Cyberbullying – There should be a law against it! Legal implications for schools.

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Most educators are now aware that cyberbullying is bullying through the use of technology. This new form of bullying makes use of the diverse range of technology now available including email, texting, chat rooms, mobile phones, mobile phone cameras, i-pods and websites. Cyberbullying shares many of the same attributes as face-to-face bullying such as a power imbalance which causes a sense of helplessness on the part of the victim, repetition and the intent to hurt. Not all researchers agree however that these three attributes are directly applicable to cyberbullying. This is often because many researchers and many educators confuse cyberbullying with all types of cyber aggression. In the physical (as opposed to the virtual world) this is often the case with bullying. People look at any aggression as bullying. Although the intent to hurt is the same in both, bullying has long been defined as a subset of aggression because of the central concept of the imbalance of power. Definitions are extremely important to practice when educators are dealing with incidents of bullying and of course crucial to legal interpretation. However, there are some differences between cyberbullying and other forms of bullying. First, there is a potential for a much wider audience to be aware of the incident than in schoolyard bullying. For example, emails could be forwarded to all the student’s contacts and websites could be created that millions of people could visit. This is argued by some to change the attribute of repetition. In face-to-face or traditional bullying the concept of repetition is seen as the person or group engaged in doing the bullying repeating it to the same victim. However, in cyberbullying because of the viral nature of technology the repetition can occur with many people posting hurtful messages to the victim. Second, there is the power of the written word or visual images in cyberbullying. When bullies abuse verbally, the victim might not remember every word, but in the case of emails and text, chat rooms and web sites the targeted student can read or see what the bully has said over and over. Written words seem more concrete and ‘real’ than spoken words. The power of images is also important as young people tell us these can be more hurtful than words. Third, there is less escape from this
form of bullying, as it can happen anywhere and at any time. While schoolyard bullying might only happen in the schoolyard or on the way home or to school, cyberbullying is 24/7 where the victim cannot feel safe anywhere. Fourth, there is the potential for anonymity of the cyberbully resulting perhaps in an increase in bullies in this form as some students could be emboldened to cyberbully when they would not bully face-to-face.

Although it is a growing phenomenon this form of bullying is still not as prevalent as face-to-face bullying in young people. In a recent study in Australia 16% of students from Year 4 to 9 reported being a victim of covert bullying but under 10% of being a victim of cyberbullying (Cross et al., 2009). Another Australian study found a similar proportion of results with 30.5% enduring face-to-face bullying and 14.1% being victims of cyberbullying (Campbell, Spears, Slee, Butler, & Kift, 2010). Cyberbullying seems to increase with age with more high school students involved than primary, although 5% of Year 4 students reported being cyberbullied. Both studies found that girls seem to be slightly more involved in cyberbullying than boys as victims. Males were more likely to admit that they bullied others in both cyberbullying and face-to-face. It is thought that most of the victims of cyberbullying are also face-to-face victims and most of the cyberbullies also bully in the playground (Cross et al., 2009) although a sizable proportion only cyberbully (Campbell et al., 2010).

No longitudinal studies have yet been published describing the effects of cyberbullying, but researchers believe that the longer-term effects of cyberbullying may be more serious than those of face-to-face bullying (Campbell, 2005). Young people report qualitatively that cyberbullying is more hurtful than face-to-face bullying (Cross et al., 2009). Recent research has suggested, as was hypothesised, that cyberbullying causes more mental health problems such as anxiety and depression in victims than face-to-face bullying presumably because of the wider audience and the 24/7 nature of this bullying (Campbell et al., 2010). McLoughlin, Meyricke and Burgess (2009) found among a sample of 349 rural and regional youth that videoing or photographing a person being bullied and posting these images on the web was the most severe form of cyberbullying. Spears, Slee, Owens & Johnson’s qualitative study (2009) reported that the impact on victims was: physical, in that victims stayed away from or left the school or the town; psychological and emotional , in
Students who bully others regularly are also at risk of negative social and developmental outcomes. Australian data suggest these students are more likely to experience a number of adverse social and internalising and externalising psychological consequences such as depression, anxiety, delinquent anti-social or criminal behaviours including alcohol and other drug use problems, violence, vandalism, graffiti use, and/or theft which appear to remain stable and extend into adulthood (Rigby, 2003; Rigby & Slee, 1999). Recent data from the ACBPS found that students who were covertly bullied or who covertly bullied others reported lower levels of connectedness to their school, higher levels of loneliness at school, felt less safe at school and were more likely to experience difficulties such as emotional symptoms, conduct problems, inattention and peer relationship problems, compared with students who were not covertly bullied (Cross et al., 2009). Young people who bully others using cyber technology also report they feel they can continually apply more severe methods of intimidation, starting with texting, followed by chat rooms, and then e-mail (Campbell, 2005).

Many people are therefore calling for a law against cyberbullying. It is true that in Australian and New Zealand law, bullying and therefore cyberbullying, is not a criminal offence per se. However, the law names criminal offences most associated with bullying as assault, threats, extortion, stalking or harassment (Campbell, Kift, & Butler, 2008). If cyberbullying and face-to-face bullying are similar and most victims and perpetrators are the same students then perhaps using the existing law is sufficient and there is no need for additional laws. However, for face-to-face bullying there has been no such outcry to criminalise bullying by students. Perhaps this is because most educators view face-to-face bullying as being mainly physical and are knowledgeable that this could be covered by the laws on assault. However, in the main, face-to-face or playground bullying is usually seen more as a disciplinary matter in schools rather than a criminal offence. Most schools have an anti-bullying policy which usually contains the sanctions or disciplinary actions against students who bully. These policies do not often mention legal remedies. It is therefore interesting to speculate why the law is seen as a solution to the problem of cyberbullying. Perhaps it is the covert nature of
cyberbullying which adults believe needs a legal solution. Yet covert bullying is very prevalent in schoolyard bullying. Or perhaps it is the unknown world of technology in which young people are the digital natives and adults are the digital immigrants which could mean that adults are more concerned about the harm that may befall students over which adults feel they have little control. However, as Nicholson (2006) argues, using laws which were not designed for bullying means that legal solutions for bullying are rarely satisfactory. These laws were often drafted before the advent of the this technology and prosecutors have to shoe-horn cyberbullying into the existing laws.

There have been many calls in society however, for the law to be updated to include cyberbullying. At the 2010 National Coalition against Bullying conference former Chief Justice in the Children’s Court the Hon. Alistair Nicholson called for legal remedies to the problem. The Coalition to Decrease Bullying, Harassment and Violence in South Australian Schools has also advocated that legal solutions are a necessary part of the solution for this problem. Furthermore, Spears, Campbell, Slee, Butler and Kift (2010) found in focus groups that teachers and parents saw the law at least as part of the solution to the problem. In addition, there is a petition online that calls for all the “people of Australia to petition for new legislation and amendments regarding bullying and psychological abuse in all its forms” (http://antibullyinglaw.org).

Non-lawyers often think of “the law” in terms of a clear rule that exists to punish/regulate behaviour that is obviously wrong (there being a clear distinction between right and wrong) and therefore will be a quick and easy fix to the problem. However, there are many purposes which the law can serve, as a deterrent, as punishment, to administer compensation or even to mark a societal norm. There are also many different areas or types of law which could apply to cyberbullying: criminal, vilification, law of torts, defamation, privacy and discrimination to name a few (Kift, 2010). Despite this complexity, schools want a clarification of their legal rights and responsibilities in responding to bullying and especially cyberbullying.

This is going to be a difficult process, especially for cyberbullying as cyberspace has no boundaries and our legal system has been founded on geographical boundaries. For instance, we call a school a building on grounds with a fence around it and if one goes on schools grounds without permission it is trespassing. The concept of the fence also delineates our homes. Schools understanding of the law is that if the
offence is not committed on school grounds or on school equipment or in school time then perhaps it is not the school’s responsibility. As most cyberbullying is conducted outside of school time and place then what legal rights and responsibilities does a school have? Yeo (1997) provides some discussion on this problem. In a NSW case on the duty of care of a school, one person argued that there was such a geographical boundary to a school’s duty of care. However, many other people argue that the emphasis is more on the nature of the relationship between teachers and students. This relationship is based on the authority and control which the school exercises over its students. Thus the school’s duty of care does not end at the school gates but owes a duty of care to students when coming and going home from school and at all school-related activities (Nicholson, 2006). Thus if a school is made aware of bullying of students as they are coming to or going home from school then they have a duty of care to intervene. This is similar for the requirements of awarding adult workers’ compensation. Nicholson (2006 p. 34) also writes “it may also be that the school and teachers could be liable, even if the bullying took place at home” referring to cyberbullying. However, the law is far from clear on this.

One aspect of cyberbullying which schools need to consider is the affect of this kind of bullying has on students while they are at school, especially since we know that many students are victims both in the playground and also through technology. In England a school’s duty to provide a safe environment has been extended to govern the conduct of students when off site (Education and Inspections Act, 2006). This regulation was introduced in an effort to combat cyberbullying. The same regulation applies to principals in South Australia who have discretionary power to discipline students for inappropriate behaviour conducted outside of school grounds and hours if it affects the student body. Most independent schools also have this discretionary power. This contrasts with some school principals who believe that if students misbehave outside of school, for example, on the weekend, then the school should not be involved.

One of the clarifications about the law that perhaps can be provided is that it is mainly criminal law or civil law in Australia that applies to cyberbullying and concerns schools. Educators often think of the criminal law when there are calls for a law against cyberbullying. However, there are many issues to be considered in invoking the criminal law with students. First, the actual behaviour of the bully must be a crime and
the bully must have intended to commit that crime. Then there are the strict proof issues which includes proving beyond reasonable doubt that there was an intention to commit a crime. There are also age issues with children under ten years old being not capable of criminal intent and the presumption of non liability between 10 and 14 years although this can be rebutted. Parents in Australia are also not criminally liable for their children’s behaviour. So when should cyberbullying be criminalised or should it be dealt with in formative discipline way similar to face-to-face bullying? Most educators would say that if the consequences of the cyberbullying are severe then the perpetrator needs to be punished more harshly. The criminal justice system does consider the impact of illegal behaviour. For instance, one may drive while drunk and not be caught or hit a tree and be charged or swerve and hit another car killing the driver. It is all the same illegal behaviour but the impact will be considered in determining punishment. The tragedy of a young person suiciding after cyberbullying is extremely difficult however to link causally to the cyberbully. It is very difficult to hold someone else responsible for a suicide so that they would be convicted of manslaughter. However, most incidents of cyberbullying are of a relatively minor nature but it is the constant, repetitive low level harm which does the damage, but we cannot legislate against being nasty. Many legal experts believe that the vast majority of cyberbullying incidents should be dealt with by schools and parents co-operatively before the cyberbullying escalates to such extremes as to become a criminal matter.

Schools often ask when is it appropriate to notify the police. As the police are charged with upholding the law, the school needs to consider if the student has committed a crime and fulfils all the conditions mentioned earlier. While some police, especially those who liaise with schools, could talk with the perpetrators and/or their families to try to deter the behaviour in the future, many police are reluctant to attend when it is clearly not going to lead to an arrest, as they often do not have the capacity to respond to less serious concerns. This also ties in with school’s requests to know what evidence to collect and keep about cyberbullying incidents to produce in court. Many schools tell students and parents to bring the written evidence from computers such as emails or download paper copies of websites when bullying has occurred. While this ability to have a written form as evidence that bullying has taken place is pleasing for schools, unless it is evidence of a crime, then it is not of interest to the police. Schools however, can keep these documents as proof of cyberbullying as often there are only
people’s verbal accounts of bullying. This proof could help in the tracking down of the perpetrator if the person is not known and could help in school sanctions against the bully.

Notwithstanding this, there are laws to punish some cyberbullying offences if the schools believe that this is an appropriate route to take. One is the telecommunication offences under the Australian Commonwealth Criminal Code Act of 1995. This prohibits using telecommunication services such as the internet and mobile phones to threaten to kill or cause harm and carries penalties of ten years and seven years incarceration respectively. The penalties for using these devices for a hoax threat is ten years and to menace, harass or cause offence carries a maximum penalty of three years. These punishments do show however, the inappropriateness of many criminal penalties when they are applied to children and young people.

The laws on stalking as mentioned previously could also apply to cyberbullying behaviour. All Australian jurisdictions have anti-stalking legislation and with the exception of Western Australia, these have been made specific to cyberstalking (Kift, 1999). A well publicised prosecution for cyberstalking occurred in Victoria in April 2010. Shane Gerada, a 21-year-old was a former friend of his victim, 17-year-old year Allem Halkic who ultimately committed suicide. Gerada pleaded guilty to cyberstalking by sending Allem several threatening text messages. He received an 18-month community-based order (Kift, Campbell, & Butler, 2010). These laws also highlight the difficulties of the legal system in Australian that laws can be different in each state. If new laws are to be passed for cyberbullying then it is important for them not to be a knee jerk reaction to a tragic high profile incident. Rather they should be carefully crafted and informed by research.

There is also an issue with the detection of cyberbullying by students. We know that most victims do not tell adults for fear of retaliation from the bullies. With cyberbullying being so covert, the school might not know when cyberbullying is taking place unless victims report it. Our challenge as educators then is to be able to encourage students to report. This is difficult as it has been shown that most young people who are bullied are embarrassed and humiliated by the experience and will rarely tell adults. About half of the victims do tell their friends and some will tell their parents, but rarely will they tell their teachers. Added to this reluctance to report bullying to school
personnel if the form is cyberbullying, young people are also afraid to tell adults for fear of the technology being taken away from them. Adults seem to think that if these young people do not have their mobile phone or are not allowed on the internet then they will be protected from cyberbullying. This of course punishes the victim and not the bully. It cuts off these often marginalised young people even further from their peers. It can be likened to forbidding a student to talk to any peer at school if they are bullied, that they must be isolated in a room at every break time so no peer could have any contact with them. It is interesting to consider that many people tell us that only in rare cases does the bullying stop when they tell an adult, with most saying it stays the same and some saying the bullying gets worse if they tell an adult.

As cyberbullying is difficult to detect by anyone, especially educators, as it is a covert form of bullying, if we are going to assist bullied young people then we need to encourage reporting. To do this schools need to look carefully at how they are now managing bullying incidents that are reported to them and provide more confidentiality in the process and much more assistance to improve the relationship between the young people and not just simplistic sanctions where the perpetrator is punished in some way and then retaliates and bullies the victim even more.

We also assume that if young people are educated that certain behaviours they might engage in have criminal penalties, it could act as a deterrent. However, with the impulsive nature of students perhaps this is not as successful a deterrent as we could wish. Most students know that under age sex is a criminal offence but this does not seem to deter some young people. It would seem likely that any law on cyberbullying probably would not stop 14-year olds from ostracising one another online. However, very few young people seem to realise the criminal potential of their cyberbullying behaviour. For example Meadows et al. (2005) have reported on case of cyberbullying by Year 8 young people in the States. They were found guilty of threatening classmates online and sentenced to community service and probation. However, the children said 'I didn't know any of this was going to happen...[we] believe[d] [instant messaging] IM is private and fleeting.’ (Kift et al., 2010). Another difficulty is that many young people believe that if they bully anonymously that means they are invisible and cannot be traced and punished and thus the application of the law as a deterrent is lost on them. Perhaps a benefit of criminalising cyberbullying is that it could act as a societal norm. This happens with laws such as in Norway where there is a law forbidding adults to
smack their children. This is seen as stating to the community that this is the expected behaviour. However, the law is not enforced but is for people to aim for. It draws attention to the problem.

The issue which needs to be considered is do we want to criminalise children? In Canada there have been recent reports of children as young as 12 and 13 years old being charged with child pornography offences for ‘sexting’ – that is sending explicit photos of themselves or others via the Internet or mobile phones Johnston (2010). This has serious implications and was not the purpose for which these offences were enacted. In Australia, such a conviction would result in the child’s name being placed on the Sex Offenders’ Registrar (Kift et al., 2010). However, while this could occur at present in Australia, a Senate report recommendation that the attorney-general will have discretion as to whether young people under 18 are charged with child sex offences for sexting by their mobile phone has been accepted (Adelaide Advertiser March 2010).

The other system of law which is applicable to schools and cyberbullying is the civil law. This type of law is invoked to pay damages or compensation to a victim. As children would not have these large amounts of money and parents are not responsible for their children’s behaviour under Australian law then it is usually the school or the school system which is sued for being negligent in their duty of care. This kind of law is decided more on the balance of probabilities rather than strict proof, with a criteria of reasonableness. So a plaintiff needs to prove that first there was a duty of care and then that that duty of care was breached. This duty of care has been recognised as extending to protecting a student from the conduct of other students. Subsequently this breach then caused the injury, either physical or psychological (Butler, Kift, & Campbell, 2010). However, the psychiatric injury or recognised psychiatric illness must be distinguished from transitory emotional or mental distress. The recent cases of school systems being sued for not intervening in severe cases of face-to-face bullying in Victoria and New South Wales highlight the need for schools to be aware of their responsibilities to provide a safe learning environment for all students (Butler et al., 2010). However, there have been no cases at present based on any form of cyberbullying. The existence of this duty of care can be problematic in its scope when applied to cyberbullying in terms of geography and time as mentioned earlier. In Australia, the existence of the duty of care depends on the relationship between a teacher and student not on whether the student was on the school premises or during
school hours. There have been cases where an injury occurred in NSW to a student 20 minutes after school finished at a bus stop which was 400 metres from the school grounds. It was decided by the court that the incident fell within the school’s duty of care because the school authority was aware the students used the bus stop and could have foreseen mischief could happen between the students (Butler, Kift, & Campbell, 2010). The idea that the injury was reasonably foreseeable is an important one in cases of duty of care, together with the concept that a reasonable person would have taken precautions to avoid the risk. Applying this to cyberbullying it would seem reasonable to expect some supervision of students while using computers on school grounds. Some schools have banned mobile phones on school grounds so that bullying use this form of communication will not happen at school. It has however, been shown that this strategy does not reduce cyberbullying amongst students as it is perpetrated mostly outside of school.

Another concept in civil law is contributory negligence. This means how much did the victim reasonably foresee the risk and take precautions. This could be difficult in the case of young people who have been cyberbullied as they might not appreciate the risk and might not report the cyberbullying for the reasons mentioned earlier, the retaliation from the bully and that the technology might be taken away from them.

So how can we usefully use the law to guide school policy and responses to cyberbullying? First, it is reasonable to assume that there is a risk of cyberbullying occurring amongst the students at the school and therefore education about good digital citizenship needs to occur for the prevention of cyberbullying. This can be accomplished by providing both pre-service and in-service education for teachers. There is a significant lack in many university teacher education programs in addressing the issue of bullying. Often it is either regulated to one lecture or at best an elective subject. However, addressing bullying should be an integral part of the core degree requirements. In-service education about the complexities of bullying needs to be regularly available to practising teachers. New research findings need to be able to be disseminated to inform school practice. Second, anti-bullying policies need to include cyberbullying and be morally, legally and educationally defensible. This means that policies do not only contain reactive responses such as sanctions against bullying but also focus on providing safe and caring school environments involving student empowerment and education. One problem with school policies is that sometimes they
do not define bullying or cyberbullying with sufficient precision. The nuances of words are important for the purposes of effective prevention and deterrence, while policy enforcement requires clarity and precision in language. School policies may be practically and legally ineffectual if the language used is too vague and does not address the foreseeable risks. The policies also need to be operationalised and followed by all staff and disseminated throughout the school community. In practice this means that there should be some kind of provision to protect reporters of cyberbullying but even more importantly that there are clear and transparent steps of what will happen after the reporting. A clear and explicit process for investigating complaints needs to be articulated and all students, staff and parents are aware of and can be confident that it will be followed. Parents also need to be made aware of what is criminal behaviour using the new technologies that their children could be involved in.

Finally however, cyberbullying, as all forms of bullying, is a complex social relationship problem. Therefore it cannot be prevented or resolved just by legal solutions although they may be part of the solution. It cannot be diminished without the resolve of the whole community including parents, schools and the young people themselves. The key to reducing the incidence and impact of cyberbullying is education, not just about bullying but about all social relationships. Parents always have an important role in decreasing bullying, but especially so in cyberbullying as it often happens within the home. Parents are able to monitor to a certain extent but even more importantly they should talk to young people about their online social life. Education is also needed for judges and lawyers about the complexities of cyberbullying and an appreciation of the complex decisions schools have to make.

References


Johnson, G. (2010). Boy, 12, and girl, 13, face felony charges for ‘sexting’ nude pictures’, The Vancouver Sun, 30 January 2010


