm to the victim or to arouse apprehension in the victim for their safety or any other person.[628] The maximum penalty for stalking in Victoria is level 5 imprisonment (10 years maximum).[629] Stalking is also an offence in all other Australian state and territory jurisdictions, with varying levels of penalties, including terms of imprisonment between two and eight years.[630]

[627] *R v Maccia* [2003] VSC 384 ('*R v Maccia*'), [22] (Gillard J).

[628] *Crimes Act* s 21A(2); *Gunes v Pearson and Tunc v Pearson* (1996) 89 A Crim R 297 ('*Gunes v Pearson and Tunc v Pearson*').

[629] *Crimes Act* s 21A(1).

[630] Australian Capital Territory, *Crimes Act 1900* (ACT), s 35 (maximum penalty imprisonment for 5 years if the offence involved a contravention of an injunction or other order made by a court; or the person was in possession of an offensive weapon; or imprisonment for 2 years in any other case.

There was a significant global movement to criminalise stalking in the 1990s, and Victoria was the second jurisdiction in Australia to implement laws criminalising stalking

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NSW, *Crimes (Domestic and Personal Violence) Act 2008* (NSW), s 13 (maximum penalty imprisonment for 5 years, or 50 penalty units ($5,500 as of 30 June 2020 (s 17 of the Crimes (Sentencing Procedure) Act 1999 (NSW)), or both.

Northern Territory, *Criminal Code Act 1983* (NT), s 189 (maximum penalty imprisonment for 2 years; or 5 years where the person's conduct contravened a condition of bail or an injunction or order imposed by a court; or the person was, on any occasion to which the charge relates, in the possession of an offensive weapon.

Queensland, *Criminal Code Act 1899* (Qld), Chapter 33A (maximum penalty imprisonment for 5 years, or 7 years where the offender uses or intentionally threatens to use, violence against anyone or anyone's property; or possesses a weapon within the meaning of the *Weapons Act 1990* ; or contravenes or intentionally threatens to contravene an injunction or order imposed or made by a court or tribunal under a law of the Commonwealth or a State. An offender liable to a maximum penalty of imprisonment for 10 years if any of the acts constituting the unlawful stalking are done when or because the stalked person is a law enforcement officer investigating the activities of a criminal organisation.

South Australia, *Criminal Law Consolidation Act 1935* (SA), s 19AA (maximum penalty imprisonment for 3 years for a 'basic' offence, and 5 years for an aggravated offence (as defined at s 5AA of that Act).

Tasmania, *Criminal Code Act 1924* (Tas), s 192 (the Act provides that, subject to exceptions, the punishment for any crime shall be by imprisonment for 21 years, or by fine, or by both such punishments, and shall be such as the judge of the court of trial shall think fit in the circumstances of each particular case).

Western Australia, *Criminal Code Act Compilation Act 1913* (WA), s 338E (maximum penalty of 8 years imprisonment where the offence is committed in circumstances of aggravation, or 3 years imprisonment in any other case.

behaviour.[631] The intention for the criminalisation of stalking behaviour was to remedy a long-standing gap in the criminal law – the lack of an appropriate remedy for people (predominantly women) who had been harassed or followed over a long period. [632]

Amendments in 2003 captured the use of technology to stalk, although this was not without its critics. The Victorian opposition expressed strong views that 'stalking is more of a physical act where one follows a person. To stalk in the normal context that we understand it is to follow somebody around and put them under duress by our physical presence and our physical relationship.'[633]

In 2011, the *Crimes Amendment (Bullying) Act 2011* amended the offence to address 'serious bullying in the community'.[634] The amending Act, informally known as 'Brodie's Law', was introduced following the suicide of 19-year-old Brodie Panlock. Before her death, Ms Panlock was subjected to significant workplace bullying by colleagues. The fact that none of those responsible for bullying Ms Panlock was charged with a serious criminal offence under

[631] *Crimes Amendment Act 1994* (Vic) ('*Crimes Amendment Act*'), s 3.

[632] See Rosemary Purcell, Michele Path and Paul E. Mullen, 'The prevalence and nature of stalking in the Australian community' (Pt UK: Informa UK Ltd) (2002) 36(1) *Australasian Psychiatry* 114; Sally Kift, 'Stalking in Queensland : from the nineties to Y2K' (1999) 11(1) *Bond Law Review* 144; Karen Whitney, 'Western Australia's new stalking legislation: will it fill the gap?' (1999) 28(2) *University of Western Australia Law Review* 293.

[633] Hon. C. A. Strong, Member for Higinbotham, (2 December 2003) Parliament of Victoria, Parliamentary Debates (Hansard) Legislative Council, 1992.

[634] Victoria, *Parliamentary Debates*, Legislative Assembly, Crimes Amendment (Bullying) Bill 2011 (Vic) Second Reading speech (6 April 2011), 1019 (Robert Clark, Attorney-General).

the Crimes Act compounded the impact of the suicide (each offender was convicted and fined under provisions of the *Occupational Health and Safety Act 2004*).[635]

Brodie's Law inserted the provisions at 21(da) to (dd) prohibiting offensive and abusive behaviour (detailed below) and expanded the concept of harm to include self-harm. In the relevant Second Reading Speech, Robert Clark (then Victorian Attorney-General) noted that bullying 'is behaviour that is calculated to cause mental harm to others. The behaviour often results in a victim suffering from a sense of powerlessness and despair.'[636] In the same speech, Mr Clark also expressed parliament's position that threats and abusive and offensive words or acts may form part of the course of bullying conduct and that the distress bullying causes its victims is so severe that it causes the victim to engage in suicidal thoughts.[637]

Subsection 21A(2) provides that a person stalks another person if they engage in a course of conduct intending to cause physical or mental harm to the victim, including self-harm or arousing apprehension or fear in the victim for their safety or that of any other person.

The offence provision captures a broad range of behaviours; the section below explores the offence's key features and its application by the courts.

5.4.1 Features and elements of the offence

A course of conduct:

[635] Ibid. See also, generally, Department of Justice (Victoria), *Bullying – Brodie's Law* (Web Page) <http://www.justice.vic.gov.au/home/safer+communities/crime+prevention/bullying+-+brodies+law,>.

[636] Robert Clark, above n 634, 1020.

[637] Ibid 1019-1020.

A course of conduct requires that the behaviour be engaged in on more than one occasion or that the behaviour be protracted,[638] and a continuity of purpose must be shown.[639] It must also be shown that the offender intended that their behaviour either caused physical or mental harm to their victim or aroused apprehension or fear for their safety (or that of any other person).[640]

Subsection 21A(2) provides a non-exhaustive definition of stalking and includes behaviours that, when repeated or combined, constitute a course of conduct. A course of conduct may include any of the following:

- Following the victim or any other person[641] or contact them by any means.[642]
- Contacting the victim or any other person by post, telephone, fax, text message, e-mail, or other electronic communication or by any other means whatsoever; electronically publishing a statement or other material relating to the victim or any other person; or purporting to relate to, or to originate from, the victim or any other person.[643]

[638] *Berlyn v Brouskos* (2002) 134 A Crim R 111 ('Berlyn v Brouskos'); *Gunes v Pearson and Tunc v Pearson* .

[639] *Nadarajamoorthy v Moreton* (2003) VSC 283 ('*Nadarajamoorthy v Moreton*').

[640] *Gunes v Pearson and Tunc v Pearson*.

[641] *Crimes Act*, s 21A(2)(a)

[642] Ibid s 21A(2)(b).

[643] Ibid s 21A(2)(ba).

- Tracing the victim's or any other person's use of the Internet or e-mail or other electronic communications;[644] making threats to the victim,[645]or using abusive or offensive words to or in the presence of the victim.[646]
- Keeping the victim or any other person under surveillance.[647]
- Acting in any other way that could reasonably be expected to cause physical or mental harm to the victim (including self-harm), or to arouse apprehension or fear in the victim for his or her own safety or that of any other person. [648]

Although each of the actions at subs 21A(2) are not necessarily standalone offences, [649] it is the culmination of behaviours and the intention behind that behaviour that amounts to stalking.[650] The concept of a course of conduct is fluid, and there is no need to decide which individual acts amount to a course of conduct.[651]

The offence provision also operates extraterritorially, and it is immaterial that some or all of the course of conduct occurred outside Victoria.[652] Given the pervasive nature of ICT, this is an essential element to address cyberbullying. Although there is limited evidence of

[644] Ibid s 21A(2)(bc).

[645] Ibid s 21A(2)(da).

[646] Ibid s 21A(2)(db).

[647] Ibid s 21A(2)(f).

[648] Ibid s 21A(2)(g).

[649] *Worsnop v R* (2010) 212 A Crim R 38, [70] (Ashely JA).

[650] *Nadarajamoorthy v Moreton*. A court can also have regard to the dictionary meaning of what is meant by the word “stalk”: *DPP v Sutcliffe* (2001) VSC 43 ('*DPP v Sutcliffe*'), [21]-[23] (Gillard J).

[651]*R v Hoang* [2007] VSCA 117 ('*R v Hoang*') (Neave JJA), cited in *Worsnop v R*, above n 649, [70].

[652] *Crimes Act*, ss 21A(6) and (7); *DPP v Sutcliffe*.

cyberbullying happening extraterritorially, the provision overcomes many jurisdictional and evidentiary issues that may apply to the location of servers held by companies such as Facebook.[653]

Injury:

'Injury' refers to both physical injury and harm to mental health.[654] Relevantly, harm to mental health includes psychological harm and suicidal thoughts but does not include an emotional reaction such as distress, grief, fear, or anger unless it results in psychological harm.[655] A victim is not required to prove a medical diagnosis or suffer a medically diagnosable condition.[656]

Intention:

Subsection 21A(3) requires that an offender intended to cause physical or mental harm to the victim (including self-harm or arouse apprehension or fear in the victim for his or her safety or any other person). There are three ways in which the prosecution can prove that the accused had the necessary intent - by proving that he or she actually intended to cause such harm, or arouse such apprehension or fear;[657] by proving that he or she knew that engaging in a course of conduct of that kind would be likely to cause such harm, or arouse such apprehension or fear;[658] or by proving that he or she ought to have understood,

[653] Although there may be issues with gathering evidence when dealing with international issues, the prosecution need only prove that some of the conduct occurred in Victoria.

[654] *Crimes Act* s15.

[655] Ibid s 21A(8).

[656] *R R v The Queen* [2013] VSCA 147 ('*R R v The Queen*').

[657] *Crimes Act*, s 21A(2).

[658] Ibid s 21A(3)(a).

in all the particular circumstances, that engaging in a course of conduct of that kind would be likely to cause such harm, or arouse such apprehension or fear, and it actually did have that result (s21A(3)(b)).[659]

The onus is on the prosecution to prove that the conduct in question resulted in causing physical or mental harm to the victim or arousing apprehension or fear in the victim for their safety.[660]

Given the broad range of behaviours and activities listed at subs 21A(2), the offence provision has captured behaviours such as following a victim,[661] loitering[662] and surveillance.[663] There are clear parallels between stalking and cyberbullying – stalking requires a course of conduct and an intention to harm. Bullying also requires the elements of repetition (i.e. a course of conduct) and an intention to harm.[664]

As with the offence under s 474.17, stalking is also mostly heard summarily and limited qualitative data is available. Therefore, the recommendation about the need for further research is also applicable here.

[659] Ibid s 21A(3)(b).

[660] Ibid., s 21A(3); *R v Maccia* [2003] VSC 384, [22] (Gillard J); *Gunes v Pearson*. The responses detailed at s 21A of the *Crimes Act* include physical or mental harm to the victim, including self-harm, or of arousing apprehension or fear in the victim for his or her own safety or that of any other person.

[661] *Slaveski v State of Victoria and Others* [2010] VSC 441 ('*Slaveski v State of Victoria and Others*').

[662] *Nadarajamoorthy v Moreton*.

[663] *R v Anders* (2009) 193 A Crim R 202 ('*R v Anders*').

[664] Consider, for example, the discussion involving Olweus, and Hinduja & Patchin in Chapter 3.

5.4.2 Application to bullying by children

Unlike s 474.17, stalking is not limited to online behaviours and can capture all forms of bullying. However, the scale of the penalty may be a deterring factor for consideration by law enforcement officers. Whilst online behaviours captured by s 474.17 are subject to a maximum penalty of three years' imprisonment, a combination of online and offline prohibited behaviour exposes perpetrators to a maximum term of imprisonment of 10 years.

Stalking also captures some elements of Olweus' bullying definition. The course of conduct requires repetition and an intention to cause harm, and arousing apprehension or fear in a victim leads to an imbalance of power. Arguably, many of the individual actions can also be seen as aggressive behaviours.

There is also precedent for stalking being used as a response to cyberbullying behaviour. In February 2009, seventeen-year-old Allem Halkic of Melbourne, Australia, took his own life. In the preceding 24-hour period, he received five threatening SMS messages from a former friend, twenty-year-old Shane Gerada.[665] The messages from Gerada included numerous threats such as "I'll put you in hospital" and "Don't be surprised if you get hit some time soon".[666]

The case was heard at Melbourne Magistrates' Court in April 2010 and reported by the media to be the first time a cyberbullying matter had come before the Victorian judiciary. The court convicted Gerada for stalking, placing him on an 18-month community correction

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[665] Shannon Deery, 'Father of bullying victim lashes Premier Brumby on cyber-bully policy', The Herald Sun (online), 14 September 2010 <http://www.heraldsun.com.au/news/victoria/father-of-bullying-victim-lashes-brumby-on-new-policy/news-story/6ba4717c4251329d68576cd3bd209f47?sv=d4f0fddf526377a13eaa4816b86cce85>.

[666] Selma Milovanovic, 'Man avoids jail in first cyberbullying case', *The Age* (online), 9 April 2010 <http://www.theage.com.au/victoria/man-avoids-jail-in-first-cyber-bullying-case-20100408-rv3v.html>.

order. In his sentencing remarks, Magistrate Peter Reardon said it was clear 'there is an increase in this type of activity where people send via internet, SMS or other means aggressive threats to other people. A message needs to be sent to the community that these sorts of behaviours need to be punished.'[667]

The offence provision offers a remedy for dealing with bullying in all its forms. Further, Olweus' elements of intention, repetition, and power imbalance are evident in the offence provision's drafting. For this offence, intention can include recklessness, repetition is a core requirement, and a power imbalance is caused by putting a person in fear of (or being subject to) harm. Although individual acts may not be aggressive, the overall impact of stalking is that it can be aggressive behaviour.

A difficulty arises in that there is a disparity in the maximum penalty between ss 471.17 and 21A. Purely online behaviour may be captured by either ss 474.17 (carrying a maximum penalty of three years) or 21A (carrying a maximum penalty of ten years). Although there are mechanisms in place to protect children from significant penalties in the youth justice system, there is a reluctance shown by some police officers to charge children for stalking. In practice, this may mean that most (if not all) cases of nonphysical offline bullying[668] may not be subject to prosecution.

There is a clear need for an offence that captures all forms of bullying, and in Victoria's case, that offence is stalking under s 21A of the *Crimes Act*. As Langos' taxonomy argues, there is no clear legal response to behaviours captured by behaviours in categories

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[667] Lauren Wilson, 'Cyber bully convicted', *The Australian* (online), April 9, 2010, <http://www.theaustralian.com.au/news/nation/cyber-bully-convicted/news-story/89bf839ef5a49bade777b76d08bcbfe3>.

[668] As argued in Chapter Three, common assault would have been the likely offence provision applying to 'sufficiently serious' physical bullying - *Summary Offences Act 1966* (Vic), s 23.

two or three. However, where those behaviours form part of a course of conduct, and that course of conduct causes physical or psychological harm, then there is a legitimate need for legal recourse to address that harm.

As demonstrated below, stalking is actively prosecuted as a response to behaviour by children in Victoria.

5.5 Volume of offending and prosecutions

Attention now turns to the number of summary prosecutions conducted under each of the offence provisions. In 2014, the Department of Communications[669] released a Discussion Paper to canvas the election commitments detailed in the Enhancing Online Safety for Children Policy.[670] The Paper took the view that s 474.17 of the *Criminal Code* was the 'existing offence provision' responding to cyberbullying.[671] The Paper further (erroneously) noted that since coming into effect in 2005, the provision had led to 308 successful prosecutions for a broad range of conduct involving the internet, including eight prosecutions involving defendants under 18 years of age.[672]

As outlined in Chapter One, the data analysis involves two key data sets – the number of alleged offender incidents (AOI) recorded by Victoria Police and the total number of prosecutions for each offence provision at the CCV. In addition, the data separates the

[669] As it was then known. From 30 June 2020, the Department of Communications formed part of the Department of Infrastructure, Transport, Regional Development and Communications.

[670] Department of Communications (Cth), 'Enhancing Online Safety For Children (Discussion Paper)', (2014), Canberra, Australia.

[671] Ibid 21.

[672] Ibid. This statement has been interrogated in the discussion on the application of s 474.17 in Chapter Five.

number of defendants aged under 18 at the time of the alleged offending, enabling a comparison of alleged offending and prosecutions of children and the adult population to provide an indicator of the ratio of alleged offending between children and the adult population.

The data sets were sourced from the Crimes Statistics Agency of Victoria (CSA), the MCV and the CCV.[673] The data obtained from CSA show the total number of alleged offender incidents reported on Victoria Police's Law Enforcement Assistance Program database (LEAP). The LEAP database shows the total number of AOIs attended by Victoria Police and represents one alleged offender but may involve multiple victims and offences. Data showing the progression from AOI to prosecutions illustrates two important issues. Firstly it demonstrates the extent to which of Victoria Police prosecute children following an AOI, and secondly, it illustrates the application of mechanisms in the youth justice system that deter children away from the court system.

The data sets for each offence provision covers the date range of 1 July 2005 to 30 June 2020, illustrating the growth in the number of cases in Victoria. The start date of 1 July 2005 has been chosen for both offence provisions as it was the commencement date for s 474.17, enabling a comparison of the application of the two offence provisions examined in this thesis.

The data is subject to the caveat that the reports are per financial year, therefore an eventuating proceeding may not necessarily be related to an AOI during the same period. Further, no data is provided showing the total volumes of prosecutions against adults. Early

[673] As noted above, initial inquiries with Court Services Victoria indicated that very few cases (<1%) were heard under the offence provisions on indictment at a Superior Court. On that basis, the data sets presented in this chapter show cases heard summarily as they capture over 99% of prosecutorial action.

research for this section showed that over 90% of AOIs involving adults resulted in prosecution for each of ss 21A and 474.17. However, following a limitation on the publication of data provided by the MCV, it was not tenable to produce current data tables for comparison. In any event, such data would not add to the current discussion involving the application of criminal law to children in Victoria.[674]

A final data set shows the total volume of prosecutions conducted under s 474.17 in NSW, Queensland, and Victoria between 2005 and 2013, providing a more accurate representation of the volume of cases during that period rather than the assertion contained in the eSafety Policy. The reasons for the data set are laid out in more detail below.

5.5.1 Alleged offending - s 474.17

The two figures below detail the total volume of AOIs in Victoria in 2005-2020 for alleged offending under s 474.17. The first figure shows the total AOIs across all age groups, and the second figure only shows total AOIs involving children.

[674] The slight decrease in data for 2019-20 across all data sets may in part be attributable to the impact of coronavirus.

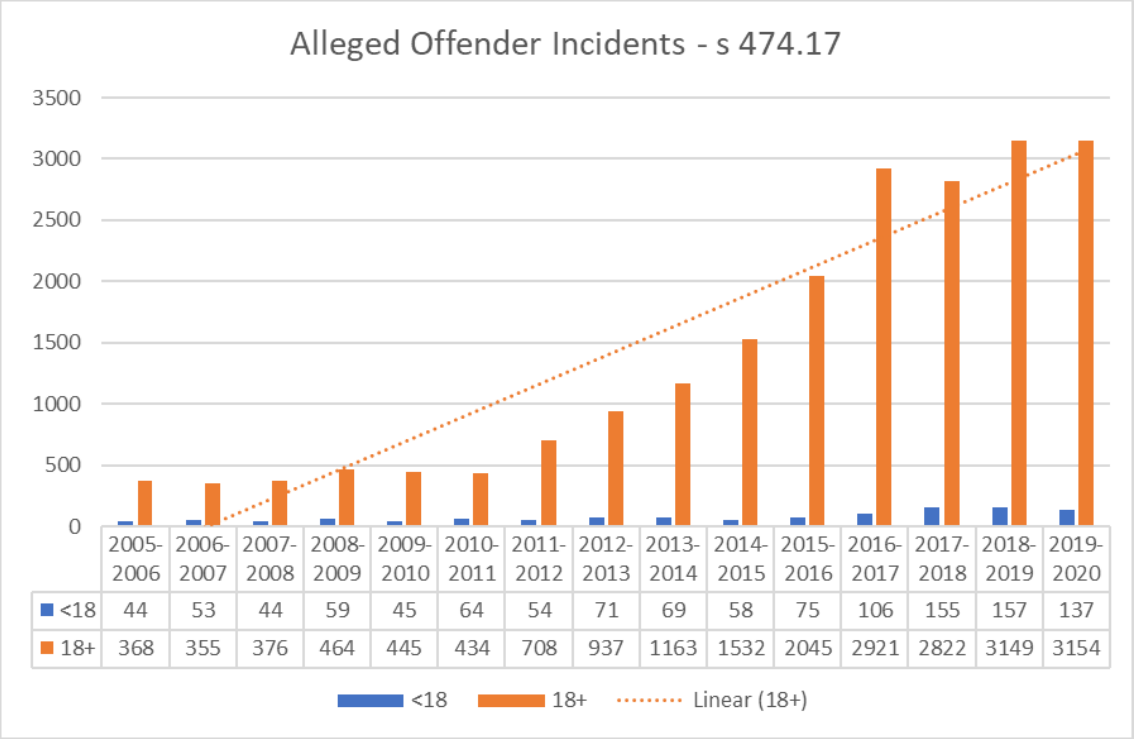


Figure 4 Alleged offender incidents s 474.17 Victoria (all offenders).

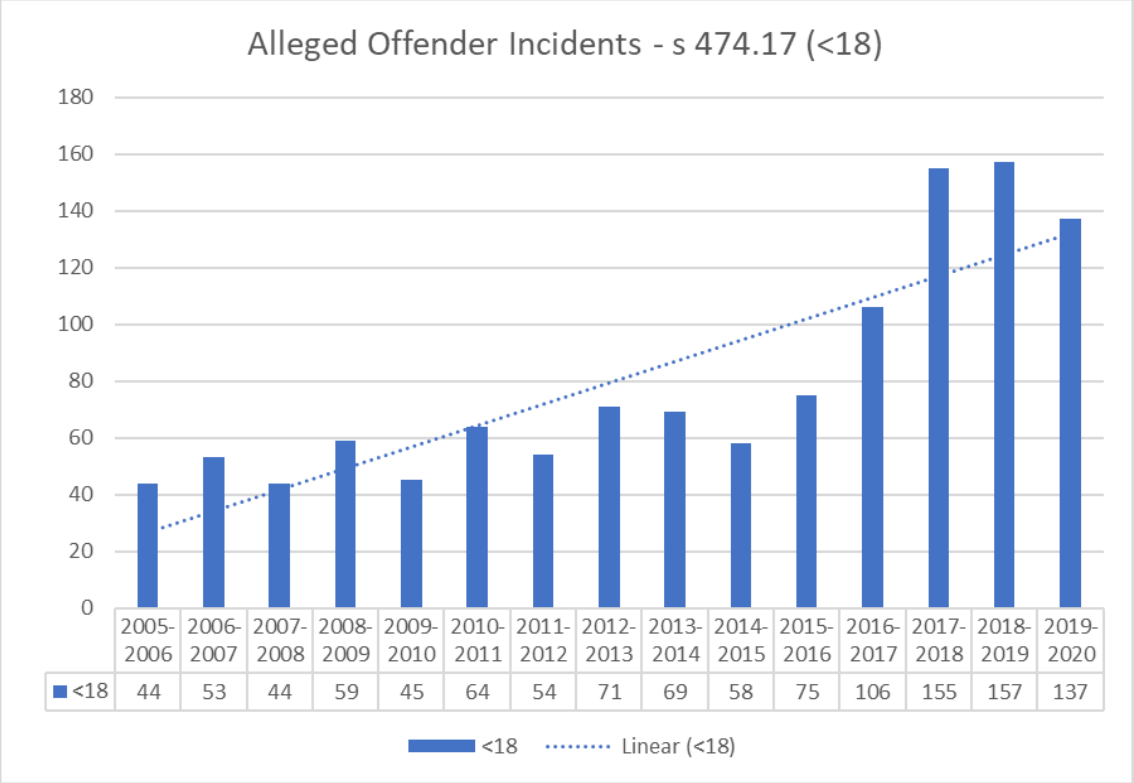
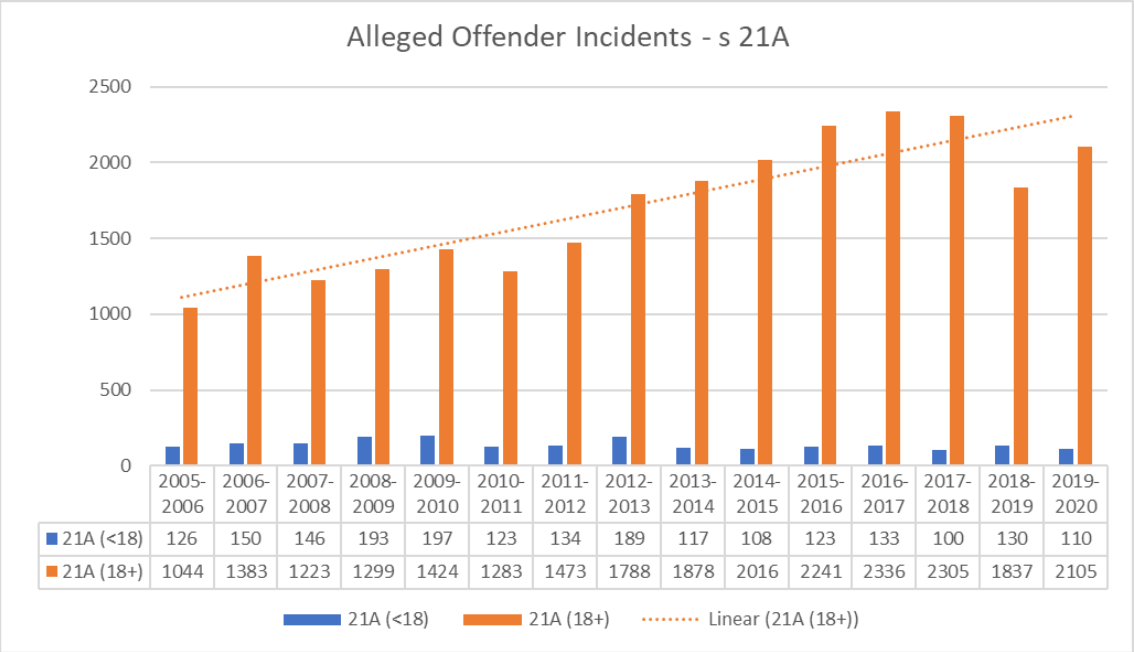


Figure 5 Alleged offender incidents s 474.17 Victoria (child offenders).

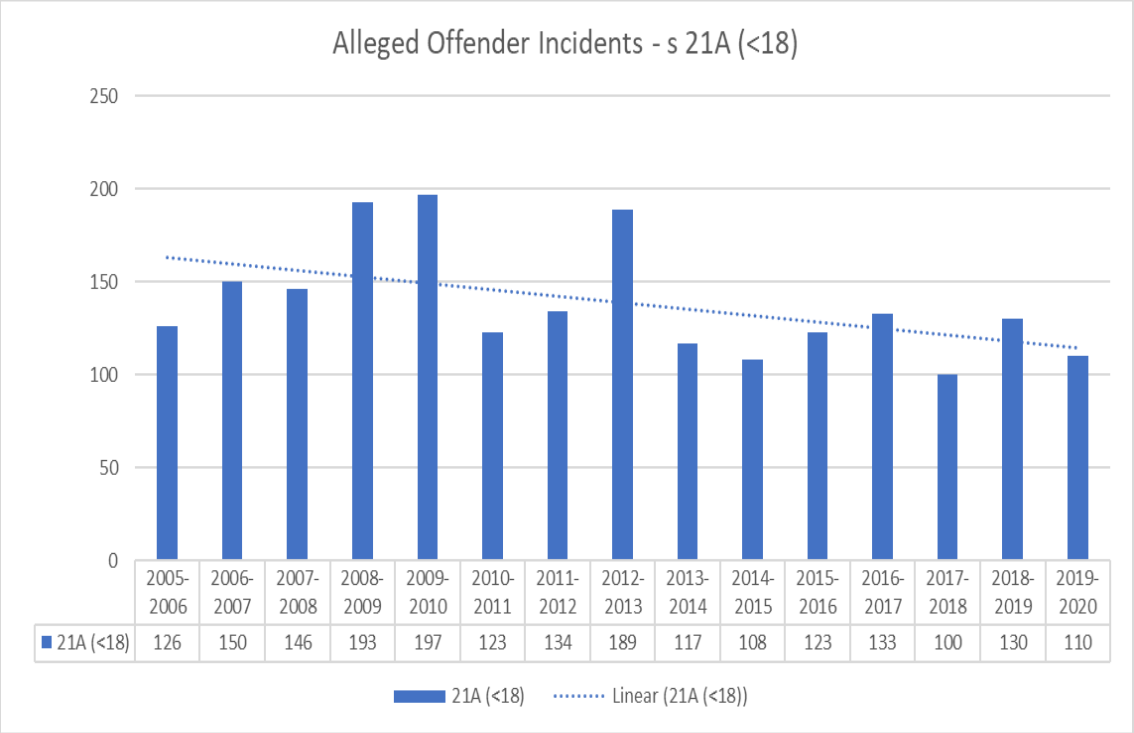
5.5.2 Offending behaviour under s 21A of the Crimes Act

The two figures below detail the total volume of AOIs in Victoria in 2005-2020 for alleged offending under s 21A. Again, the first figure shows the total AOIs across all age groups, and the second figure only shows total AOIs involving children



	2005-2006	2006-2007	2007-2008	2008-2009	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020
21A (<18)	126	150	146	193	197	123	134	189	117	108	123	133	100	130	110
21A (18+)	1044	1383	1223	1299	1424	1283	1473	1788	1878	2016	2241	2336	2305	1837	2105

Figure 6 Alleged offender incidents s 21A Victoria (all offenders).

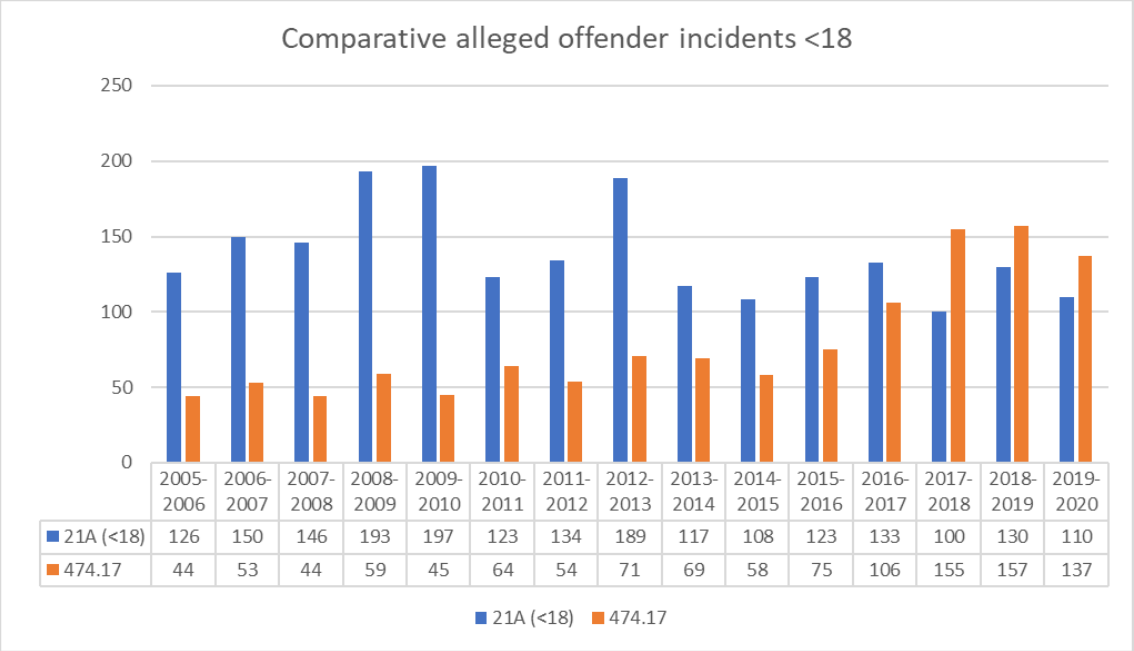


	2005-2006	2006-2007	2007-2008	2008-2009	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020
21A (<18)	126	150	146	193	197	123	134	189	117	108	123	133	100	130	110

Figure 7 Alleged offender incidents s 21A Victoria (child offenders).

5.5.3 A comparison of AOIs.

The next figure compares the total number of AOIs involving children across the two offence provisions.

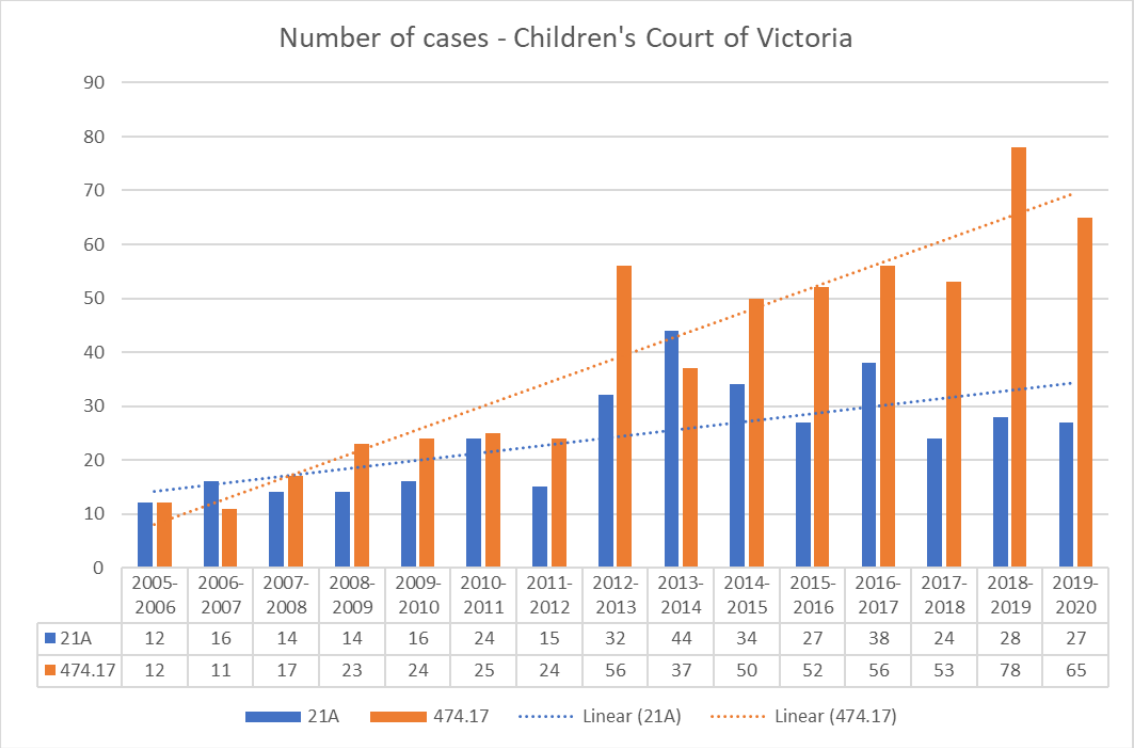


	2005-2006	2006-2007	2007-2008	2008-2009	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020
21A (<18)	126	150	146	193	197	123	134	189	117	108	123	133	100	130	110
474.17	44	53	44	59	45	64	54	71	69	58	75	106	155	157	137

Figure 8 Comparison of alleged offender incidents (children only).

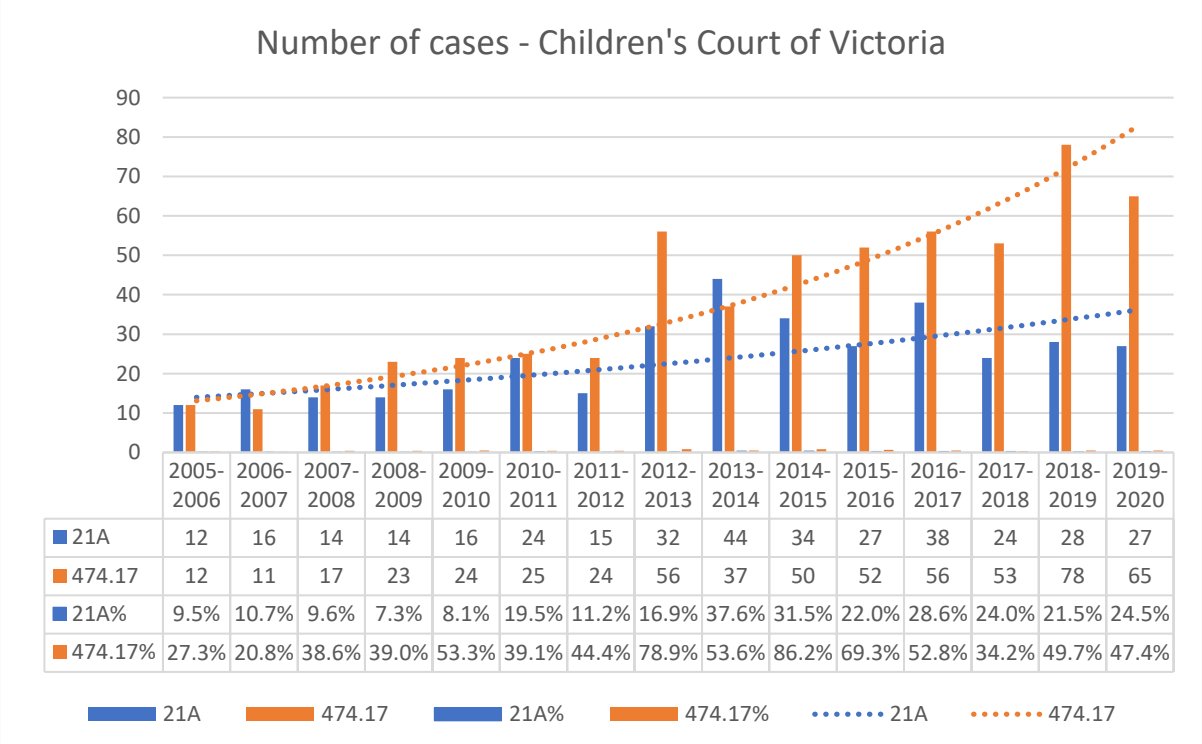
5.5.4 Total number of cases at CCV

The next two figures show the total number of cases heard at the CCV resulting from the AOIs above. The second figure shows the total number of prosecutions as a percentage of AOIs during the same period and provides a track bar detailing growth in the number of AOIs resulting in prosecution.



	2005-2006	2006-2007	2007-2008	2008-2009	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020
21A	12	16	14	14	16	24	15	32	44	34	27	38	24	28	27
474.17	12	11	17	23	24	25	24	56	37	50	52	56	53	78	65

Figure 9 Total number of proceedings at the Children's Court of Victoria for each of ss 21A and 474.17.



	2005-2006	2006-2007	2007-2008	2008-2009	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020
21A	12	16	14	14	16	24	15	32	44	34	27	38	24	28	27
474.17	12	11	17	23	24	25	24	56	37	50	52	56	53	78	65
21A%	9.5%	10.7%	9.6%	7.3%	8.1%	19.5%	11.2%	16.9%	37.6%	31.5%	22.0%	28.6%	24.0%	21.5%	24.5%
474.17%	27.3%	20.8%	38.6%	39.0%	53.3%	39.1%	44.4%	78.9%	53.6%	86.2%	69.3%	52.8%	34.2%	49.7%	47.4%

Figure 10 Total number of proceedings at the Children's Court of Victoria for each of ss 21A and 474.17, with percentages of AOI's leading to prosecution.

5.5.5 Analysis of the data

In addition to demonstrating the volume of alleged offending and prosecutions under each provision, the data in Figures 4 to 10 illustrate many interesting findings, including:

- Continued growth in the number of AOIs for s 474.17 in both the adult and child population.
- Continued growth in the number of AOIs for s 21A in the adult population, yet a decrease in the number for children.
- Victoria Police continued to register more AOIs for s 21A than s 474.17 until 2017.
- Children were significantly more likely to be prosecuted for alleged offending under s 474.17 than s 21A.

These findings may suggest that, until 2017, Victoria Police were more likely to record matters as stalking on LEAP. This finding could be on two possible grounds. Firstly, it may be familiarity with state offence provisions rather than Commonwealth offences. Secondly, the behaviour in question may expand beyond purely online behaviour (i.e. thereby excluding s 474.17 from consideration as a possible offence provision).

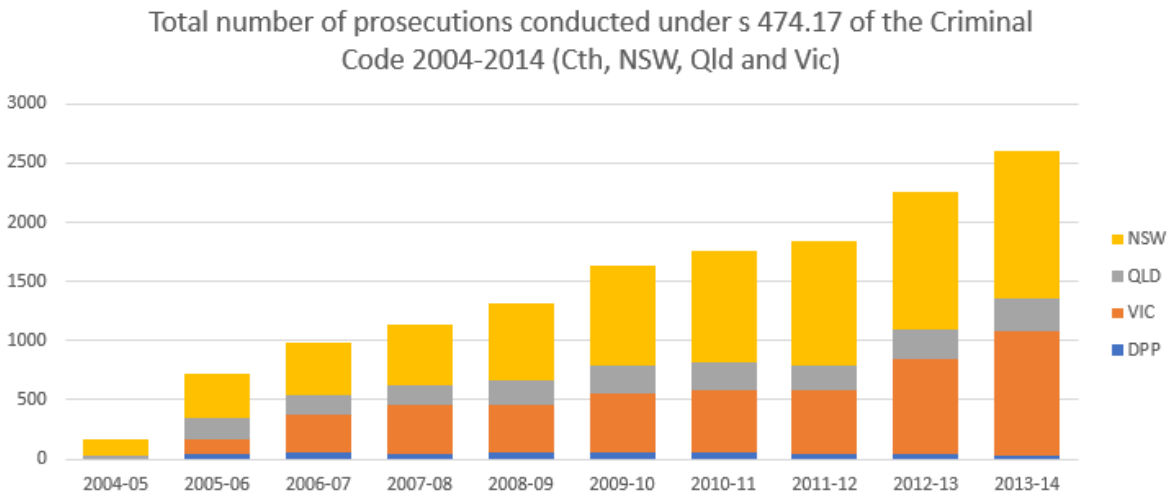
More importantly, the data in Figures 9 and 10 show that, despite more AOIs for s 21A, children were significantly less likely to be prosecuted for stalking. The significant decrease may indicate that practices and policies such as police discretion or relevant prosecution policies protect a significant proportion of children from the criminal justice system for s 21A. By way of contrast, Figure 10 shows a significantly higher overall percentage of children prosecuted for alleged offending under s 474.17.

The trend lines in Figure 9 show a much more profound growth in the number of proceedings under s 474.17 than for s 21A. These findings may warrant future research into the ongoing application of the relevant offence provisions.

5.5.6 The application of 474.17 in the period 2004-2013

As noted above, the Enhancing Online Safety Discussion Paper reported that the total number of ‘successful’ prosecutions conducted under s 474.17 in 2004-2013 was 308.

Data obtained from the Commonwealth DPP under Freedom of Information[675] showed 417 matters heard during the same period. On that basis, it appears that 109 of those may have been 'unsuccessful' prosecutions. However, data sourced from the justice departments of Australia's three largest jurisdictions (NSW, Qld, and Victoria) shows a vastly different picture as those jurisdictions heard almost 14,000 prosecutions during the same time.



YEAR	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	**Total**
NSW	142	373	436	515	646	844	939	1,042	1,168	1,244	**7,349**
QLD	20	176	172	172	202	229	241	215	245	284	**1,956**
VIC	0	125	319	407	407	504	529	538	806	1,041	**4,676**
DPP	4	41	51	46	57	55	51	40	37	35	**417**
Total	**166**	**715**	**978**	**1,140**	**1,312**	**1,632**	**1,760**	**1,835**	**2,256**	**2,604**	**14,398**

Figure 11 Comparison of the total number of prosecutions undertaken by the CDPP and those undertaken in selected state courts of summary jurisdiction 2004-2014.

The data above in Figure 11 shows that the previously cited figures were grossly incorrect — as a percentage of total matters heard from 2004-2014, the CDPP prosecuted less than 3% of matters across the chosen jurisdictions. This reliance on erroneous data suggests that a fundamental review of the process establishing the eSafety regime and its recommendations is warranted. Whilst it may be that matters prosecuted by the CDPP represent the 'sufficiently serious' incidents, there was close to 14,000 other identifiable

[675] *Freedom of Information Act 1982* (Cth).

cases (being at least 97% of matters) that were also seen as sufficiently serious to warrant prosecution by the selected states. Furthermore, whilst the data above shows Australia's three largest jurisdictions, inquiries with the other jurisdictions showed that their respective law enforcement agencies had also undertaken prosecutions since the commencement of s 474.17.[676]

As the next chapter argues, as an example of evidence-based regulation, the size of the problem to be addressed was significantly underestimated. As detailed in Figure 110, the CCV heard 192 matters involving children during the period 2005-2013. Therefore, the response by the Commonwealth as a response to counter cyberbullying was not sufficiently informed nor adequately developed to take into account the true volume of prosecutions undertaken. Nevertheless, children were actively being prosecuted, and clearly, there was a need to consider (in line with the Enhancing Online Safety Policy) a criminal law option for dealing with cyberbullying by children.

Further, the data clearly shows that the number of matters prosecuted by the CDPP peaked in 2008-09 and began to decrease, whereas the number in each of the listed states continued to increase each year. This may be attributable in part to the relevant police gaining experience in prosecuting the offence.

[676] Preliminary enquires were made with relevant justice departments in the Australian Capital Territory, the Northern Territory, Tasmania, South Australia and Western Australia. All responded indicating that, whilst at a lower number, prosecutions had been undertaken in the period 2005-2013, including actions at their relevant youth courts. All state and territory police forces are empowered to enforce Commonwealth criminal laws (stemming from the power of their relative courts to hear federal matters under s 77(iii) of the Australian Constitution).

5.6 Conclusion

This chapter demonstrates that children are increasingly subject to prosecution in Victoria under each of the offence provisions explored, despite being serious indictable offences.

It is easy to conceive of s 474.17 as applying to cyberbullying. The objective test concerning the use of a carriage service requires a reasonable person to find the behaviour (in all the circumstances) to be menacing, harassing or offensive. In *Monis*, the High Court reminded us that the reasonable person requirement is a construct that requires a judge or jury 'to put to one side subjective reactions which may be related to specific individual attributes or sensitivities.'[677] Thus, the reasonable person is a constructed proxy for the judge or jury.[678]

The application of stalking to offline and online behaviours overcomes the limitation of s 474.17, only applying to online bullying. Although the offence is drafted to cover the range of behaviours in paragraphs 21(A)(2)(a) – (f), it is necessary to prove the intent to cause physical or mental harm to the victim or that the offender ought to have understood that their behaviour would cause harm The offence provision also looks at the cumulative effect of the offender's behaviours in causing that harm. Therefore, it can account for several 'lesser' incidents of harm (arguably, this is also true of the 'method of use' offence at s 474.17).[679] As argued in Chapter Three, cyberbullying is rarely a standalone behaviour, and as such, the offence of stalking provides a criminal law response to tackle combinations of online and offline bullying.

[677] *Monis*, [44] (French CJ).

[678] Ibid.

[679] *Nadarajamoorthy v Moreton*.

This chapter's empirical data shows a growing number of AOIs and prosecutions under each offence provision. This growth is especially true about behaviour by children. While the comparative data shows a higher percentage of prosecuted AOIs for adults, there remains a continued and troubling growth in the volume of AOIs and children prosecuted. The data shows an apparent reduction between the number of AOIs and eventuating number of children prosecuted when contrasted with the significantly higher level of proceedings commenced against alleged offenders aged 18 or above. Much of this may be attributable to Victoria Police's role as gatekeepers to prosecution and the relevant public prosecution policy's role to minimise the criminal law's application to children within a court setting (as discussed in Chapter Two).

Further work may be warranted to explore why there is continued growth in the volumes of AOIs and prosecutions of children. Several factors could be in play, such as an increase in the overall number of offences or there is a greater understanding and awareness of what the law is. Whilst the data presented in this thesis provides a baseline source for future research, qualitative data could discover the reasons for the increased level of AOI and prosecutions.

This chapter makes clear that these laws are regularly being applied to behaviour by children in Victoria. As discussed above, these may not necessarily be bullying or cyberbullying; however, given the level of the penalty attached to the offence provisions, there is a need to protect children where possible from these offence provisions by having a broader range of responses to bullying behaviour (these appear at Chapter Seven of the thesis).

Finally, the finding that the eSafety regime was developed based on significantly erroneous data about the number of prosecutions conducted under s 474.17 is a significant concern. The figure of 308 ‘successful’ prosecutions is the metaphoric ‘tip of the iceberg’ and the true size of the actual problem needs to be addressed in developing an appropriate and robust evidence led response to cyberbullying.

Part C: Identifying and establishing a criminal law threshold

Chapter Six – Identifying the line at which bullying behaviour warrants a criminal law response

6.1 Introduction

This part of the thesis critically examines how the responses detailed in Part B address bullying by children, and it also argues for significant reform to ensure that the line at which bullying and cyberbullying warrants criminalisation is clearly drawn.

As shown in Chapter Three, bullying behaviour can cause significant harm. However, how the law assists with identifying harmful behaviours and responding to them remains the central line of enquiry in this thesis.

This part of the thesis uses a graduated response model based on Ayres and Braithwaite's regulatory pyramid as a framework for evaluation.[680] At the base of the pyramid are the non-criminal responses of eSafety and personal safety intervention orders (noting that there will be no further discussion of tort). Criminal law responses form the top part of the pyramid, with the offence of stalking at the apex, representing the offence provision with the highest penalty level.

[680] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992), 35.

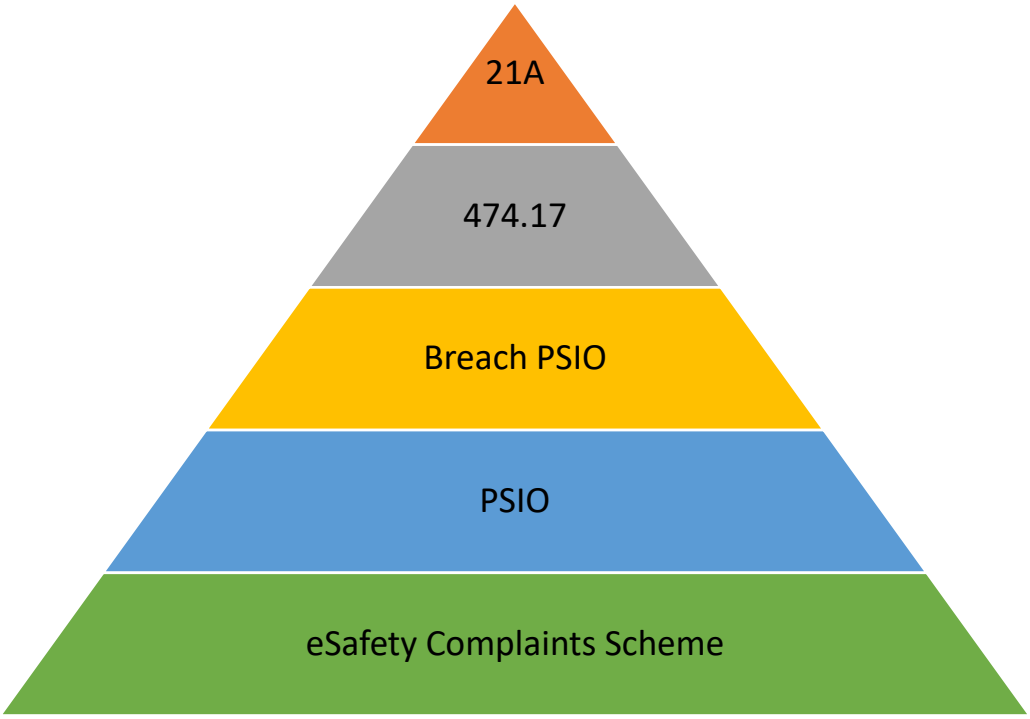


Figure 12 Graduated response - existing options.[681]

This chapter analyses regulatory and criminal law responses to cyberbullying and the relevant responses are examined from the least punitive to most punitive responses.

The pyramid categorises options in terms of their impact on the rights and liberties of an alleged offender. For example, the eSafety complaints scheme has no criminal sanctions attached, whereas contravening a PSIO does. The act of contravention, therefore, becomes the segue between civil and criminal law.

6.2 Non-criminal law responses

The section below examines the effectiveness of the non-criminal law responses in reducing or responding to bullying and cyberbullying and whether there is a need for a criminal law response. As will be detailed, the responses will be measured according to their

[681] Note – the colours have no additional meaning. They are merely meant to differentiate each category of response.

ability to minimise harm and incidents of behaviour, the extent to which there is some form of sanction attached to the offending behaviour, and whether there is an effective recourse for victims.

As will be detailed, there is significant growth in both the number of complaints reported to Office of the eSafety Commissioner and in the number of PSIOs being applied for by children. Cumulatively, these suggest that there is a growing problem to be addressed and that the response to that problem is largely ineffective.

6.2.1 Enhancing Online Safety

This thesis argues that the eSafety complaints scheme is ill-designed to respond to most cyberbullying incidents and therefore fails to achieve the stated intent of the Liberal Party's Enhancing Online Safety for Children Policy that formed a key part of their 2013 election campaign. That Policy outlined an intention to provide a safety net where service providers failed to take down the material. However, as argued in part 4.4.4. of this thesis, the scheme in practice overwhelmingly fails to deliver on that intention. Two issues likely cause this failure – the threshold at s 5 of the *eSafety Act* is extraordinarily high for a civil or regulatory process, and the limited scope of service providers captured by the two-tier scheme.

As detailed in Chapter Four, s 5 of the *eSafety Act* entrenches a requirement that cyberbullying material must have the effect of seriously threatening, seriously intimidating, seriously harassing or seriously humiliating the Australian child.[682] This requirement suggests that the severity of the material in question goes beyond the threshold required for criminalisation under s 474.17 of the *Criminal Code*, which merely requires that a reasonable person regard the use of the carriage service as being, in all the circumstances, menacing, harassing or offensive. The harm required also goes beyond what is required by s 21A of the

[682] *eSafety Act* s 5.

Victorian Crimes Act. Neither offence provision requires the harm caused, or effect, to be 'serious'.

This threshold is concerning, particularly given that the High Court held that the level of behaviour for a breach of s 471.12 (being a parallel provision to s 474.17) must be at the upper end of the spectrum.[683] The threshold issue may stem from the development of the *eSafety Act,* and as outlined earlier, the data cited by the Department of Communications captured less than 3% of the total number of proceedings conducted under s 474.17 of the Criminal Code during the period 2005 to 2013.

Firstly, as an example of evidence-based regulation, the size of the problem to be addressed was significantly underestimated. Thus, the response by the Commonwealth was not adequately developed. Further, the belief that only eight prosecutions of children had occurred in the preceding decade may have influenced the government to consider that the criminal law already effectively responded to cyberbullying incidents by young persons (despite the creation of a new offence provision forming a key part of the policy going into the federal election). However, as the data in this thesis shows, there were 229 prosecutions of children in 2004-14 at the CCV alone. This error is significantly problematic from an evidence-based regulation view, particularly given that a standard part of developing a legislative response to issues is to use a regulatory impact assessment (RIA).

An RIA process is intended to 'force policy makers to consult, and to work through a sequential process of articulating the problem, assessing a range of options, recommending the best option and explaining why other options are not good'. [684] The use of RIA occurs in all Australian jurisdictions, with the Office of Best Practice Regulation stating that the

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[683] *Monis*, [73] (French CJ); [336] (Crennan, Kiefel and Bell JJ).

[684] Australian Government (2010), Best Practice Regulation Handbook, Canberra at 17 to 19. A slightly varied 6 step approach is adopted in Victoria: Government of Victoria, 2011, Victorian Guide to Regulation, Department of Treasury and Finance, Melbourne at 43.

‘Australian Government and COAG have best practice regulation requirements in place to ensure that regulation is effective in addressing an identified problem, and efficient in terms of maximising the benefits to the community, taking account of the costs’.[685]

To achieve this, the Commonwealth’s Best Practice Regulation Handbook sets seven criteria for assessing the adequacy of a Regulatory Impact Statement (RIS), including a requirement that the RIS should clearly identify the problem that needs to be addressed, including evidence of the problem, documenting existing regulation and identifying relevant risks.[686]

This thesis argues that the mistake about the magnitude of the problem to be remedied led to the development of an overly ‘light-touch’[687] statutory removal/take-down scheme forming the primary regulatory response to cyberbullying, rather than undertake further consideration about the need for a new, lower-level offence and access to restorative or therapeutic justice. As detailed in the previous chapter, the number of actual prosecutions clearly shows that the criminal law is being applied far more than thought and, if the correct number of prosecutions were identified, ought to have led to criminal law reform following stated policy.

The Regulatory Impact Statement (RIS) to the eSafety Bill noted that victims have no recourse against a bully and that the ‘situation is likely to be contributing to a perception that cyberbullying is not currently adequately addressed nor does it carry any consequences for the perpetrator’.[688] The cyberbullying complaints scheme development focused on two key

[685] Ibid.

[686] Ibid.

[687] The Hon Paul Fletcher MP, Parliamentary Secretary to the Minister for Communications, House of Representatives Hansard, 3 December 2014, pp 14038–14039.

[688] Regulatory Impact Statement, Enhancing Online Safety for Children Bill 2014 (Cth), 36 (‘EOSFC Bill RIS’).

powers: removing the material and issuing end-user notices. Each of these powers is flawed. As argued below, the Office of the eSafety Commissioner fails to meet its intended role in exercising those powers.

The cyberbullying provisions in the eSafety Act, as made, contain no criminal sanctions, despite a significant volume of proceedings being brought under s 474.17 of the Criminal Code and continued growth in the number of cases (including children). Accordingly, it sits at the base of the graduated response pyramid.

Removal regime

The *eSafety Act* does not directly prohibit cyberbullying and is limited to take down powers for five social media platforms. The 2018 Report of the 'Statutory Review of the Enhancing Online Safety Act 2015' (the Briggs Report) noted this limitation.[689] The Briggs Report recommended redrafting the legislation in such a way as to embrace all relevant platforms, services, distribution mechanisms and devices and the future state of online and digital communication in a way that is technology and platform-neutral as far as is possible, recognising that the online industry is unlikely to ever be in a steady state.[690] This recommendation became part of a broader online safety reform project announced by the (then named) Department of Communications and the Arts in December 2019[691] and is consistent with arguments earlier in this thesis.

[689] Lynelle Briggs AO, Report of the Statutory Review of the Enhancing Online Safety Act 2015, and the Review of Schedules 5 and 7 to the Broadcasting Services Act 1992 (Online Content Scheme), Commonwealth of Australia, October 2018 ('Briggs Report').

[690] Briggs Report, 21.

[691] The outcome of the reform project is outside the scope of the thesis. Any information known at the time of submission will be appended to the thesis. The Department of Communications became part of the Department of Infrastructure, Transport, Regional Development and Communications in 2020.

Despite this, the Briggs Report believed that the cyberbullying complaints scheme was considered an appropriate safety net for users.[692] In terms of being a 'safety net' when a social media service fails to take the material down, this view is correct. However, this thesis argues that the complaints scheme is ineffective because it sets an overly high threshold for applications and acts primarily as a 'safety net'. However, the threshold to get to that 'safety net' is far too high for such a limited outcome, and the *eSafety Act* does not make it an offence to engage in cyberbullying, and it is argued that the 'serious' requirement at s 5 of the *eSafety Act* is why less than 5% of complaints are actioned.[693]

End-user notices

As permitted by s 41 of the eSafety Act, the issuing of an end-user notice was considered by the government to be the second essential tool in responding to cyberbullying. Relevantly, the RIS states:

> In this regard, a further element of the framework announced by the Government in October will be a power for the Commissioner to issue a notice against a person who has posted cyberbullying material targeted at an Australian child.
>
> This notice, an 'end user notice', will for example require the end user who posted the material to remove it; to refrain from posting more such material; or to apologise to the victim.
>
> The Government has drawn on a number of models in developing this mechanism … They have found that in many cases a formal written request to cease cyber-bullying behaviour, issued by their service, resolves the issue.[694]

An end-user notice may require the end-user to take all reasonable steps to ensure the removal of the material, refrain from posting additional material targeted at the child, or

[692] Briggs Report, 7.

[693] The refusal to action a complaint is a reviewable decision before the Administrative Appeals Tribunal (*eSafety Act*, s88(5)).

[694] EOSFC Bill RIS, 37. Note, the RIS used the term 'end user' as opposed to 'end-user' which appears in the *eSafety Act*.

apologise to the child for posting the material.[695] However, as noted earlier, the eSafety Commissioner had not issued any end-user notices,[696] stating that the circumstances warranting such a 'serious intervention' have not arisen.[697] This is somewhat problematic considering the data presented in Chapter Five showing the growth in the number of children being prosecuted under each of s 21A and s 474.17 for what may be considered cyberbullying behaviour. In fairness to the Office of the eSafety Commissioner, the issue may be due to a lack of resources to facilitate such enforcement actions. As detailed earlier in the thesis, the Commissioner has been conferred with many additional powers. However, a cursory review of their annual reports does not show a corresponding growth in staffing levels or funding.

Section 43 of the *eSafety Act* requires a person to comply with an end-user notice and provides that non-compliance may be dealt with following the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) (the *RP Act*). The *RP Act*[698] and the *eSafety Act*[699] provide for making an application to the Federal Court of Australia (FCA) or Federal Circuit Court seeking an injunction. However, the ability to seek an injunction at either court is curtailed by FCA Rules, treating a minor as being a 'person under a legal incapacity',[700]

[695] *eSafety Act* ss 41 and 42.

[696] Briggs Report, 19. The *Office of the eSafety Commissioner Annual Report*s for 2018-19 and 2019-20 did not contain details of any end user notices being given during those year.

[697] Ibid 24.

[698] *Regulatory Powers (Standard Provisions) Act 2014* (*'RP Act'*), pt 7.

[699] *eSafety Act*, s 48.

[700] *Federal Court of Australia Rules 2011* (Cth) ('FCA Rules'), div 9.6.

needing a litigation guardian[701] unless the Court dispenses with the need for that Rule.[702] If either of the relevant courts were minded to enjoin,[703] the Court could injunct a minor to do a specified thing (e.g. stop messaging a specified person).[704] Failure to comply with an injunction amounts to contempt of court.[705]

Simply put, the Federal Court Rules are not designed to deal with children as participants in proceedings, and there is a need for a more effective framework when dealing with children. Neither Act confers jurisdiction on youth courts to hear enforcement proceedings against young persons, which is ironic (and problematic) given the *eSafety Act* was initially designed exclusively to respond to cyberbullying of young persons.

The Commissioner may also issue a 'formal warning' for a failure to comply;[706] however, the warning has no substantive legal effect, aside from putting a person on notice about their behaviour.

Regulatory culture and philosophy

The eSafety Commissioner contends that their interpretation and application of the 'serious' cyberbullying requirement had rarely been contested by social media sites,[707]

[701] *Federal Circuit Court Rules 2001* (Cth) ('FCC Rules'), pt 11.

[702] *FCC Rules*, Rule 1.06.

[703] To legally compel by way of a court ordered injunction.

[704] Section 121 of the *RP Act* provides that an injunction may be either restraining or performance.

[705] *FCC Rules*, Rule 19.02.

[706] *eSafety Act*, s 44.

[707] Legal and Constitutional Affairs Committee, Australian Senate, *Adequacy of existing cyberbullying laws,* Canberra, Friday 9, February 2018, 62 (evidence of Julie Inman-Grant, eSafety Commissioner, Office of the eSafety Commissioner).

noting that factors such as repeat behaviour go towards the question of seriousness.[708] Arguably, the high threshold set at s 5 of the eSafety Act works in favour of social media services and limits the volume of requests made to them by the Commissioner. When giving evidence to the Australian Senate, the Commissioner indicated that 'you can catch more flies with honey than you do with vinegar';[709] and a senior staffer described the Office's work in the following terms '… this is not a compliance activity… We see ourselves as brokers of positive digital relationships…'.[710]

On the question of a need for more criminal penalties, another senior staffer advised that the position was 'we're not sure, and if there is then it would address only the most egregious.'[711] These statements offer a troublesome insight into a regulator's operations that consider addressing bullying behaviour via an end-user notice as a 'serious intervention'.[712] This culture and approach to implementation are arguably contrary to Parliamentary intent in enacting such a scheme. There is a clear need for the eSafety Office to revisit the reasoning in the RIS[713] underpinning the end-user notice to achieve the goal of protecting children from cyberbullying effectively. Again, this supports the placement of the eSafety cyberbullying regime at the bottom of the graduated response pyramid.

The statutory review of the *eSafety Act*

[708] Ibid 63 (evidence of Maria Vassialidis, Executive Manager, Office of the eSafety Commissioner).

[709] Ibid 64 (Inman-Grant).

[710] Ibid 66 (evidence of Toby Dagg, Acting Manager, Compliance Tools and Citizen Services, Office of the eSafety Commissioner).

[711] Ibid 69 (Vassialidis), see also 64 (Inman-Grant).

[712] Briggs Report, 24.

[713] EOFIC RIS.

Section 107 of the *eSafety Act* provided mandated a statutory review of the Act's operation and the legislative rules, including whether the Act or the legislative rules required amending.[714] Overall, the inquiry found that the powers and functions of the eSafety Commissioner were not well focused or articulate.[715] The Review Report noted that the rule of law can and must prevail online as in the physical world and made many criticisms of the eSafety Commissioner's approach to enforcing their statutory obligations.[716]

The Report recommended, amongst other things, that the Government move to strengthen the regulatory framework for digital and online safety by enforcing a much more proactive regulatory regime in legislation.[717]

2019 Reform process

The statutory review triggered a further reform process by the Department of Communications to implement many of the review's recommendations. These changes included introducing a set of basic online safety expectations for industry (mainly social media) and an enhanced cyberbullying scheme for Australian children to capture a range of online services, not just social media platforms.[718]

[714] As provided for at *eSafety Act* s 64.

[715] Briggs Report, 27.

[716] See above, at section 7.2.1.2 Statutory review of the Enhancing Online Safety Act

[717] Ibid 40. As noted above, the Department of Communications and the Arts announced proposed amendments to the eSafety cyberbullying framework in December 2019. These reforms are outside the scope of this thesis, which examines the law up to 30 June 2020 and had not been enacted as of 3 November 2020.

[718] Department of Infrastructure, Transport, Regional Development, and Communications (formerly the Department of Communications), 'Consultation on Online Safety Reforms' (December 11, 2019) < https://www.communications.gov.au/have-your-say/consultation-online-safety-reforms>.

On 23 December 2020, the Department released a consultation draft of the Online Safety Bill. The changes to the cyberbullying by children provisions were confined to the two changes noted in the paragraph above. Although expanding the cyberbullying scheme to include other forms of communications technology is a welcome reform, more could be done. For example, further reform would include expectations on users of communications technology and bolstering the end-user notice regime, as argued earlier in this chapter.[719]

The Bill was introduced to Parliament on 24 February 2021 and received Royal Assent on 23 July 2021.[720]

Summary

The issues outlined above are clear indicators that the eSafety cyberbullying regime (as made) offers little protection for victims of cyberbullying and sanctions for perpetrators. Overall, the scheme lacks the 'moral voice' that the criminal law possesses and requires further work to ensure the regime can actively condemn and address cyberbullying behaviour rather than rely on the statutory take-down scheme.

On its own, the removal regime fails to deliver a tangible outcome in addressing cyberbullying. The removal regime must operate in tandem with issuing an end-user notice.[721] Cyberbullying requires a cyberbully and a victim, yet there is no condemnation of the bullying behaviour. The message 'if you post bullying material, it will get removed' is

[719] For more detail, see Department of Infrastructure, Transport, Regional Development, and Communications (formerly the Department of Communications), 'Consultation on a Bill for a new Online Safety Act' (December 23, 2020) < https://www.communications.gov.au/have-your-say/consultation-bill-new-online-safety-act>.

[720] Parliament of Australia, 'Parliamentary Business – Bills and Legislation', < https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6680>.

[721] As noted earlier in the thesis, this is required by the *HDCA* (NZ), s 24.

insufficient. The law's moral voice must be heard, and it must state that there are consequences attached to cyberbullying. The eSafety office needs to be seen by the community as actively enforcing these provisions, countering harmful behaviour, and putting bullies on notice that their behaviour is problematic. This need is consistent with GfK's finding that children indicated that education about penalties, and evidence of them being enforced, would act as a strong deterrent, particularly when evidence of enforcement is visible and known to them (e.g. at their school or in their local community).[722]

The eSafety cyberbullying framework does not feature sanctions for cyberbullying perpetrators. Instead, the removal regime offers a limited remedy. It does not actively condemn the underlying behaviour, and despite the purpose of end-user notices being to put the bully on notice of their behaviour, issuing a notice ought not to be considered a severe form of response, and an effective enforcement regime needs implementing. This issue is explored further in the next chapter.

There is a clear need for a criminal law response based on the eSafety regime being ineffective in addressing overall cyberbullying behaviour.

6.2.2 Personal Safety Intervention Orders

As argued in Chapter Four, PSIOs offer a comprehensive range of protections from harm caused by a range of prohibited behaviours.

A PSIO made by a court can prohibit both online and offline behaviours, capturing a broad range of bullying and cyberbullying incidents. This broad coverage is incredibly valuable, given that a large body of research, discussed in Chapter Two, shows that cyberbullying rarely occurs without some form of offline bullying.

The data table in section 4.3.2 shows an evident growth in the number of orders made by the CCV, indicating there are behaviours captured by persons under the age of 18

[722] GfK Report, 55.

that are sufficiently serious or considered by the court to be, to warrant the making of a PSIO against them;[723] notably, there was a 60% overall increase in the number of orders made in the period 1 July 2015 to 30 June 2019.[724] Children in Victoria (or via their parents or other representatives) actively use the PSIO regime as a method to protect themselves from prohibited behaviour. As argued in Chapter Four, the regime also facilitates access to justice. There is no cost to applicants, and the ability to apply directly to a Court means applicants are not reliant on Victoria Police acting on an allegation or complaint.

The PSIO regime also highlights an important feature of the rule of law – PSIOs put the subject of the order on notice that their behaviour is prohibited, and there are criminal law sanctions attached to breaching orders. A court must explain the order to the recipient, and it must explain the consequences of breaching an order. [725] The court delivers a clear message – the behaviour is wrongful, the behaviour must desist, or the continued behaviour will result in the commission of an offence.

This form of two-step prohibition gives the recipient of a notice a choice or opportunity to cease engaging in prohibited behaviour. As noted in Chapter Four, the CCV heard 218 cases for breaching a PSIO between 2012 and 2017. This number accounted for about 5.4% of PSIOs made by that court during that period. The low level of alleged breaches prosecuted suggests that some subjects of orders hear the criminal law's moral voice or may simply be deterred by the possible or likely sanction attached to breaching the order.

The making of a PSIO against a child engaged in bullying behaviour is a clear message to that child that their behaviour warrants a response but is not sufficiently serious to warrant criminalisation. It is when the prohibited behaviour continues that the matter

[723] Children's Court of Victoria, *Annual Report 2018-2019*, 46.

[724] Ibid.

[725] *PSIO Act* ss 40 and 76.

becomes criminal. Accordingly, they offer a valuable tool to bullying and cyberbullying, despite having criminal sanctions attached for breaching an order. Chapter Seven proposes an additional mitigation strategy to protect children from prosecution in the form of a 'Stop Bullying Order'.

6.2.3 Is there a need for a criminal law response?

The data presented in this thesis suggests that non-criminal law responses to bullying and cyberbullying[726] are increasingly engaged in Victoria. In the financial year 2018-19, 95 of the cyberbullying complaints received by the eSafety Officer in the 2018-19 calendar year came from Victoria,[727] and the CCV heard 1136 PSIO applications.[728] The numbers for each response continue to grow.

Of the non-criminal law responses explored in Chapter Four, this thesis argues that PSIOs operate most effectively against bullying and cyberbullying. The fact that they can be obtained relatively quickly, without recourse to Victoria Police, is a significant factor in reaching this view. Further, breaching an order (as a two-step prohibition) being an offence means they are a de-facto form of criminal response to bullying and cyberbullying.

A PSIO also addresses bullying as a whole, allowing victims to protect themselves from harm in all forms, rather than relying upon removing material from a limited selection of social media providers. To that extent, they offer relief from all forms of bullying rather than a specific subset of cyberbullying. However, a PSIO is limited by its operation against one single bully. One of the benefits of the eSafety regime is that a social media service can be

[726] The term 'behaviour' is used purposefully to illustrate that the lack of qualitative data means we cannot confidently say these are being applied to cyberbullying behaviour.

[727] *Office of the eSafety Commissioner Annual Report 2018-19*, 204-6.

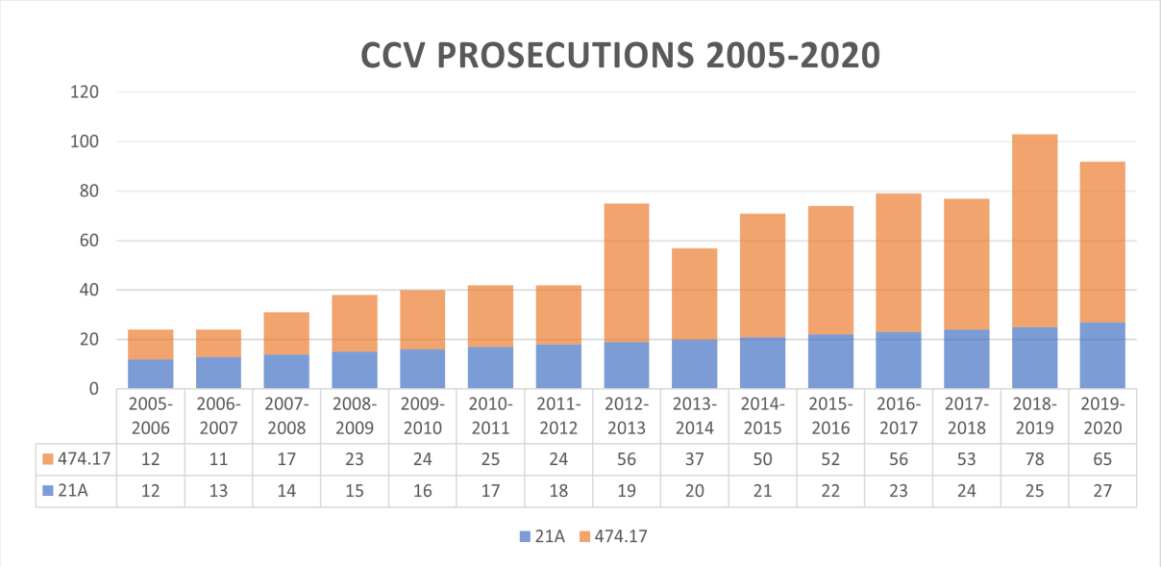
[728] Figure 3 Personal safety intervention order applications finalised by courts in Victoria 2012-2020. It is also important to note that applications may have been made to the MCV as they also have jurisdiction to hear applications concerning children.

directed to take down the material and associated posts, shares, or likes. On this basis, this thesis argues there is a clear need for a criminal law response to respond to both bullying and cyberbullying.

6.3 Criminal responses

Between 1 July 2005 and 30 June 2016, the CCV heard 331 cases involving an alleged breach of s 474.17 and 248 cases involving s 21A. Those figures include 20 prosecutions of children under the age of 14. Of those, 15 prosecutions were for breaching s 474.17 (4.5% of total cases in Victoria for the offence during the same period) and five prosecutions for stalking (2% of total stalking cases in Victoria during the same period).

The figure immediately below shows an evident growth in the number of proceedings under the relevant offences in the period 2005-20.



	2005-2006	2006-2007	2007-2008	2008-2009	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020
474.17	12	11	17	23	24	25	24	56	37	50	52	56	53	78	65
21A	12	13	14	15	16	17	18	19	20	21	22	23	24	25	27

Figure 13 Prosecutions at the CCV under ss 21A and 474.17 (2005-2020).[729]

6.3.1 Section 474.17: Using a carriage service to menace, harass or cause offence

Despite being limited to using a carriage service, the provision at s 474.17 has been applied to cover a broad range of behaviours that menace, harass or cause offence. The

[729] The slight decrease in 2019-20 may in part be attributable to the impact of coronavirus.

cases detailed in Chapter Five demonstrate that bullying elements exist in offences prosecuted under this provision – repetition,[730] aggression,[731] intent to harm[732] and a power imbalance.[733]

The broad drafting has allowed the criminal law to respond and adapt, as the use of technology to cause harm varies by platforms, and s 474.17 has been effectively used to prosecute behaviours such as trolling (that may or may not have a specified target), as was seen in the case of *R v Hampson*.[734]

Although the application and interpretation of s 474.17 have not been before the High Court, the *Monis* case, prosecuted under s 471.12, (examined earlier in the thesis), provides the highest authority on the construction of offensiveness in a parallel provision dealing with postal services. The High Court made it clear that prosecution under s 471.12 requires the alleged behaviour to have a serious potential effect upon an addressee, an effect which causes apprehension, if not a fear, for that person's safety.[735]

The Court's view that the behavioural threshold needs to be in the higher ranges of seriousness,[736] although not necessarily the most extreme,[737] arguably places the offence provision out of reach for most bullying and cyberbullying unless the behaviour was 'likely to

[730] For example, *R v Ogawa*.

[731] For example, *R v Hooper; ex parte Commonwealth DPP*.

[732] For example, *Crowther v Sala*.

[733] For example, *Mc Manus v Bakes*.

[734] *R v Hampson*.

[735] *Monis*, [337] (Crennan, Kiefel and Bell JJ).

[736] Ibid [43] (French CJ).

[737] Ibid [336] (Crennan, Kiefel and Bell JJ).

have a serious effect on the emotional well-being of an addressee'.[738] As a side note, the *Hampson* case represents the sole prosecution identified where the maximum penalty of three years' imprisonment was imposed at first instance as the case involved extreme and graphic references to paedophilia and child murder. The Queensland Court of Appeal noted that Hampson's behaviour was 'ghoulish and disgusting by any reasonable standards, and its inevitable consequence was to cause emotional pain and distress to relatives and friends grieving the deceased children. It was behaviour that the sentencing judge described as 'depraved'. [739]

However, the Court ultimately held that the sentence was manifestly excessive, and that 'the offending was not within 'the worst category of cases which [the penalty of three years imprisonment] is prescribed… (and) greatly exceeded those normally imposed for breaches of s 474.17(1).'[740]

Further, as will be discussed below, the provision does not capture offline behaviour. As evidenced earlier in this thesis, cyberbullying rarely occurs without other forms of offline bullying. To that extent, despite having a broad application to acts involving the use of a carriage service, the online components of bullying on their own may be insufficient to warrant prosecution.

6.3.2 Section 21A: Stalking

Of the two main offences explored in this thesis, it is argued that the stalking provision in s 21A of the *Crimes Act* is the less desirable yet the more applicable offence provision to capture overall bullying and cyberbullying. The provision has been amended over time to ensure that the required pattern of behaviour includes online and offline behaviours. However, the maximum penalty of 10 years' imprisonment is incredibly high

[738] Ibid [310].

[739] *R v Hampson*, [35] (Muir J).

[740] Ibid [39] (Muir JA) with White JA agreeing [46].

relative to bullying behaviour, particularly compared to an offence under s 474.17 and similar stalking offences in other Australian jurisdictions.[741]

As noted above, s 474.17 is limited to online behaviour, whereas responding to a mixture of offline and online behaviour carries the risk of the offence escalating to stalking, based purely on the inclusion of offline behaviour. Physical elements of bullying may amount to common assault.[742] However, as an overall pattern of behaviour, there is no clear criminal law response to behaviours such as name calling or social exclusion when it happens offline.

Section 21A contains some of Olweus' bullying indicia – a course of conduct necessitates repetition,[743] aggression, and an intention to cause physical or mental harm to the victim. The required course of conduct is aggressive and repeated. However, the question remains whether an offence with a ten-year maximum penalty is an appropriate response to children's behaviour, particularly when offline behaviour may not, historically, have been prosecuted (as was the case in *Oyston*).

The next chapter addresses the concern related to the high level of the penalty attached to s 21A by implementing a new lower-level offence where alleged offending may consist of a combination of online and offline behaviours.

6.3.3 Difficulties with the existing offences

Although each of the offence provisions detailed above can arguably apply to cyberbullying behaviours, it is undesirable to consider that the most applicable response is the prosecution of an indictable offence. In simple terms, they are 'very big sticks' to be used as a response to cyberbullying by children. The drafting of each offence is sufficiently broad

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[741] See discussion at section 5.4 of this thesis – footnote 630.

[742] *Summary Offences Act 1966* (Vic), s 23.

[743] *Gunes v Pearson*.

to make them laws of more general application than the initial mischief to be addressed by the relevant provision.

Consider the development of stalking as an offence. From a formal criminalisation viewpoint ('criminalisation on the books'), the offence was created to deal with potentially heinous behaviour and the maximum penalty of ten years' imprisonment reflected the Victorian Parliament's view about the seriousness of the behaviour.

To a considerable extent, the data presented in the preceding chapter illustrates the significant role that substantive criminalisation ('criminalisation in practice') plays in keeping children from being charged with an indicatable offence. Children are not only the beneficiaries of the protection afforded by *doli incapax*, they are also protected through the application of criminalisation in practice. Police discretion, prosecutorial policies and diversion programs are all active parts of the substantive criminalisation framework.

As Chapter Five argued, non-criminal law approaches are not as robust or effective as would be desirable, and accordingly, there is a legitimate role for criminalisation and criminal law to address the harm and wrongdoing caused by cyberbullying. Returning to the Rule of Law and the Fair Warning Principle, the offence provisions are also problematic on the basis that they do not directly or clearly prohibit behaviours in terms that a reasonable ordinary person would identify as applying to bullying or cyberbullying. This is especially concerning when children may readily identify or have knowledge of what is meant by the term 'bullying'; therefore, any prohibition should use language that is readily understood by the alleged offender.

Despite this, the preceding chapter showed continued growth in both the number of alleged offender incidents and prosecutions for each offence provision. The following chapter puts forward approaches to remedy this position. Firstly, it proposes a framework that actively uses the word 'bullying' and places the offence in clear terms. Secondly, a regime is suggested whereby the application of the criminal law occurs only when a defined trigger occurs (breaching what is nominally called a 'stop bullying order'). Thirdly, the

proposed offence is a summary offence. In addition to providing a requisite level of clarity and certainty about the scope of the offence, implementing this framework also provides a further opportunity to divert children away from the criminal justice system.

6.3.4 Review into the adequacy of existing offences

In September 2017, the Australian Senate commenced an inquiry into the adequacy of existing offences in the Criminal Code and state and territory criminal laws to capture cyberbullying. The inquiry looked at cyberbullying by and of both children and adults. The terms of reference included the application of s 474.17 and penalty adequacy, particularly where victims self-harmed or suicided. The inquiry was also tasked with looking at other measures used to combat cyberbullying predominantly between school children.[744]

The Committee heard evidence from many highly respected professionals about the difficulty of seeking protection from the criminal law. Josh Bornstein[745] gave evidence about the difficulties of applying the law to trolling behaviour.[746] Van Badham[747] gave evidence of systemic failure in applying a range of laws, primarily s 21A of the Victorian Crimes Act and the enforcement of personal safety intervention orders.[748]

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[744] Australian Senate, Proof Journals of the Senate, No. 59, 7 September 2017, 1896.

[745] Principal, Maurice Blackburn Lawyers.

[746] The Senate Legal and Constitutional Affairs References Committee, *Adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying*, Committee Hansard, (7 March 2018, Melbourne, Australia), 2.

[747] Journalist and Media Section Vice President, Victorian Branch, Media, Entertainment and Arts Alliance.

[748] The Senate Legal and Constitutional Affairs References Committee, *Adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying*, Committee Hansard, (7 March 2018, Melbourne, Australia), 13.

The Committee also noted data from the Commonwealth DPP that there had been 927 charges against 457 defendants found proven under s 474.17 since its introduction in 2004. The Attorney-General's submission to the inquiry stated that it was not possible to specify how many of those cases related to cyberbullying,[749] clarifying that the figures (discussed in Chapter Five of the thesis) did not include prosecutions by state or territory authorities.[750] No evidence was sought or tabled about the total number of prosecutions across all jurisdictions. Therefore, the data presented in this thesis is the first time a more accurate position has been provided about the volume of prosecutions.

During the inquiry, Barbara Spears stated, consistent with the central argument in this thesis, that identifying the line where cyberbullying becomes criminal was 'too hard'.[751] A large body of submitted evidence suggested that most people do not know which specific laws apply to cyberbullying,[752] and the Committee noted that state and territory offences that could apply to cyberbullying vary between jurisdictions and that they 'tend to relate to stalking, harassment, assault, threats and defamation'.[753]

The Committee, noting the serious harms that cyberbullying can cause, subsequently recommended that Australian governments ensure that the general public has a clear awareness and understanding of how existing criminal offences apply to cyberbullying.[754] As

[749] AECL Report, 3.

[750] Ibid.

[751] Legal and Constitutional Affairs Committee, Australian Senate, *Adequacy of existing cyberbullying laws,* Canberra, Friday 9, February 2018, 3 (Associate Professor Barbara Spears, Founding Member Australian Universities' Anti-bullying Research Alliance).

[752] Ibid 1 (Professor Marilyn Campbell Founding Member Australian Universities' Anti-bullying Research Alliance). Evidence (9 Feb 2018), 1.

[753] AECL Report, 7–8.

[754] Ibid Recommendation 4.

of 30 June 2020, there had been no formal government response to the Report,[755] and there had been no progress on implementing this recommendation. As argued throughout this thesis, the rule of law requires certainty and clarity. Moreover, the criminal law ought to be a response of last resort. However, despite several government inquiries happening during work on this thesis, making recurring recommendations, there has been little progress in understanding when bullying and cyberbullying warrant a criminal law response.

On the penalty issue, the committee recommended that the Australian government consider increasing the maximum penalty imposed by s 474.17 of the Criminal Code from three to five years' imprisonment for adult offenders.[756] It did not recommend legislating for increasing penalties for cyberbullying offences caused by minors,[757] and there was no explicit reasoning given to support this view. Further, despite discussion in the Report about the 'adequacy of the existing penalties for cyberbullying',[758] there was no exploration of whether the existing penalty of three years was too high (noting the suggestion in *Monis* that a two-year penalty was 'significant').

[755] Legal and Constitutional Affairs Committee, Australian Senate, *Adequacy of existing cyberbullying laws,* Canberra, Inquiry Page, accessible at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Cyberbullying/Government_Response. It should be noted that the Covid-19 pandemic caused significant disruption in 2020 and many activities, including Parliament sitting were suspended.

[756] AECL Report Recommendation 5. Government members of the committee indicated they did not agree with the recommendation to increase the penalty for s 474.17, suggesting further consultation was required before committing to such an action ('Additional Remarks from Government Members', 65).

[757] Ibid Recommendation 3.

[758] Ibid 44.

As outlined earlier in the thesis, most cases under s 474.17 are heard summarily, and there is a limit on the maximum penalty of two years imprisonment per count imposed on courts of summary jurisdiction. Interestingly, the Committee noted (without reference to submissions made to it) that:

> … none of the charges or prosecutions that the committee is aware of appear to relate to cyberbullying between school aged children. This demonstrates that whilst the ability to prosecute exists in theory, in practice it is not a deterrent to school aged children which amplifies the need to have other deterrent approaches to cyberbullying when children are involved.[759]

The text of s 474.17 explicitly refers to using a carriage service (i.e., using a communications device to convey a message electronically) to menace, harass, or cause offence. Within Olweus' definition, bullying is a form of aggression that encompasses behaviours that would menace, harass, or cause offence. In the context of children, such behaviour is generally referred to as bullying. At a minimum, the data presented in this thesis show that children were prosecuted (and numbers increased annually) since the commencement of the offence provision.

Figure 9 above shows that at least 387 matters were prosecuted under s 474.17 at the CCV between 2005 and 2014. Arguing an inability to prosecute in practice is manifestly incorrect, highlighting an undeniable need for accurate qualitative data about applying those offence provisions and the need for transparency or visibility about the actual volume of bullying and cyberbullying cases dealt with by the children's courts across Australia. To state that not one of the 387 matters heard by the CCV was related to bullying or cyberbullying is unlikely. Charging a child with using a carriage service to menace, harass or cause offence is likely to include at least some portion of behaviour that could be identified or described as cyberbullying. The law could be a deterrent to school-age children if actual data and cases

[759] Ibid 32.

were presented to show the application of the provision by state and territory law enforcement bodies and that children can be (and are) prosecuted for cyberbullying.

The Committee accepted evidence that existing Commonwealth, state and territory criminal offences 'adequately cover serious cyberbullying incidents' (added emphasis).[760] Further, the Committee expressed concern that some cases of 'serious and possibly criminal cyberbullying' had not been pursued in the courts, contending that this may be due to a lack of awareness of the offences amongst the public or a lack of understanding of or willingness to apply those laws by law enforcement authorities.[761] To that point, the National Children's Commissioner stressed the need to examine actions taken under s 474.17, the seriousness of those cases and where thresholds of seriousness were reached,[762] and Langos' taxonomy shows a wide range of behaviours under the umbrella term 'cyberbullying' which may be caught by ss 21A or 474.17.

6.4 Identifying the threshold at which behaviour is 'sufficiently serious'

The threshold at which behaviour is 'sufficiently serious' is the threshold at which behaviour warrants formal criminalisation in the form of legislation or prosecution in the case of substantive criminalisation. Thus, it is now becoming somewhat possible to answer the central question in this thesis – when is bullying behaviour sufficiently serious to warrant criminalisation?

Identifying and setting the threshold requires an understanding of the harm caused by bullying and choosing an appropriate response. As argued above, the responses outlined

[760] Ibid 60.

[761] Ibid.

[762] Ibid 59 (Megan Mitchell, National Children's Commissioner, Australian Human Rights Commission).

in Part B of the thesis apply to bullying and cyberbullying, but in a very piecemeal manner. The graduated response model above shows four clear categories to address cyberbullying:

1. Making a complaint to the eSafety Commissioner.
2. Applying for a PSIO.
3. Bringing an action in tort.
4. Police action for contravening a PSIO or committing an indictable offence (ss 474.17 and 21A).[763]

As noted throughout the thesis, the criminal law should only apply as a response to behaviour where there are no other means that are equally effective to prevent, eliminate or reduce harm to persons. Before the commencement of the eSafety cyberbullying regime, there was no regulatory response tailored to addressing cyberbullying. However, as argued above, the eSafety cyberbullying framework offers limited solutions to victims of cyberbullying. That framework supports two contrasting views – the need to reduce the eSafety Act threshold and issue end-user notices, or in the alternative, a continuing need for a criminal law response to cyberbullying. The repetition of the 'serious' requirements at s 5 of the *eSafety Act* connotes that the threshold for harmful behaviour to commit an offence is at the 'higher end of seriousness' and possibly at the extreme.

Between 2015 and 2019, the eSafety Office received 1,431 complaints.[764] About 20% of the cases actioned by eSafety are Victorian,[765] amounting to approximately 286 complaints during that time. This figure falls below the total of 333 cases brought under ss 21A or 474.17 during the same time at the CCV. Given that children are more likely to be prosecuted than a social media site is to be told to take down material, it is argued that the criminal law is not being used as a tool of last resort in response to bullying (broadly, rather

[763] Noting that only PSIO, breach of a PSIO and 21A would apply to traditional bullying.

[764] Above, Part 4.4.3.1 of the thesis (Reports made to the Office).

[765] Ibid.

than cyberbullying) in Victoria. Based on the graduated response pyramid at the beginning of this chapter, it would ordinarily be expected that there would be a smaller proportion of cases as the punitive nature of a response grows. The figures cited in this paragraph suggest a clear imbalance in that regard, and there needs to be a more accessible provision for dealing with overall volumes of bullying.

By way of contrast, the PSIO regime offers a significant protection level and can help prevent, eliminate, or reduce harm to bullying victims. The orders can prohibit a range of behaviours and form the threshold at which bullying becomes a legal issue.

However, the criminal law line at which perpetrators of bullying and cyberbullying should be charged for an indictable offence is not as clear. For example, cyberbullying can amount to stalking under s 21A or using a carriage service to menace, harass, or cause offence under s 474.17 (or both). However, charging a child with an indictable offence is a severe step; this is particularly so where bullying includes a mixture of online and offline bullying, and that offline behaviour can only be responded to by s 21A, where those behaviours form all or part of the requisite course of conduct.

6.5 Applying the criminal law to bullying by children

As discussed in Part A, there are mechanisms to minimise or reduce the risk of unduly exposing a child to the criminal justice system, and the CCV has access to a range of diversionary or therapeutic responses to minimise any impact on a child offender.

As part of the Senate Inquiry into the effectiveness of the criminal law as a response to cyberbullying, the Law Council of Australia submitted that one of their concerns is:

> … not to criminalise the conduct of children in respect of their behaviour and drag them into the criminal justice system when these types of behaviours can be dealt with in another way. There is a conflict here because we can see the horrific consequences of the conduct of

> children who may not understand what their words or actions are resulting in. What we then see are tragedies, both for the victim's family and for that of the alleged perpetrator. [766]

As this thesis repeatedly asserts, children need to be protected from exposure to criminal law wherever possible. The criminal law is a bluntly coercive and morally loaded tool and something to be used sparingly and with care.[767] Despite this, there is continued growth in the number of relevant proceedings at the CCV.

The ties between the development of social media and the increase in prosecutions since 2005 suggest there may be a correlation between the two, although this may need to be the subject of further research. The data shows that 'something' that meets the threshold of the relevant offence provisions is happening, but there is no qualitative data available to show the proceedings' substance or the behaviour leading to prosecution.

Ultimately, charges being pressed for breaching a PSIO or alleged offending under ss 21A or 474.17 are currently the line at which bullying behaviour warrants prosecution (i.e. criminalisation in practice). When taken back to first principles, a criminal law response to bullying needs to reflect Olweus' four elements – there needs to be aggressive behaviour, an intention to cause harm, a power imbalance and repetition. As this thesis has argued, the development of cyberbullying necessitates a reconsideration of how, or if, the last two elements occur, but the core focus for all forms of bullying must be aggressive behaviour and an intention to cause harm. Within an overall bullying response framework, it is frightening that an offence provision that carries a maximum ten-year term of imprisonment draws the closest parallels to bullying. In contrast, online-only behaviour can be addressed

[766] Arthur Moses, President-elect, Law Council of Australia evidence to the Australian Senate, Legal and Constitutional Affairs References Committee, *Adequacy of existing cyberbullying laws,* (Transcript of Hearing, Canberra, 9 February 2018), 8.

[767] Simester, Spencer and Virgo, 581.

by a take-down scheme or an offence carrying a maximum of a three-year term of imprisonment.

6.6 Conclusion

This chapter demonstrated the difficulty in identifying the line at which children's bullying behaviour warrants criminalisation.

The eSafety Office's establishment was primarily intended to administer a complaints system for cyberbullying material targeted at an Australian child.[768] However, the focus shifted significantly from that function during its first few years of operation. This chapter has argued that the eSafety regime has a higher threshold of harm than criminal law, and this is despite the *eSafety Act* being a civil or administrative measure to remove material from a limited range of electronic media. The eSafety Office's failure to issue end-user notices also limits the regulatory message that cyberbullying is wrongful and must cease, despite issuing end-user notices forming a large part of the eSafety cyberbullying framework developed by Parliament.

Given this, the chapter argued that the growing number of applications for PSIOs by or against children is unsurprising. However, as outlined above, the eSafety Commissioner investigates less than 5% of complaints, leaving the remaining 95% with limited recourse. Further, the lack of enforcement provisions in the *eSafety Act* shows that the eSafety Office can only take minimal action in the area of cyberbullying by or against an Australian child.

By way of contrast, Chapter Four showed that almost 75% of applications for a PSIO to the MCV (which has jurisdiction to hear applications by or concerning children) were made directly to the Court rather than through Victoria Police. Although there was no publicly available data showing the split of police/private applications made to the CCV, it receives

[768] *eSafety Act*, s 3 (as enacted).

~7% of Victoria's total number of applications. Children are increasingly looking for protections that an intervention order can afford, and this could be partly attributable to the lack or failure of other non-criminal law options to protect victims of bullying. The number of PSIOs being made is also accompanied by a growth in the number of children prosecuted for contravening those orders. Breaching an order is a clear line at which a child's behaviour becomes sufficiently serious, exposing them to criminal liability. However, the prosecution is based on breaching a court order rather than for behaviour that may best be described as bullying or cyberbullying per se (even though that prohibited behaviour would form the substantive part of the intervention order).

Finally, the growing number of prosecutorial actions under ss 474.17 and 21A is a cause for concern. In one sense, it is clear that a decision to prosecute a child under s 471.17 or 21A clearly illustrates that a decision has been made as to whether the bullying behaviour is sufficiently serious to warrant prosecution. Both offences are indictable, but they form part of an incoherent framework. Furthermore, the disconnect between penalties associated with purely online behaviour and a combination of online and offline behaviour is a significant cause for concern. This framework needs reform – charging a child with an offence, especially an indictable one, should be a last resort.

Better options are vital, and the next chapter proposes significant reform.

Chapter Seven – Reform: Establishing a criminal law threshold for 'sufficiently serious' bullying

7.1 Introduction

This chapter proposes significant reform to address the concerns raised in Chapter Six and to provide the necessary certainty about when bullying behaviour is sufficiently serious to warrant criminalisation. In doing so, the regulatory pyramid in Chapter Six is amended, as shown below.

This chapter commences with an overview of existing reviews and inquiries into cybersafety and cyberbullying before arguing that significant reform remains necessary, particularly regarding two existing areas – the *eSafety Act* and PSIOs. One of the key reforms argued for is introducing an order known as a 'stop bullying order', which would apply only to children. The introduction of the order would also enable a statutory definition of the term 'bullying' into the PSIO Act, and a draft term is proposed below.

The chapter also argues for a new, lower-level offence of harassment to address the lack of a summary offence that can apply to bullying behaviour. If recourse to the criminal law is considered a necessary response to bullying behaviour, there must be adequate protections for child offenders before being charged for committing an indictable offence. The United Kingdom's *Protection from Harassment Act 1997* forms the basis for the proposed summary offence.[769]

The chapter provides the following graduated response model and discusses each level[770] from least punitive to the most punitive response:

[769] *Protection from Harassment Act 1997* (UK).

[770] Except tort, for the reasons specified in Chapter Four.

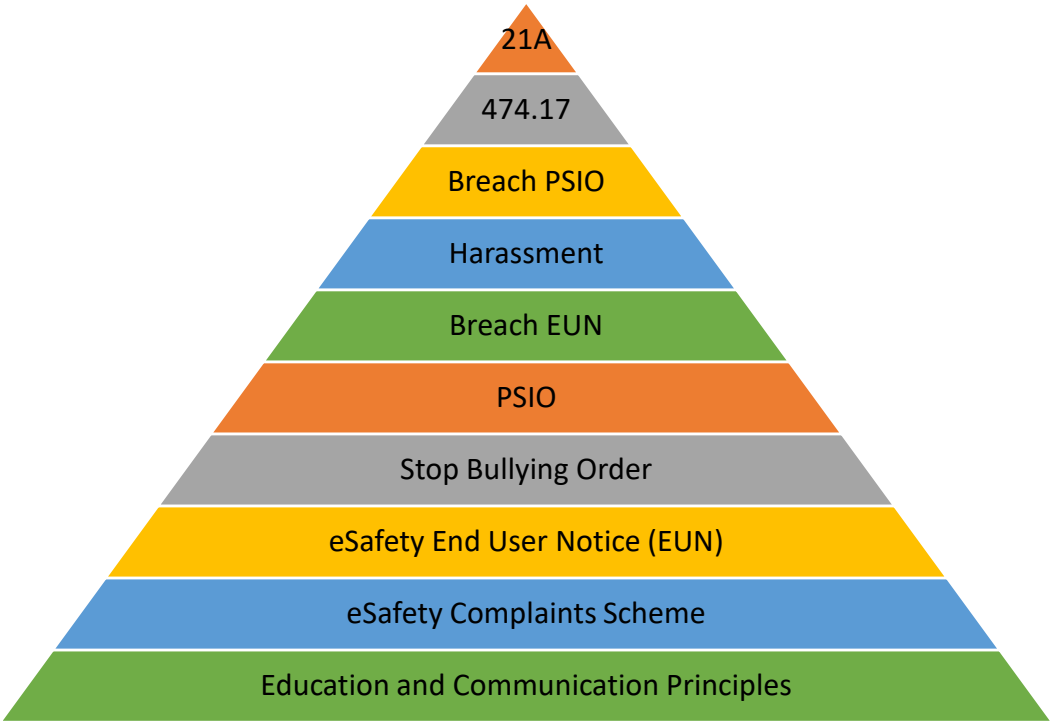

Figure 14 Graduated response – reformed options.[771]

7.2 Previous attempts at reform

Children's online safety has been an ongoing challenge since the Australian Institute of Criminology raised cyberbullying as an issue in 2007.[772] The section below provides an overview of the attempts to address this issue at state or territory and federal levels of

[771] Note – as with the prior pyramid, the colours have no additional meaning. They are merely meant to differentiate each category of response.

[772] Kim-Kwang Raymond Choo, *Future directions in technology-enabled crime 2007-09* (Canberra : Australian Institute of Criminology, 2007).

government in Australia. Additionally, the reviews and inquiries highlight recurring themes that are explored throughout this thesis.

7.2.1 Commonwealth

7.2.1.1 The High Wire Act

In 2010, the Commonwealth Parliament established the 'High Wire Act: Cyber Safety and the Young' Inquiry as part of its' commitment to addressing cyber-safety issues for young people'.[773] The Inquiry's Terms of Reference required that a Joint Select Committee on Cyber-Safety be appointed to inquire into and report on the online environment in which Australian children engage and the nature, prevalence, implications of and level of risk associated with cyber-safety threats, such as cyberbullying and stalking.[774]

The Inquiry was a significant step in the understanding of children and online safety issues. One of Interim Report's key themes was the lack of understanding or agreement about what was meant by many terms (for example, the term 'cyber-safety'). As a result, the Committee adopted a pragmatic approach and accepted the Australian Privacy Commissioner's definition that 'cyber-safety' is a 'broad concept that concerns minimising the

[773] Joint Select Committee on Cyber Safety 'High-Wire Act Cyber-Safety and the Young' (Interim Report, June 2011), Parliament of the Commonwealth of Australia, 6 ('High-Wire Interim Report). To add clarity, the Inquiry was commenced by the Australian Labor Party, who formed government at that time.

[774] Ibid xxii-xxiii. The terms of reference also required the committee to explore other cyber-threats including exposure to illegal and inappropriate content; inappropriate social and health behaviours in an online environment (e.g. technology addiction, online promotion of anorexia, drug usage, underage drinking, and smoking); identity theft; and breaches of privacy.

risks to children online from a range of negative influences, including inappropriate social behaviours, abuse, identity theft and breaches of privacy'.[775]

The Interim Report's cyberbullying chapter strongly advocated for an agreed definition of ‘cyberbullying’ and explored the nexus with 'offline bullying'. The Report also canvassed many questions that remain relevant to contemporary cyberbullying research – demographics of cyberbullies, some children's experiences, the causes and means of cyberbullying, prevalence, impact and implications, and the role of bystanders.[776]

The Committee also explored sanctions against cyberbullying, noting advice from the Attorney-General's Department that serious instances of cyberbullying may constitute an offence under Commonwealth law,[777] and received advice that criminal legislation at state and territory level allowed for the prosecution of harassing, threatening and intimidatory behaviour through a combination of assault, threatening and stalking offences.[778] Appendix E to the Interim Report provided a list of ‘online offences’ in Commonwealth, state and territory criminal laws, but there was no offence type listed for cyberbullying.[779]

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[775] Ibid 13.

[776] Ibid 57.

[777] Ibid 317. The Interim Report explained that it is ’an offence to use the Internet or a mobile phone in a way that a reasonable person would consider to be menacing, harassing or offensive, and it carries a maximum penalty of three years imprisonment.’ This is a reference to section 474.17 of the *Criminal Code Act*, which is explored in detail in Chapter Four.

[778] Ibid 318.

[779] Ibid Appendix E – Online Offences. The Appendix also detailed the relevant laws as a response to misuse of a carriage service and suicide related material.

In an attempt to address this gap, the Committee recommended that the Attorney-General, in conjunction with the National Working Group on Cybercrime,[780] undertake a review of legislation in Australian jurisdictions relating to cyber-safety crimes, including cyberbullying.[781] The Committee also proposed developing a Cyber White Paper intended to be a 'strategic blueprint' to coordinate government-wide cybersecurity policies and initiatives.[782] Unfortunately, the High-Wire Act Inquiry was abandoned after the 2013 federal election, and the White Paper was never released.

7.2.1.2 Statutory review of the Enhancing Online Safety Act

In 2018, a statutory review of the *Enhancing Online Safety Act 2015* examined, amongst other things, the need for police involvement, noting an absence of published data on cyberbullying or cyber abuse cases referred by the Commissioner to the police.[783] The review was critical of the Office of the eSafety Commissioner's paternalistic approach to regulation and suggested that concerns about being cognisant about teenagers' maturity, growth stages and other vulnerabilities should not be allowed to outweigh the need to report

[780] The National Cybercrime Working Group was established in May 2010 by the then Standing Council of Attorneys-General to facilitate a national response to cybercrime. The group was chaired by the Secretary of the Australian Attorney-General's Department and comprised representatives from state and territory police and justice agencies, the Australian Crime Commission, the Australia New Zealand Policing Advisory Agency and CrimTrac. (https://www.directory.gov.au/portfolios/home-affairs/national-cybercrime-working-group).

[781] High-Wire Interim Report, 335.

[782] Julian Bajkowski, 'Cyber White Paper Hit by Delay', Government News (September 2009) <http://www.governmentnews.com.au/2012/09/cyber-white-paper-hit-by-delay/>.

[783] The eSafety Commissioner advised that 10 formal referrals had been made to state and territory police forces about sufficiently serious prohibited online content and 576 formal referrals about sufficiently serious prohibited online content to the AFP between 2016 and 2019 (Briggs Report, 25).

the most dangerous cyberbullying activity to police. The review also noted that there is a risk that some cyberbullies could continue a pattern of bullying behaviour into adulthood if they can get away with it when younger, possibly reinforcing the acceptability of threatening or violent and dangerous behaviours that could endanger the community and their families later.[784]

7.2.2 State and territory reviews into bullying and cyberbullying

Additionally, inquiries have been undertaken in select states and territories (in chronological order):

- Tasmanian Law Reform Institute' Bullying'[785] (January 2016),
- Northern Territory Law Reform Committee Report into Bullying[786] (August 2018), and
- Queensland Government Cyberbullying Taskforce' Adjust Our Settings: A community approach to address cyberbullying among children and young people in Queensland'[787] (September 2018).

Each of these reviews raised several, often recurring, issues. The section below outlines the three issues of most relevance to this thesis.

<u>Bullying as stalking</u>

[784] Briggs Report, 24.

[785] Tasmanian Law Reform Institute, *Bullying*, Final Report No 22 (2016).

[786] Northern Territory Law Reform Committee, *Report into Bullying*, Report 44 (August 2018).

[787] State of Queensland, *Adjust Our Settings: A community approach to address cyberbullying among children and young people in Queensland,* Final Report, (Department of the Premier and Cabinet) September 2018 ('Adjust our Settings Report'). Some confusion arose as to the number of charges brought under s 474.17, with the Taskforce noting that none of the charges brought under the provision (by the Commonwealth DPP) were laid against school-aged children, which was essentially verbatim the statement from the Senate Committee Inquiry.

The 2015 Tasmanian Law Reform Institute inquiry into bullying was one of Australia's first significant (non-academic) inquiries to thoroughly examine bullying behaviour (including cyberbullying), law, and reform options.[788] In its final report, the Institute expressed that stalking is the most applicable to bullying behaviour in the catalogue of existing criminal offences.[789]

Interviews conducted by the University of NSW with law enforcement officers also expressed this view:

> I suppose the main offence in our [state or territory] legislation that would apply to some of this behaviour [bullying] is stalking. In this jurisdiction stalking is an indictment (sic) offence… So to justify charging someone with a crime of stalking it really has to be something that justifies a Supreme Court trial… It is not intended to be trivial conduct.[790]

The view that stalking is the most applicable offence provision to bullying is consistent with the position of this thesis. Further, the concerns echoed by the law enforcement officer are sufficient grounds to warrant reform.

Commonwealth v state and territory offences, and penalty level

The Northern Territory Law Reform Committee Report (2018) found that while NT criminal law can address some aspects of offline, face-to-face bullying (e.g. assault), cyberbullying is addressed primarily in the *Criminal Code*. The report also suggested that Territory laws, particularly stalking,[791] do not cover all conduct that may constitute bullying.

Finally, the Committee accepted the view presented by NT Police that the maximum penalties (two years' imprisonment in the case of stalking, and three years imprisonment in

[788] Tasmania Law Reform Institute, *Bullying*, Issues Paper No. 21 (May 2015).

[789] Tasmania Law Reform Institute, *Bullying*, Final Report No. 22 (Jan 2016), [2.1.2].

[790] Barbara Spears et al, above n 82, 37.

[791] *Criminal Code Act 1983* (NT), s189.

the case of using a carriage service to menace, harass or cause offence) tended to hinder the ability of the NT Police to investigate such crimes effectively.[792] This submission is of particular interest as the maximum penalty applicable to stalking in Victoria is ten years' imprisonment.[793]

The Committee noted the overlap between Commonwealth and Territory criminal offence provisions:

> While the use of Commonwealth legislation such as section 474.17 is available to members and can be used to fill in gaps in NT legislation, the complexities and nuances in using different legislation discourages police members from using this option.[794]

The reluctance of law enforcement officers to pursue offending based on the penalty level attached to an offence and the complexities involved in enforcing dual jurisdictions are crucial issues examined in this thesis. Again, this view presents a compelling case for reform.

Accurate data collection

Finally, a key recommendation by the Queensland Government Cyberbullying Taskforce was the need to record accurate data. This recommendation is consistent with UN Resolution 69/158.[795] The absence of a drafted statutory offence for bullying and cyberbullying means that, across all jurisdictions in Australia, the true extent of prosecutions for behaviour best described as bullying or cyberbullying becomes lost amongst general statistics.

The federated nature of the Australian criminal law system means that accurate data needs to be recorded in all jurisdictions to ensure the capture of offences under both

[792] Northern Territory Law Reform Committee, *Report into Bullying*, above n 786 , 25.

[793] The level of penalty in each Australian jurisdiction is detailed in Chapter Five.

[794] Ibid 24, citing page 3 of the Northern Territory Police Force Submission.

[795] Above, n 1.

Commonwealth and state and territory offences, enabling an accurate understanding of the full extent of bullying prosecutions across Australia. This is particularly relevant given the error when considering the overall application of s 474.17 in all Australian jurisdictions.

7.3 Reform: Education and communication principles

7.3.1 Generally

Education plays a vital role in the prevention and response to bullying behaviour. Australia continues to invest significant funds to educate children, and the broader community, about online threats and dangers. To date, most education programs teach that 'bullying is bad' or focus on how to practice online safety.[796]

In addition to traditional messages about minimising harm, education must educate about sanctions for committing specified acts – bullying is wrong, and there are consequences for bullying. The Queensland Government and the Australian Senate consider cyberbullying primarily a social and public health issue wherein education plays an important part. Both inquiries also recommended a need for education about existing criminal law offences or other legal responses that apply to cyberbullying.[797] Importantly, in line with the data about prosecutions detailed in Chapter Five of this thesis, education programs must also state that children are actively being prosecuted under the relevant criminal law provisions. The need for education was a key theme in the GfK research detailed in Chapter One and submissions to the adequacy of existing offences inquiry.

[796] See for example Office of the eSafety Commissioner, 'eSafety Kids' (Web Page) <https://www.esafety.gov.au/kids/be-an-esafe-kid>.

[797] Adjust our Settings Report, above, n 787; Senate Legal and Constitutional Affairs References Committee, 'Adequacy of existing offences' above n 264.

As argued in this thesis, developing new laws that target bullying behaviour requires making tough calls about what is merely offensive or is genuinely bullying behaviour.[798] Using the prohibition of sex discrimination as an example of behaviour that goes beyond merely offensive, Franks illustrates the process of how, in the long term, regulation facilitates social norms – 'recognising sexual harassment as sexual discrimination has changed how things are and how they have always been done here'.[799] Furthermore, legally and explicitly defining conduct as wrong is a strong starting point for education about that behaviour and can be a catalyst for change.

Education programs must develop broadly to capture both the general community (e.g. children, parents, and schools), law enforcement officers and legal practitioners. Education must detail how and when law enforcement agencies will or may take action for bullying. Significant resources are required to educate and inform the community that there are criminal sanctions for bullying behaviour. Campaigns need to be larger than just school-based or self-directed learning. Australia's response to other problematic online behaviours, such as online piracy, had strong media campaigns to enforce their messages. There is a significant reason why such a campaign is necessary – online piracy primarily impacts money; bullying impacts young persons' lives and well-being.

7.3.2 Communication Principles

A key tool in bolstering education about harmful behaviour is to adopt the Communication Principles[800] developed in NZ to apply to digital communications, either as

[798] Mary Anne Franks, 'The Banality of Cyber Discrimination, or The Eternal Recurrence of September' (2010) 87 *DU Process* 1, 5.

[799] Ibid 6.

[800] *HDCA*, s 6.

drafted or modified and subject to inquiry or public consultation. The Principles clearly outline expectations about digital communication and are matters that an Approved Agency and courts (as defined in the *Harmful Digital Communications Act 2015* (NZ)) must take into account in determining the application of civil and criminal remedies as a response to harmful digital communications.[801] Relevantly, the Principles provide that digital communication should not:

- disclose sensitive personal facts about an individual;
- be threatening, intimidating, or menacing;
- be grossly offensive to a reasonable person in the position of the affected individual;
- be indecent or obscene;
- be used to harass an individual;
- make a false allegation;
- contain a matter that is published in breach of confidence;
- incite or encourage anyone to send a message to an individual to cause harm to the individual;
- incite or encourage an individual to suicide; or
- denigrate an individual because of their colour, race, ethnic or national origins, religion, gender, sexual orientation, or disability.[802]

Having clear communication principles outline government (and community) expectations around online behaviours by a person is vital in developing Australia's response to bullying. The principles could be adopted more broadly to refer to 'harmful communications' rather than being confined to digital communications. As argued throughout this thesis, penalising online actions, with no penalty applying to offline forms of those

[801] Ibid s 6(2).

[802] Ibid.

actions, is nonsensical. The communication principles can be contrasted with the proposed Australian basic online safety expectations, that focus solely on industry expectations in providing online services,[803] rather than the behaviours of individuals.

7.4 Non-criminal law reform

As argued in this thesis, there are significant deficiencies in the cyberbullying regime established by the *eSafety Act*. While it is argued that action should be taken against bullying in all forms (noting that other forms may arise in the future with the development of technology), there is a risk that government will continue to view cyberbullying as a discrete form of behaviour. Government responses have tended to focus on online communications' unique characteristics rather than the underlying behaviour and aggression. As argued earlier in the thesis, the online world magnifies the element of repetition through technology, and this has no real-world parallel. To this end, Chapter Six argued that the eSafety cyberbullying regime is an ineffective tool in addressing underlying bullying behaviour by children and needs significant reform.

7.4.1 Amending the eSafety Cyberbullying Regime

As argued earlier in the thesis, one of the primary systemic failures of the eSafety cyberbullying regime was the failure to fully implement many aspects of the Australian Liberal Party's 'Enhancing Online Safety for Children Policy', such as examining the need for a new criminal offence and the need for restorative justice, as law. As outlined in Chapter One of this thesis, the Policy suggested that the government consider a new simplified offence provision to criminalise cyberbullying and that any complaints scheme

[803] Online Safety Bill 2020 (Cth) (Exposure Draft), Pt 4.

deals with material targeted at and likely to cause harm to an Australian child.[804] The Policy also stipulated that any offence provision include a broad range of sentencing options where the offender is a minor, such as counselling, restorative justice, community-based orders, and probation.[805]

7.4.1.1 The threshold in section 5 of the eSafety Act

Section 5 requires that the cyberbullying material be likely to have the effect of seriously threatening, intimidating, harassing, or humiliating the Australian child (added emphasis); taking it beyond the requirements at s 474.17 of the *Criminal Code*,[806] which merely require that the effect be one that a reasonable person would regard as being menacing, harassing, or causing offence. As noted earlier in this thesis, the High Court, through *Monis*, have interpreted this as requiring that the effect of menacing, harassing, or causing offence must be at the higher end of seriousness.

Whilst s 5 applies and relies on an objective test of whether an ordinary reasonable person would form the view that the cyberbullying material would have the effect detailed above, it must also be borne in mind that the government drafted the original Act to only apply to persons under the age of 18. Accordingly, the objective test where the bully is a child should explicitly be drafted from the viewpoint of a child of comparable age or maturity (but not a subjective test), providing an important safeguard in situations such as where a child bully misjudges the consequences of their actions.

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[804] Enhancing Online Safety for Children Policy, above n 443, 6.

[805] Ibid.

[806] Conversely, Government's stated view seems to suggest that the 474.17 standard is higher. See, for example, the Department of Infrastructure, Transport, Regional Development and Communication's 'Online Safety Legislative Reform Discussion Paper', 33.

As noted earlier, terms such as ‘the most egregious’ material or references to repetition were used by the Office as indicators of cyberbullying material having a ‘serious’ effect on an Australian child. In the absence of a statutory definition, clear guidelines are required to guide the interpretation and application of the serious threshold – for example, such guidance should consider whether additional weight should be given to bullying that focuses on specified attributes. Much of this comes back to the drafting of s 5 of the Act, and Olweus’ elements need to be considered in an online environment, with factors of repetition and power imbalance remaining vital considerations. The material itself may be lower level, but the harm may stem from how it is distributed, how fast, how wide, and to whom the material is delivered. Relevantly, paragraph 5(2)(b) of the eSafety Act includes harm caused as ‘an indirect result of the material being accessed by, or delivered to, one more other persons’ and more needs to be made of that point. As argued earlier in this thesis, the use of ICT means that online material is more difficult to contain, and in some cases, the distribution of material cannot be quantified. In particular, the discussion in section 3.3.1.2. of the thesis highlighted the complexities associated with Olweus’ element of intention within an online environment.

The Act needs to be amended to remove the ‘serious’ threshold to enable broader access by children suffering online harm. Further, the provisions should focus on the elements of the behaviour (i.e. the behaviour must be repeated, it must cause harm or be capable of causing harm), rather than on the ‘material’ – that is, a clear prohibition needs to be drafted addressing the poster of the material — ‘a person must not’, thus necessitate a sanction for non-compliance.

7.4.1.2 Issuing end-user notices

Another area for reform is the lack of end-user notices issued by the Commissioner. The failure to issue is contrary to the Parliamentary intention expressed in the relevant EM

and relying on the rapid removal scheme alone does nothing to address underlying behaviour. Directly directing specified social media to remove material may have no or limited effect upon the child posting material. As noted in the Briggs Review, this may actively contribute to that child continuing or escalating that behaviour well into adulthood.

The Regulatory Impact Statement to accompany the EM also argued that an end-user notice regime had the highest likelihood of decreasing harm from exposure to material or harm from other behaviours than education or creating a new cyberbullying offence.[807] In addition, a notice scheme's benefits included being a more expedient process for dealing with cyberbullying, addressing socially undesirable behaviours that cause cyberbullying, acting as a deterrent to re-offending, and reducing physical and mental harm caused by cyberbullying.[808]

At a minimum, amendments to the *eSafety Act* should require that the Commissioner must issue an end-user notice when a 'valid' complaint is received (i.e. it is dependent on an assessment being undertaken, rather than remove all discretion). As noted earlier in the thesis, failure to comply with an end-user notice may result in an application being made to a federal court for an injunction, despite those courts classing children as being under a legal incapacity to represent themselves in proceedings. Therefore, clearer consideration needs to be given to the enforcement regime and what, if any, benefits or disadvantages apply to alternative options.

Giving the end-user notice could occur in tandem with a take-down notice to a relevant service or in response to a complaint deemed to meet the threshold required at s 5 but does not concern using a social media site (i.e. a 'relevant electronic service'[809]). The

[807] EOSFC Bill RIS, above n 688.

[808] Ibid.

[809] *eSafety Act s 4* (definition of *'relevant electronic service'* includes emails, SMS, online chats, and online gaming services).

end-user notice is a central feature in achieving the government's aim of education and harm minimisation and serves itself to put a person on notice that their behaviour is a cause of concern. The notice serves an important rule of law function, and a continued failure by the Office to give notices fails to uphold the obligations expected by Parliament to do so. The provision of a notice formed a key feature of the proposed online safety model (and studied in detail in the regulatory impact statement to accompany the Enhancing Online Safety Bill) and the power should be exercised by the Commissioner in line with parliament's intent.

An alternative approach could be to implement parallel provisions to the *HDCA*, requiring the host of the material to notify the author that a complaint has been received.[810]

7.4.2 PSIO

Given the growth in the number of PSIOs granted to protect children, there is a risk that more children may be subject to prosecution for contravening an order; therefore, adding a further level of protection for children is desirable. Furthermore, as noted in Chapter Four, failure to comply with a PSIO is an offence punishable by a maximum of 2 years imprisonment, 240 penalty units or both.[811] Accordingly, this section argues for introducing a new kind of order specific to children and a statutory definition of 'bullying' included in the *PSIO Act*.

7.4.2.1 Stop bullying orders

[810] *HDCA* s 24(2).

[811] *PSIO Act* s 100. As of 30 June 2020, one penalty unit in Victoria was $165.22, making the maximum penalty $39,652.80.

This proposed reform centres around an order nominally referred to in this thesis as a ‘stop bullying order’ (SBO), where the respondent is a child. As noted in Chapter Four, the PSIO regime provides a two-step prohibition process that invokes civil and criminal remedies. On that basis, it is desirable to frame orders and education about them in a language that children can readily understand.

An SBO, as proposed, centres on the premise that a court cannot (or ought not) make a PSIO where the subject of the order is a child unless that child has first been the subject of an SBO. As noted in Chapter Four, the ‘two-step probation’ model consists of civil and criminal remedies. That is, a civil order is made and then breaching it becomes a criminal matter (cf. civil injunctions). An SBO would be able to capture most of the behaviours of the PSIO regime. However, the focus should be on rehabilitation and restorative justice rather than criminalisation for breaching an SBO. The definition of harassment in the *PSIO Act* means a course of conduct by a person towards another person that is demeaning, derogatory or intimidating and includes such conduct carried on by or through a third person.[812] Examples in the *PSIO Act* (cited earlier) of prohibited behaviour include ‘A makes derogatory taunts to B, including racial taunts or taunts about B's sexual orientation or gender identity’ and ‘A encourages another child to taunt B.’[813]

These examples illustrate that the PSIO regime has been drafted to apply to children and extends to bullying. The idea of name-calling is a common theme in bullying literature. The example of ‘Jonesy is a fag’, particularly with repetition of that message, or others are encouraged to join in, is behaviour that the PSIO regime can capture. However, it would be desirable to avoid criminalisation for breaching a first level order. The term and concept of ‘harassment’, as defined in the *PSIO Act,* becomes one of the bases for the definition of ‘bullying’, discussed below.

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[812] Ibid s 7.

[813] Ibid.

An SBO would provide an opportunity to respond to lower level kinds of bullying, albeit behaviour that is considered by the court warrants a response. The provision could adapt the language used at s 5 of the *Online Safety Act* by removing the 'serious' threshold (e.g. 'the behaviour or material would be likely to have the effect on the Victorian child of threatening, intimidating, harassing or humiliating the Australian child). As noted throughout the thesis, bullying exists on a spectrum and an SBO presents an opportunity to respond to (with the view of stopping) harmful bullying behaviour at an earlier stage, before the behaviour warrants criminalisation in the form of prosecution.

The proposed SBO would therefore be an additional step to protect child respondents before a PSIO is made against them unless a court dispenses with such a requirement. Potential grounds for a court refusing to grant an SBO may include the court forming the view that the behaviour is at a level for which issuing a PSIO is the more appropriate course of action or where the proposed respondent has been the subject of previous SBOs.

In line with a PSIO, a person who has been issued with an SBO would still have access to mechanisms such as mediation and interim orders to resolve matters before making a final order. Similarly, a court must explain the content of the orders to the respondent (including the consequences and penalties that may follow if the respondent fails to comply with the terms of the final order).[814]

Failure to comply with an SBO may result in a PSIO being made by the CCV.

7.4.2.2 Defining bullying:

[814] Ibid ss 40 and 76.

The SBO regime's introduction also provides an opportunity to define bullying within the *PSIO Act* by varying the definition of 'prohibited behaviour' at s 5 of the Act. The following is a proposed draft for the purposes of the *PSIO Act*:

> **Meaning of bullying behaviour**
>
> For the purposes of this Act, bullying is repeated behaviour in the form of —
>
> (a) assault; or
>
> (b) harassment; or
>
> (c) property damage or interference; or
>
> (d) making a serious threat;[815]
>
> where the respondent person is a child.
>
> For the purposes of this definition, harassment includes behaviours such as name calling and social exclusion, either in person or through the use of communications technology.

Age becomes a central feature, creating a dual regime. Unless a court thinks otherwise, a child respondent will be subject to an SBO, thereby explicitly recognising the unique challenges associated with child offenders and the youth justice system. As outlined in section 2.4 of this thesis, some children have specific vulnerabilities such as the lack of impulse control and should be protected from the criminal justice system to the greatest extent possible. The thesis does not consider that an SBO should apply to adult offenders because most adults are rational beings with free will, subject to the issue of capacity. An SBO does not necessarily 'forgive' a child for their behaviour but is designed to put them on notice in very clear and readily understood terms that their behaviour is questionable or problematic. An SBO also gives that child an opportunity to reform that behaviour.

On that basis, an SBO would only apply to children's bullying behaviour. Moving directly to a criminal offence for breaching an SBO is undesirable, and Simester and von

[815] The terms 'assault', 'harassment, 'property damage or interference, and 'making a serious threat' are already defined at pt 2 of the *PSIO Act*.

Hirsch warn that the intermediate character of two-step prohibitions such as the one found in the PSIO regime as sitting somewhere between criminal and civil law carries inadequate safeguards.[816] To that extent, an SBO becomes protective of its subject/the respondent — breaching an SBO would not lead to prosecution. Preferably, access to diversion or mediation programs would be a more appropriate response at first instance. Failing to comply with the diversion or other program, in conjunction with ongoing bullying behaviour, could lead to a court making a PSIO (which carries a criminal sanction for breach). To vary Simester and von Hirsch's term, an SBO would be a form of 'three-step prohibition' (civil-civil-criminal prohibition).

Developing safeguards, such as the three-step prohibition, ensures that the criminal law is only invoked when other mechanisms have failed. The behaviour is called 'bullying' and uses language that children are likely to understand from the outset. The offender has an opportunity to reform their behaviour or face escalating sanctions. In this instance, the criminal law will only be invoked where the offender is given notice that the behaviour consists of a serious wrong on at least two occasions. It is this level of warning that becomes the line at which bullying behaviour is sufficiently serious to warrant a criminal law response.

There may be counter-arguments in that some children ought to be held to account for their behaviour at first instance, especially when the behaviour is particularly egregious (or to use the term examined in this thesis, 'sufficiently serious'). The CCV would maintain powers to refuse to grant an SBO where a PSIO is a more appropriate response. Access to criminal sanctions would also remain available, and an SBO does not preclude prosecution under either ss 474.17, 21A or for the new offence of harassment detailed below.

7.5 Criminal law reform

[816] Simester and von Hirsch, above n 38, [225].

Consideration now turns to the options for criminal law reform. Unlike many of the policies, inquiries and reviews examined in earlier chapters, this thesis advocates there is merit in creating a lower-level offence provision rather than increasing the maximum penalties for existing offence provisions.

As argued in this thesis, the indictable status of the offence provisions under s 474.17 and s 21A may deter law enforcement officers from applying those laws. Arguing that bullying behaviour is sufficiently serious when it reaches the threshold of indictable offences may be counteractive in terms of stemming bullying behaviour. Although the Tasmanian Law Reform Institute considered that creating a new offence of 'bullying' may be an overly punitive reform,[817] the benefits of a summary offence prohibiting bullying would include deterrence, education, potentially lower prosecutorial reluctance and potentially less stigma attaching to a conviction.[818]

7.5.1 Creating a new offence provision – harassment

Short of proceedings being brought for assault or making threats, there are limited options for addressing offline behaviours that menace, harass or cause offence. At present, stalking is the main provision to capture both in-person and online incidents of harm causing behaviour.

As detailed in section 5.4 above, stalking is a composite offence and can consist of many acts, and s 21A of the Victorian *Crimes Act* makes it an offence to engage in a course of conduct with the intention of causing physical or mental harm to the victim or to arouse apprehension in the victim for their safety or any other person.

Intent can be proven in three ways. Firstly, there are two subjective tests – the alleged offender actually intended to cause such harm, or arouse such apprehension or fear (s21A(2)); or knew that engaging in a course of conduct of that kind would be likely to cause

[817] Tasmanian Law Reform Institute, above n 220, 3.3.37.

[818] Ibid 3.3.38.

such harm, or arouse such apprehension or fear (s21A(3)(a)). Intent may also be proven objectively – the alleged offender ought to have understood, in all the particular circumstances, that engaging in a course of conduct of that kind would be likely to cause such harm, or arouse such apprehension or fear, and it actually did have that result (s21A(3)(b)). Of the three tests, it is only the objective test that requires proof that harm has occurred.[819]

Although the provision captures behaviours that may be described as bullying, this thesis argues that recourse to an indictable offence is problematic. This is particularly so given the disparity between the maximum penalties applicable to online-only behaviours under s 474.17 of the Criminal Code (3 years) and the maximum penalty of 10 years for s 21A (noting that sentencing options and processed dealing with children in the criminal justice system play a strong part in sentencing). Despite this, as was shown in section 5.5 of this thesis there continue to be high volumes of alleged offending by children under each offence provision, and up to 37.6% of children being prosecuted under s21A for their alleged offending (the average percentage of alleged offending proceeding to court was 23.7% across the period 2010-2020).

The high level of penalty attached to stalking was also raised as a concern by police officers,[820] and this is reflected in the percentages above. As detailed in Chapter Two, police cautions are a key tool in diverting children away from the formal criminal justice system and were applied in response to an average of 56% of incidents of alleged offending. As detailed above, the averaged percentage of children alleged to have breached s 21A over a ten year period proceeding to the Children's Court of Victoria was 23.7%, suggesting that cautions or other forms of dispensation were applied to the remaining 72.3%. Whilst this is a positive

[819] *R v Hoang* (2007) 16 VR 369.

[820] Barbara Spears et al, Research on youth exposure to, and management of, cyberbullying incidents in Australia: Part B, above, n 117.

outcome in keeping alleged offenders away from the court system, it is arguably a poor outcome for the victims of the alleged behaviours.

This returns to the tension between formal and substantive criminalisation. Although bullying can be captured by s 21A, bullying may not actively be prosecuted by police officers and the court system, creating a disconnect between criminalisation 'on the books' and criminalisation 'in practice'. To that extent, it is desirable to create a lower-level offence provision to address this tension. Although bullying is within the scope of s 21A, the evidence presented in this thesis shows that criminalisation of that provision, at least in the case of children, is not as effectively applied in practice.

What makes bullying distinct, is that the Education Council definition of bullying captures 'behaviour that intends to cause physical, social and/or psychological harm'.[821] Bullying behaviour, as defined by Olweus, is behaviour where there is a deliberate intention to cause harm to the victim. As noted in Chapter Three of this thesis, proving intention can be extremely difficult. However, intention is a subjective test. In practice, the prosecution could ask an alleged offender if they intended to harm the person.

The proposed offence of harassment can be drafted as a subjective mens rea offence, similar to the offence of common assault at s. 23 of the *Summary Offences Act 1966* (Vic):

> Any person who unlawfully assaults or beats another person shall be guilty of an offence.
>
> Penalty: 15 penalty units or imprisonment for three months.[822]

Therefore a summary offence of harassment could be drafted as 'any person who unlawfully harasses another person shall be guilty of an offence'. Therefore a summary offence of harassment could be drafted as 'any person who unlawfully harasses another person shall be guilty of an offence'. Given that harassment or bullying can include elements

[821] Above, n 229 (added emphasis).

[822] *Summary Offences Act 1966* (Vic), s 23.

of physical assaults, the maximum penalty attached to the offence should match that at s. 23, noting that courts have discretion under the *Sentencing Act* or the *Children, Youth and Families Act*.

Additional context and framing of the offence could be provided by adopting wording similar to that at s. 1 of the PFHA (UK), which provides (as amended for current purposes):

1. A person must not pursue a course of conduct which amounts to harassment of another.
2. Subsection (1) does not apply to a course of conduct if the person who pursued it shows—
    a. that it was pursued for the purpose of preventing or detecting crime,
    b. that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
    c. that in the particular circumstances the pursuit of the course of conduct was reasonable.[823]

Should such wording be added to proposed offence, it is suggested that the offence could be drafted to read 'any person who unlawfully engages in a course of conduct which amounts to harassment of another person shall be guilty of an offence.'

Bullying exists on a spectrum, and as argued in this thesis there may be a significant volume of 'lower' behaviour that on its own does not warrant criminalisation (in either it formal or substantive sense). Accordingly, having an offence provision that addresses behaviours that fall short of the intention to cause injury offences in the Crimes Act has significant merit. A new, lesser, offence would not only be an alternative to those injury provisions, but also s. 21 to which it is likely be be an alternative lesser offence and is most relevant to bullying.

[823] Section 1 of the *Protection from Harassment Act 1997* (UK) in its original form does provide an objective test.

There are many arguments in support of a new offence provision. Simester and Sullivan suggest that the symbolic significance of enacting that some activity is a criminal offence can be a reason favouring criminalisation, at least where stigmatisation of the activity is desirable.[824] However, tension exists between protecting victims of bullying and the appropriateness of criminalising that behaviour. Because of the stigma attached to the criminal law, it must be shown that criminalisation is the most appropriate regulation method, preferable to alternative methods of legal control available to the state.[825] Creating a criminal law can be a tool for communicating to the public that the prohibited activity is a serious wrong.[826] Offences must be drafted in clear, effective terms to address the wrongdoing or harm and meet the rule of law and other concerns.[827]

One option for dealing with behaviour that may fall short of the requirements of s 21A is to create a lower-level offence provision for 'harassment', and the United Kingdom's *Protection from Harassment Act*[828] (*PFH Act*) provides one such model for consideration. As will be detailed below, the *PFH Act* provides a range of summary and indictable offence provisions, providing greater flexibility for police officers to respond to alleged offending (i.e. in enforcing the statute). From a formal criminalisation viewpoint, the *PFH Act* is drafted to address a much greater range of mischief than captured by s 21A.

The term 'harassment' is a key feature in both ss 474.17 and the PSIO regime and has a developed body of law regarding the meaning of the term. However, unlike the SBO regime, the proposed Act would capture behaviours by adults and children; and capture behaviours at a lower end of the spectrum of offending contemplated by the High Court in

[824] Simester, Spencer and Virgo [596].

[825] Simester and von Hirsch, above n 38, [190].

[826] Simester, Spencer and Virgo [596]

[827] Simester and von Hirsch, above n 38, [190].

[828] *Protection from Harassment Act 1997* (UK).

Monis. Further, a broad offence of 'harassment' would not be limited to online behaviour as per s 474.17.

The *Protection from Harassment Act 1997 (UK)*

The *PFH Act* provides a range of responses to address harassment, and relevant sections are outlined below. As it applies to England and Wales, the law provides separate offences for harassment and stalking and civil actions provisions.[829]

The prohibition on harassment in England and Wales is simply drafted – 'A person must not pursue a course of conduct — (a) which amounts to harassment of another, and (b) which he knows or ought to know amounts to harassment of the other.'[830] The Act does not define the term 'harassment', although sub 7(2) provides that a reference to 'harassing' includes 'alarming the person or causing the person distress'.[831] Further, the United Kingdom Supreme Court held in *Hayes v Willoughby* that 'harassment' is 'an ordinary English word with a well understood meaning. Harassment is a persistent and deliberate course of unreasonable and oppressive conduct, targeted at another person, which is calculated to and does cause that person alarm, fear or distress,'[832] and is similar to the High Court of Australia's interpretation in *Monis*.

[829] Ibid s 3. Scotland's law is of a more limited application and provides civil claims known as an 'action of harassment' (s 8) and allows domestic abuse victims to apply for non-harassment orders (s8A). Breaching a non-harassment order is punishable on indictment by a maximum term of imprisonment of 5 years, or six months where the matter is heard summarily (or by way of penalty described as 'the statutory maximum').

[830] Ibid s 1(1). The definition as it applies to Scotland is drafted in similar terms at s 8 of the Act.

[831] Ibid sub 7(2).

[832] *Hayes v Willoughby* [2013] UKSC 17, [1] (Lord Sumption, with Lord Neuberger and Lord Wilson agreeing). Use official reports where available: see AGLC

The PFH Act makes stalking a form of an aggravated offence.[833] A person's course of conduct amounts to the stalking of another person if it amounts to harassment of that person, the acts or omissions involved are ones associated with stalking, and the person whose course of conduct it is knows or ought to know that the course of conduct amounts to harassment of the other person.[834] The definition of stalking covers behaviours such as following a person, contacting or attempting to contact a person by any means, and publishing any statement or other material about a person.[835] In addition, the behaviour must occur on two or more occasions.[836]

The maximum penalties for the offences are relatively low when compared to the penalty for stalking in Victoria. For example, harassment is punishable in England and Wales by a maximum term of imprisonment of six months,[837] whereas stalking is punishable by a maximum of 51 weeks' imprisonment.[838]

The PFH Act also has a range of aggravated stalking offence provisions and prohibits behaviours that knowingly and on at least two occasions put people in fear of violence[839] and stalking involving fear of violence or serious alarm or distress.[840] The

[833] *Protection from Harassment Act 1997* (UK), s 2A.

[834] Ibid.

[835] Ibid s 2A(3).

[836] Ibid s 2A(1)(a); s 4A(1).

[837] Ibid s 2(2). An offender may also be subject to a level 5 penalty (£5,000) or both penalty and imprisonment.

[838] Ibid s 2A(4). An offender may also be subject to a level 5 penalty (£5,000) or both penalty and imprisonment.

[839] Ibid s 4.

[840] Ibid s 4A.

maximum penalty for putting a person in fear of violence is 10 years imprisonment on indictment, or six months when the matter is heard summarily.[841] The maximum for stalking involving fear of violence or serious alarm or distress is 10 years imprisonment on indictment or twelve months when the matter is heard summarily.[842]

The range of offence provisions seems designed to capture stalking at a lower level. Enacting a lower-level offence may offer some benefit for the rule of law – the fair warning rule is invoked and puts the respondent on notice that their behaviour is problematic, and a court determines the appropriate penalty for the impugned behaviour. However, this thesis does not argue to amend the offence of stalking in Victoria.

While no Australian jurisdiction has broad-based anti-harassment provisions, the Australian Law Reform Commission raised the issue in 2014 within the context of privacy.[843] The ALRC recommended, and this thesis agrees, that legislation prohibiting harassment would provide Australians with protection similar to that in other common law countries, including the United Kingdom, New Zealand, and Singapore. In those jurisdictions, the anti-harassment legislation provides a useful model for Australian (and other) legislatures when enacting a statutory tort of harassment or other harassment legislation.[844]

The level of penalty

The low level of penalty for harassment and 'baseline' stalking in the UK Act produces two conflicting arguments. Firstly, the penalty level should not be so high as to preclude law enforcement officers from pursuing prosecutions. The evidence given to

[841] Ibid s 4(4).

[842] Ibid s 4A(5).

[843] Australian Law Reform Commission, Serious invasions of privacy in the digital era : Final Report (Commonwealth of Australia, 2014), Chapter 15 'Harassment'.

[844] Ibid 308. The ALRC did not explore the implementation of a criminal law of harassment and focused on developing a statutory tort.

various inquiries discussed throughout this thesis has shown that police officers tend to stay away from indictable offences for children's actions, especially where a lower offence is available. The counterargument is that the low level of the penalty may lead to too many prosecutions occurring and the criminal law becoming a tool of first resort in dealing with harassment. Therefore, the availability of a lower level of offence is risky when dealing with behaviour by children. Whilst a lower-level offence may capture more children in the criminal justice system, it also provides those children with reform options such as the diversion program at CCV. A child can be held accountable for their actions; however, the criminal law's full weight need not be applied to that child. A lower-level offence would also convey the message that the behaviours targeted by parliament are sufficiently serious to warrant criminalisation.

Whilst these are ultimately matters for the government to consider, penalties should be in the lower range and focus on restorative and therapeutic justice where possible or appropriate. There should also be active community education to address concerns raised about the lack of community knowledge about bullying and the law. As noted earlier in the thesis, the High Court suggested that a maximum penalty reflects the parliament's view on the severity of the behaviour in question. Bullying behaviour and the number of children prosecuted continue to grow, and governments must limit these growing trends. This thesis argues that, if the number of children being prosecuted continues to grow, referring children charged with harassment to the CCV diversion program to address existing and future behaviours is appropriate.[845] Having a lower level offence and better access to schemes such as diversion programs may go some part in enabling the youth criminal justice system to deal with this alleged offending in more lenient, problem-solving ways.

[845] A sentencing option for adults may be community service, or anger management/other education options.

As detailed in Chapter Two, the diversion scheme in Victoria has reported success completion rates of 94%. Whilst not all children are referred to the diversion program, children who engage in bullying behaviour may be ideal candidates for the diversion program. The focus should be on rehabilitation. In the alternative, the maximum penalty (as provided for at sub-s 360(1) of the CYF Act) should be a fine without conviction (para 360(1)(e)).

7.6 Existing offence provisions

Despite the recommendation of the Senate Committee to raise the maximum penalty for s 474.17 to five years for adults, no reform of the laws at ss 21A or 474.17 is suggested by this thesis. This view is based on the fact that the youth justice framework has a range of sentencing options to minimise the impact on child offenders; however, there remains a need to retain the higher penalties for adult offenders. Arguably, given the growth in ICT use, the need to bolster the penalty at s 474.17 for adults may be entirely appropriate. However, that issue is outside of the scope and focus of this thesis.

Implementing the SBO regime is also an opportunity to minimise the number of children proceeding to become the subject of a PSIO and risk criminal sanctions for contravening the PSIO. Further, introducing the lower-level offence of harassment also seeks to minimise children's exposure to indictable offences. However, there will always be cases where the severity of the behaviour, however judged, warrants being charged with committing an indictable offence (e.g. cases involving significant emotional or psychological harm or incidents where bullying has led to a child attempting or completing suicide).

7.7 Implementation

In addition to the reform options and implementation issues outlined above, some further implementation issues require consideration.

Although the central line of enquiry of this thesis concerns the law as it applies in Victoria, many of the reform options argued for in this chapter provide an opportunity for creating national cohesion in tackling bullying behaviour (in all its forms). Australia's federated nature adds a layer of complexity – the laws in each state and territory have developed independently and respond to the harms and threats to society as envisaged through the eyes of the relevant legislature at differing points in time. This difference is most abundantly clear in the varying penalty levels for stalking detailed earlier in the thesis. Victorian Parliament set the maximum penalty applicable to s 21A as 10 years' imprisonment. In terms of the criminal law's moral voice, that level of punitive sanction roars that the behaviour captured by the provision is serious.

Despite bullying being about power imbalance and Olweus' other elements rather than age, bullying is still primarily viewed as an issue between or against children,[846] and there is a need to centralise youth justice and vest powers in the relevant children's courts. Accordingly, applications for PSIO and similar orders should, even when heard at another court of summary jurisdiction such as MCV, be registered with the relevant children's court when they involve a child applicant or respondent.

Children's courts exercise as a specialist jurisdiction and are best placed to understand the parties' needs. By way of example, the CCV operates at over 50 locations within the state (10 in Metropolitan Melbourne and 41 in country areas[847]), and the connection to local communities gives the Court the capacity to build cohesion in how laws to counter bullying are applied and have oversight of any geographical or racial bias within

[846] As noted in Chapter One, bullying also has connotations in the industrial relations and workplace safety sphere, but this was not explored in the thesis.

[847] Children's Court of Victoria, 'Our Locations' (Web Page) <https://www.childrenscourt.vic.gov.au/about-us/court-locations>. See also Children's Court of Victoria, *Children's Court of Victoria Annual Report 2018-19*, 49.

police districts. As highlighted in Chapter Two, Victoria Police are more likely to prosecute children in certain areas, so there is a need to understand those issues and tailor the therapeutic justice response accordingly. Further, there is a significant and concerning over-representation of indigenous children in Victoria and other jurisdictions, which needs significant action to ameliorate.

Responding to bullying must continue to be interdisciplinary. The Senate Inquiry into the adequacy of existing offences and the Queensland Taskforce both formed the view that governments should approach cyberbullying primarily as a social and public health issue. Although those inquiries focussed specifically on cyberbullying, this thesis argues that this applies equally to bullying as a whole. This thesis strongly agrees with Sabella's argument that focusing on cyberbullying as a priority at the expense of addressing offline bullying is a mistake – both must be addressed as different manifestations of the same underlying issues.[848] Koops argues, and this thesis agrees, that technology and social and legal norms co-evolve;[849] therefore, the law must keep track of these and develop options that meet these evolving demands.

Education is also essential on many grounds. As highlighted in this thesis, one of the common themes in research is the lack of understanding by law enforcement officers about bullying and cyberbullying. Education must be directed towards law enforcement agencies to ensure that they, as 'gatekeepers' of the criminal law, have an in-depth understanding of the behaviours and the varying legal responses that can be applied. Another theme concerned the lack of education about sanctions for this behaviour. The research outlined in this thesis showed that the general public has limited knowledge of the laws that apply as a response to

[848] Russell A. Sabella, Justin W Patchin and Sameer Hinduja, 'Cyberbullying myths and realities' (2013) 29(6) *Computers in Human Behavior* 2703, 2708.

[849] Bert-Jaap Koops, 'Technology and the Crime Society: Rethinking Legal Protection' (2009) 1(1) *Law, Innovation and Technology* 93, 111.

cyberbullying. Not only is community knowledge necessary, but the rule of law also requires certainty. We must specify the behaviours and eventuating harm with enough clarity so that members of the public (and especially children) can understand that those behaviours are prohibited.

7.7.1 Conferral of Commonwealth jurisdiction

As argued above, the CCV and its counterparts are the best-equipped forums for handling matters related to bullying by young persons. However, this may not be entirely practical as it may place a heavy burden on the court system.

Although subs. 77(iii) of the Australian Constitution permits the conferral of federal jurisdiction on state courts, conferring additional Commonwealth responsibilities on a state court, as recommended above for breaches of end-user notices, will require significant negotiation and coordination between the Commonwealth and the states. There is also a counter risk that any state bullying laws covering online behaviours may fall foul of the incompatibility prohibition at s 109 of the Constitution.[850] Accordingly, any Commonwealth or state laws require careful drafting to ensure limited risk on each of these grounds.

Each of the reform options proposed in this thesis – amending the eSafety cyberbullying framework, consideration of a lower-level offence and the implementation of SBOs – has the potential of imposing a significant burden on any court system. An alternative option to mitigate this risk is to empower law enforcement officers to issue an SBO, and this option is similar to the eSafety Commissioner's power to give an end-user

[850] As of 30 June 2020, there had been no reported cases arguing that the online provisions of s 21A of the *Crimes Act* were incompatible with a Commonwealth law.

notice.[851] In the case of the SBO, it is proposed as a mechanism to delay or negate the involvement of children in the criminal justice system, but an SBO is not a judicial notice – it may be considered more in line with an infringement notice provision. The relevant police officer must explain the consequences of contravening an SBO.

7.7.2 Capturing data

The need to collect accurate data has been a key recommendation in many reviews conducted into bullying and cyberbullying. There are many differing and conflicting views on how these behaviours ought to be defined, and it is when commonality is achieved, accurate data collection can occur via an agreed definition. Although this thesis does not advocate for a stand-alone 'bullying' offence (aside from the proposed wording in the *PSIO Act* enabling stop bullying orders), court registries and judicial staff can be equipped with guidelines to recognise when cases amount to 'bullying'.

One of Queensland's Cyberbullying Taskforce's key recommendations was that Queensland Police keep records of bullying cases. The recommendation could be achieved via an amendment to the Australian and New Zealand Standard Offence Classification (ANZSOC) and introducing a sub-category to the provisions that align closest to bullying behaviour. The Taskforce found the lack of data on charges, prosecutions and outcomes related to cyberbullying prosecuted in Queensland concerning[852] and suggested recording

[851] Noting in practice that statutory office holders ordinarily delegate functions to staff members – see for example, *eSafety Act* s 63.

[852] Adjust our Settings Report, 70. In its response, the Queensland Government indicated it will investigate the collection and reporting of the number of matters under the Criminal Code that relate to bullying and cyberbullying, noting that this will requires work to assess what changes to systems or

statistics about bullying and cyberbullying to inform policy and practice to prevent cyberbullying.[853]

Given the difficulties associated with gathering data for this thesis, this recommendation is vital in understanding the true scope of bullying and cyberbullying in Australia.[854] The recommendation should apply to all law enforcement agencies in Australia, and the data be made available via a national database. The discrepancy identified in the number of children prosecuted under s 474.17 when developing the Enhancing Online Safety for Children Bill is a significant example of data relevance in developing evidence-based regulation. However, the question remains as to how the Commonwealth would have proceeded with correct data. For example, what regulatory solution would have occurred had the Australian government been made aware of over 14,000 prosecutions rather than 318?

Capturing this data is invaluable, particularly if the status quo remains. This thesis has had to rely upon statistics for existing offences: the volume of prosecutions under offence provisions that 'best fit' bullying and cyberbullying. While these provisions *can* capture bullying behaviour, it cannot be said that every single prosecution under those provisions applies to bullying behaviour by children. Utilising the offence provision at s 474.17 as a data capture tool may require some level of analysis by the relevant judicial officer.

Finally, capturing accurate data enables the monitoring of and assessment of the effectiveness of existing or future mechanisms to tackle bullying behaviour - if volumes of

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legislation may be required to record data relating to bullying or cyberbullying (Queensland Government response to 'Adjust our Settings Report', 13).

[853] Adjust our Settings Report, 74.

[854] The data for Part B was collected in accordance with freedom of information requests to the relevant individual courts or requests made directly to the relevant departments of justice, and to the Crimes Statistics Agency (Victoria). I am deeply grateful for their assistance.

prosecutions under ss 474.17 and 21A at the CCV reduce, fewer children are exposed to indictable offences and their associated sanctions. Conversely, in the absence of significant reform, the number of cases may continue to rise.

7.7.3 Diversity

Australia has ongoing issues with discrimination and harassment based on specific or protected attributes.

What has become apparent during researching this thesis is that the federal government's focus has moved from protecting young people from harmful communications and cyberbullying to the protection of religious freedom.[855] The issue of bullying and cyberbullying by young people has not been adequately addressed by parliament, and the clarity and certainty required by the rule of law are still absent. This proposed reform allows parliament an opportunity to protect more vulnerable children – such as indigenous children, children with a disability and gender diverse children. The need to protect vulnerable children is in line with Australia's obligations under the existing anti-discrimination framework. As noted earlier in the thesis, laws such as the *Sex Discrimination Act* and the *Racial Discrimination Act* are primarily confined in their application to employment and services provision. This thesis has argued that attribute-based bullying does exist. As a child victim of perceived attribute-based bullying, the author considers this a vital rather than discretionary reform issue.

Actively combating bullying, particularly (actual or perceived) attribute-based bullying, may also be one of the most robust means to reduce levels of harassment within the adult population. Children growing up knowing 'you cannot say/do that' and understanding why that prohibition is in place may become more well-balanced and respectful adults. Identifying

[855] For example, the Religious Discrimination Bill 2019 (Cth).

with certainty the level at which bullying behaviour ought to be captured by the criminal law is the first step in achieving that aim, and there can be flow-on effects to the broader community.

7.8 Conclusion

This chapter has demonstrated a need to draw and articulate the line at which bullying and cyberbullying become criminal. The reform proposed in this chapter primarily focuses on prevention and giving offenders notice that their behaviour is problematic and must cease. Unfortunately, there has been a tendency to consider the criminal law as the 'go-to' response for dealing with 'sufficiently serious' bullying and cyberbullying incidents.

As raised throughout this thesis, the rule of law embodies a cluster of values, including certainty, clarity and perspectivity. It requires a system of legal ordering, not just ad hoc responses to the conduct of individuals. More relevantly, the criminal law has a communicative function, and it speaks with a distinctly moral voice.[856]

The reforms proposed in this chapter give life to those requirements. In particular, bolstering education to include details of sanctions ensures that the prohibition 'if you do X, Y will happen' is clear. Further, the proposed model gives law enforcement officers a framework to address bullying behaviour without recourse to the criminal law.

The threshold at which bullying becomes a crime is also clearly drawn. Children have a right to be protected by the criminal law. They also have a right to be protected from the criminal law. The introduction of a 'Stop Bullying Order' puts a child on notice in language that they understand and conferring sole jurisdiction on the CCV ensures access to therapeutic justice and the ability to monitor the stop bullying regime's progress and development.

[856] Simester and Von Hirsch, [4].

The federal government has grappled with cyberbullying for a long time; however, the question ought not to be directed at the most punitive response but how to prevent children from being exposed to those responses.

Chapter Eight – Conclusion

> In recent years our knowledge of modern technology has increased considerably, and as a result we have witnessed remarkable material progress, but there has not been a corresponding increase in human happiness. There is no less suffering in the world today, and there are no fewer problems. Indeed, it might be said that there are now more problems and greater dangers than ever before.[857]

Bullying is, and always has been, a major social challenge that has defied regulation. However, despite the enormous benefits provided by information and communications technology, the corresponding growth of cyberbullying has made the problem of bullying more acute.

As argued in this thesis, cyberbullying is also a complex legal issue and is a behaviour that merits criminalisation for 'sufficiently serious' incidents. As detailed in Chapter One, the key question in this thesis asks when is cyberbullying by children sufficiently serious to warrant applying the criminal law in Victoria and whether the threshold of seriousness is readily identifiable. Cyberbullying poses significant challenges in how the law should respond; however, the temptation to speak of cyberbullying and the harm caused by it in vague terms does little to assist our understanding of when to criminalise the behaviour.

To address the key question, the thesis undertook three lines of enquiry. Firstly, Part A examined the concepts of bullying and cyberbullying through multi-disciplinary approaches. Secondly, Part B undertook a doctrinal analysis of legal responses to bullying

[857] Geshe Kelsang Gyatso, *How to Solve Our Human Problems – The Four Noble Truths*, (Tharpa Publications, 2005) viii.

behaviour. Thirdly, the thesis examined the extent to which the criminal law threshold for bullying and cyberbullying could be identified or established.

Chapter Two looked at two important background issues. Firstly, the meteoric rise of information and communications technology (ICT) was outlined to demonstrate the technical environment in which cyberbullying has evolved. Secondly, it provided an overview of the relationship between children and the criminal justice system. As the thesis focuses on the application of the criminal law to children, it was vital to examine key concepts such as capacity and the doctrine of *doli incapax* before detailing the roles of key players in Victoria's youth criminal justice system – primarily Victoria Police and the Children's Court of Victoria. In doing so, the chapter highlighted the existence of police discretion in diverting children away from the youth justice system and the important role played by the Children's Court of Victoria in ensuring that the particular vulnerabilities of children are explicitly recognised in the criminal law process.

Chapter Three then undertook an in-depth examination of what is meant by the terms bullying and cyberbullying. The chapter adopted the definition of 'bullying' developed by the Australian Education Council and unpacked its essential elements. In short form, the definition provides that bullying 'is an ongoing and deliberate misuse of power in relationships through repeated verbal, physical and/or social behaviour that intends to cause physical, social and/or psychological harm.'[858] The chapter argued that clearly defined terms, such as the one devised by the Education Council, are valuable not only as a base for consistent empirical research but are also necessary as a function of the rule of law to ensure that laws be accessible, clear and predictable.

Before the 1970s, there had been little or no identifiable systematic research into bullying. Work published by Dan Olweus in 1978 defined bullying as being an aggressive

[858] Australian Education Council, above n 199.

behaviour with a deliberate intent to harm.[859] Further, Olweus' work identified two other characteristics that lifted bullying beyond 'mere aggression' - there must be an imbalance of power between the parties, and the behaviour is repeated and ongoing over time.[860] The kinds of harm caused by bullying were then illustrated through the cases of *Cox* and *Oyston*.

Consideration then turned to what is meant by the term 'cyberbullying', and Olweus' elements were then explored within a cyberbullying context. The elements of power imbalance and repetition are much more difficult to define in a cyberbullying context, and the limitation that cyberbullying is confined to social/relational and verbal bullying was of interest. This finding is consistent with research data showing those two forms of behaviour were by far the most common forms of offline bullying.

The chapter addressed how the elements of power imbalance and repetition differed in an online environment. For example, a power imbalance online can be tied more closely to technical skills and the bully's popularity online. Similarly, repetition can be largely dependent on how often material is 'liked', viewed or shared. As a result, it may be impossible to contain information posted online, leaving victims with little recourse given that repetition may occur at the hands of others rather than the original bully. Other factors such as anonymity, pervasiveness, and the roles of witnesses and bystanders were also outlined.

The chapter also showed that consistent with offline bullying, there were significant variations in reported rates of cyberbullying victimisation, suggesting a strong need for clear definitions and a strong argument that bullying as a whole must be addressed rather than focus primarily on cyberbullying.

The various kinds of bullying behaviours were then detailed by reference to a taxonomy created by Colette Langos[861] before providing an overview of key social media

[859] Olweus, above n 234.

[860] Ibid.

[861] Langos, above n 280.

sites and how those platforms could be used for cyberbullying purposes. The details contained in Langos' taxonomy highlighted the 'grey areas' in which behaviours may be difficult to categorise as 'sufficiently serious' to warrant criminalisation.

Part B of the thesis then explored various legal responses to counter bullying and cyberbullying behaviours.

Chapter Four detailed three approaches – tort law, the regime established by the *Enhancing Online Safety Act 2015* (Cth) ('eSafety') and the Victorian personal safety intervention order (PSIO) regime. Of those three, the thesis argues that the PSIO regime may offer a better level of protection and remedy to a victim of bullying or cyberbullying. However, the chapter concludes that tort law does not offer a proactive or timely response and raises concerns about some identified limitations with the eSafety cyberbullying regime.

The drafting of s 5 of the eSafety Act was of particular concern. The provision establishes an extremely high threshold as to when action can be taken about cyberbullying material, requiring that a reasonable person would conclude that the cyberbullying material was intended to have an effect that was seriously threatening, intimidating, or humiliating an Australian child (emphasis added). That threshold is significantly higher than the threshold required by the offences discussed in the following chapter.

Chapter Five focused on two offence provisions. Having provided a theoretical overview of the role of the criminal law (particularly as it applies to bullying and cyberbullying behaviour), the chapter then examined the offence of using a carriage service to menace, harass or cause offence (contrary to s 474.17 of the *Criminal Code* (Cth)) and the offence of stalking (contrary to s 21A of the *Crimes Act* (Vic).

The chapter then presented empirical data about the application of those offence provisions to children. The primary data sets present levels of alleged offending incidents (AOI) and the number of eventual prosecutions under each of the offence provisions. What becomes clear is that there is continued growth in AOI volume by children overall, despite a slight decrease in the AOIs by children for s 21A since 2013-2014.

The final data set in the chapter was significant as it disproved an assertion made by the Australian government that there had been 308 successful prosecutions conducted under s 474.17 during the period 2004-2013. That figure was widely cited during the development of the Enhancing Online Safety regime and significantly under-represented the actual size of the problem being addressed by that process. In real terms, there had been over 14,000 prosecutions during the same period at courts in NSW, Qld and Vic. The figure of 308 had been replicated in law journals and other inquiries, and the record needs to be corrected. What became clear in the chapter is that the two offence provisions are regularly being applied to behaviour by children in Victoria. Given the broad drafting of the provisions, they may be applied to behaviour that may not necessarily be described as bullying or cyberbullying.

Part C of the thesis then examines the extent to which a criminal law threshold can be identified or established to respond to bullying and cyberbullying.

Chapter Six assesses the various legal responses at Part B of the thesis and demonstrates the difficulty in identifying the line at which children's bullying warrants criminalisation. The chapter argued that the non-criminal law options outlined in Chapter Four do not sufficiently respond to bullying and cyberbullying, and thus there is a role for the criminal law in responding to those behaviours. The eSafety regime is flawed on many grounds, not merely the high threshold imposed by s 5 leading to less than 5% of cyberbullying complaints made to the office being actioned. Systemic issues such as a failure to give end-user notices and the continually growing remit of the office have contributed significantly to making the cyberbullying regime ineffective.

Against this background, the growing number of children being prosecuted under each of s 471.17 and s 21A is a cause for concern and charging a child with an indictable offence should be a last resort (also noting that breaching a PSIO can become a summary offence).

Chapter Seven proposed significant reform to address these concerns. The chapter first examined past reviews and inquiries into cybersafety and cyberbullying before advocating for reform.

The chapter argued a need for stronger education about wrongfulness and the consequences of engaging in bullying behaviour. This argument was supplemented by adopting communication principles developed in New Zealand, arguing that having clearly stated principles will outline government and community expectations about online communications.

The chapter then argued for significant change to the eSafety cyberbullying regime. First, it argued for reducing the threshold at s 5 of the Act to remove the 'serious' threshold. The provision should also focus on the underlying behaviours rather than on the material. Additionally, there must be a prohibition on engaging in cyberbullying behaviour (i.e. 'a person must not'), thus necessitating a sanction for non-compliance. The second key reform to the regime would be to remove the Commissioner's discretion regarding when an end-user notice must be issued.

Significant reform was then proposed for the PSIO regime, with the key reform being the implementation of an order known as a 'stop bullying order' (SBO). An SBO centres on the need to protect children, where possible, from exposure to the criminal law. As Chapter Four noted, a PSIO operates based on a ‘two-step prohibition’ and breaching a PSIO is a criminal offence. Given that children may lack maturity, there is a need to provide an extra layer of protection rather than potentially subject them to the same penalty as adults who breach a PSIO. An SBO also uses language that children better understand. In practice, a court ought not (unless they think otherwise) issue a PSIO against a child unless they have first been the subject of an SBO. The implementation of the SBO regime would provide a 'three-step prohibition' process, thus giving children an additional opportunity to reform their behaviour. This reform also presents an opportunity to define the term 'bullying behaviour' in the relevant statute.

The final reform proposal centred on the development and introduction of a new offence of 'harassment'. The proposed offence is based on the United Kingdom's *Protection from Harassment Act 1997* and would capture behaviours that fall short of the threshold at s 21A. It is proposed that it be a summary offence. Although the offence can bring more children in contact with the youth justice system, it also protects children from being charged with indictable offences for what may be a significantly lower level of offending.

As a community, we must contribute towards an environment in which future generations understand that bullying is behaviour that cannot, and will not, be tolerated. We must also remember that children who engage in those behaviours must be protected from criminal law as much as possible. Unfortunately, the law's operation and structure have largely hampered our understanding of how or when to respond to bullying behaviour. It is time for this to change.

This thesis has contributed greatly to the understanding of how cyberbullying by children (and bullying more generally) interacts with the criminal law in Victoria. By examining what is meant by the terms and the youth criminal justice system, it became clear that those behaviours can be, and are actively, captured by the two offence provisions examined in this thesis. Although when behaviour is ‘sufficiently serious’ to warrant criminalisation remained unclear, the data in Chapter Five clearly showed that children are considered alleged offenders by Victoria Police and many cases progress to prosecution at the CCV.

More concerningly, the true extent of how many children are prosecuted (particularly under s 474.17) has been grossly underreported in developing responses to these behaviours. The finding that the eSafety regime developed on the misunderstanding that only eight children had been prosecuted under s 474.17 in the period 2004-2013 meant that the government was not properly placed to understand the true extent of the problem they intended to address. The true extent of how many children, across Australia, have been

charged and prosecuted for behaviours that may properly be defined as bullying and cyberbullying warrants further examination.

The reform argued for in this thesis ensures that children and the community understand the expectations and limits placed upon their behaviour. The reform also makes it clear that there are consequences for breaching those limits. Imposing such prohibitions goes beyond merely setting legal thresholds; they can also guide and shape behaviour. Explicitly stating that bullying and cyberbullying is wrongful and the behaviour is prohibited gives the criminal law its moral voice. It is once those limits are breached that bullying and cyberbullying become sufficiently serious to warrant criminalisation.

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