

TASMANIA
LAW REFORM
INSTITUTE

Bullying

ISSUES PAPER NO. 21

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Information about the Tasmania Law Reform Institute

The Tasmania Law Reform Institute was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and the Law Society of Tasmania. The creation of the Institute was part of a Partnership Agreement between the University and the State Government signed in 2000. The Institute is based at the Sandy Bay campus of the University of Tasmania within the Faculty of Law. The Institute undertakes law reform work and research on topics proposed by the Government, the community, the University and the Institute itself. The Institute's Director is Ms Terese Henning. The members of the Board of the Institute are Ms Terese Henning (Chair), Professor Margaret Otlowski (Dean of the Faculty of Law at the University of Tasmania), the Honourable Justice Stephen Estcourt (appointed by the Honourable Chief Justice of Tasmania), Dr Jeremy Prichard (appointed by the Council of the University), Mr Craig Mackie (nominated by the Tasmanian Bar Association), Ms Ann Hughes (community representative), Mr Rohan Foon (appointed by the Law Society of Tasmania) and Ms Kim Baumeler (appointed at the invitation of the Institute Board).

Acknowledgments

This Issues Paper was prepared for the Board by Ms Claire Jago. Valuable feedback was provided by the Institute's Directors (past and present), Emeritus Professor Kate Warner and Ms Terese Henning and TLRI Board members. The author also consulted with the Anti-Discrimination Commissioner, Ms Robin Banks.

Background to this Issues Paper

In May 2014, the Tasmanian Attorney-General, the Hon Vanessa Goodwin, requested that the Board of the Tasmania Law Reform Institute consider as a project the examination of the capacity of Tasmanian laws to address the issue of bullying and cyberbullying, legislative approaches of other jurisdictions aimed at addressing the problem of bullying and cyberbullying, and options for any necessary reform. The project was accepted on 5 June 2014.

How to Respond

The Tasmania Law Reform Institute invites responses to the issues discussed in this Issues Paper. There are a number of questions posed by this Issues Paper and respondents can choose to answer any or all of those questions in their submission.

There are a number of ways to respond:

- **By filling in the Submission Template**

The Template can be filled in electronically and sent by email or printed out and filled in manually and posted. The Submission Template can be accessed at the Institute's webpage <<http://www.utas.edu.au/law-reform/>>.

- **By providing a more detailed response to the Issues Paper**

The Issues Paper poses a series of questions to guide your response – you may choose to answer, all, some, or none of them. Please explain the reasons for your views as fully as possible. Submissions may be published on the Institute’s website, and may be referred to or quoted from in a final report. If you do not wish your response to be so published or you wish it to be anonymous, simply say so and the Institute will respect that wish.

After considering all responses, it is intended that a final report, containing recommendations, will be published. Responses should be made in writing.

Electronic submissions should be emailed to: law.reform@utas.edu.au

Submissions in paper form should be posted to:

Tasmania Law Reform Institute
Private Bag 89
Hobart, TAS 7001

The Issues Paper is available at the Institute’s web page at <http://www.utas.edu.au/law-reform/> or can be sent to you by mail or email.

If you are unable to respond in writing, please contact the Institute to make other arrangements.

Inquiries should be directed to Dr Helen Cockburn on the above contacts, or by telephoning (03) 6226 2069.

CLOSING DATE FOR RESPONSES: 31 July 2015

Executive Summary

The Issues Paper examines the current laws and legal frameworks in Tasmania that are potentially able to address bullying behaviours, including cyberbullying. It discusses the legislative approaches taken by other jurisdictions to address the problem of bullying and considers whether legislative reform in Tasmania is necessary to deal with bullying and options for possible reform.

Part 1 is introductory; it includes the Terms of Reference and defines the scope of the Issues Paper.

Part 2 discusses the current laws available for dealing with bullying behaviours in Tasmania and in other jurisdictions. It considers the criminal law, legislative and non-legislative civil frameworks, avenues to address cyberbullying as distinct from other forms of bullying, and regulations on education providers.

Part 3 of the Issues Paper considers whether Tasmania's current legal framework sufficiently addresses bullying. It is noted that, although there are a number of legal responses that can potentially be enlivened by bullying behaviours, Tasmania's current laws in this area are a patchwork collection and are arguably unable to address the full range of bullying behaviours.

Part 4 canvasses a number of options for reform. Reform could be through a single reform or a number of options could be combined to form a tiered response. Part 4 considers criminal, civil and education-based responses. A criminal response could be utilised through an extension of the existing offence of stalking or through the creation of an offence of 'bullying'. A civil action of 'bullying' could be created, although it is noted that the personal and financial cost and the potential for lengthy delays may contribute to victims' reluctance to institute a civil claim for 'bullying'. 'Bullying intervention orders' and the extension of the functions of the Anti-Discrimination Commissioner are also put forward as options for civil reform. Finally, the option of placing requirements on education providers to deal with school-based bullying is discussed.

Underlying the discussion is the reality that bullying is a complex social problem. Bullying can manifest in a number of ways and is difficult to define. The consequences of bullying can differ depending on the person bullied, and bullying often involves young people, raising questions about how and indeed whether the law should be used.

List of Questions

Question 1 (p 49)	Do you think that the current legal frameworks available to address bullying are adequate? Why or why not?
Question 2 (p 49)	Do you think that legislative reform is necessary to address the problem of bullying?
Question 3 (p 49)	Do you think that the current avenues to address workplace bullying in Tasmania are sufficient? Why or why not?
Question 4 (p 49)	Should Tasmanian legislation be amended to include anti-bullying provisions that mirror the <i>Fair Work Act 2009</i> (Cth) procedures?
Question 5 (p 51)	If reform is necessary, what kinds of bullying do you think a legal response should address?
Question 6 (p 51)	In any legislative response to bullying, should cyberbullying be dealt with as a discrete practice or as one form of more general bullying?
Question 7 (p 53)	Do you think that a criminal response to bullying is appropriate? Why or why not?
Question 8 (p 57)	If you think that a criminal response is justified, do you prefer amendment to the stalking provision or the creation of a separate offence or bullying? Why?
Question 9 (p 57)	If you prefer amendment of the stalking provision, how should the provision be amended?
Question 10 (p 58)	If you prefer the creation of an offence of bullying: (a) What kinds of behaviour should be included in the offence? (b) What kind of consequences should be intended or caused (eg, should the offence be established where an offender has intended to cause serious emotional distress or should a higher threshold of harm be required)? (c) What form should the mental element take?
Question 11 (p 60)	Do you think that bullying should be a civil wrong?

Question 12 (p 60)	If so, what kind of behaviour should be proscribed?
Question 13 (p 60)	Is a criminal response also justified or should the civil action be the most severe legal response to ‘bullying’?
Question 14 (p 62)	Do you think that it should be possible to apply for a ‘bullying intervention order’?
Question 15 (p 62)	If so, what considerations do you think should be taken into account in making an order and in determining the conditions that can be imposed under an order?
Question 16 (p 64)	Do you think that the Anti-Discrimination Commissioner’s functions should be extended to deal with bullying? If so: (a) how should the prohibition on bullying be described? (b) should the victim have to establish that they have been bullied or should the onus to disprove bullying shift to the alleged bully?
Question 17 (p 64)	How should third parties be involved in the resolution process?
Question 18 (p 67)	Do you think that schools should be legally required to have anti-bullying policies and procedures? Why or why not?
Question 19 (p 67)	If yes, how prescriptive should the requirements be? For example, should they stipulate minimum standards in relation to investigative and disciplinary measures within schools and reporting obligations between schools, or should they instead merely require the formulation of statements of principles or targets?
Question 20 (p 67)	Should the policies and procedures be uniform between schools, or should schools have discretion to create their own within set requirements?
Question 21 (p 67)	If reform is desired, should a tiered response be implemented or is only one type of response necessary? If a tiered response is preferred, how should the tiers be structured? Should a tiered response be embodied in one legislative provision or should it be located in different pieces of legislation depending on the type of bullying, its location and who is involved?

Part 1

Introduction

1.1 Background

1.1.1 This Issues Paper is concerned with the use of legal frameworks to address bullying. The effectiveness of Tasmania's laws when dealing with bullying (including cyberbullying) has been the subject of significant community concern. Recent instances of suicides attributed to bullying appear to have strengthened community desire to ensure that the law is able to deter and sanction bullying behaviour and to ensure that the law is responsive to bullying that occurs through new technologies. Other jurisdictions are also concerned with the effects of bullying and are similarly grappling with questions of whether and how the law should be used to deal with bullying.

1.1.2 This reference was proposed by the Attorney-General, the Hon Vanessa Goodwin, and was accepted by the Institute in June 2014. The Terms of Reference of this Issues Paper are:

- Identify Tasmania's current law and legal frameworks that may be used to address bullying behaviour, including cyberbullying, whether the law captures different forms of bullying and whether it may be enhanced.
- Research legislative approaches aimed at addressing the problem of bullying, including cyberbullying, in other jurisdictions (in Australia and overseas).
- Examine how, and whether, the law should be used to address bullying behaviours, particularly among children and young persons.
- Provide recommendations for any necessary law reform.
- Any other matters the Tasmania Law Reform Institute considers relevant to the Terms of Reference.

1.1.3 A range of problems arise when trying to use the law to deal with bullying, including:

- The claimed high rate of bullying amongst young people and questions about the appropriateness of a legal response when a significant percentage of bullying is likely to be perpetrated by young people – particularly given society's desire to avoid introducing young people to the formal legal system where possible;
- The many forms of bullying and the great variance in severity;
- The difficulty defining what 'bullying' actually includes;
- That bullying generally arises out of a pre-existing social relationship. Often, it may be desirable to maintain an ongoing relationship in some form and sometimes organisations like schools, workplaces or internet service providers may be best placed to deal with bullying;
- Other than cyberbullying, which can leave an electronic trail, it may often be difficult to find evidence to prove that bullying has taken place, which creates difficulties in establishing that the law has been broken; and
- Research showing that bullying behaviour is often a symptom of the bully's underlying psychological or emotional issues.

1.1.4 The Commonwealth has the power to legislate on cyberbullying under s 51(v) of the *Constitution* but does not have the power to legislate on other forms of bullying, such as physical or verbal bullying.¹ The states have the power to legislate on anti-social behaviour more generally, including behaviour occurring by electronic means,² and hence the Tasmania Law Reform Institute has jurisdiction to consider this issue.

1.2 Scope

1.2.1 This Issues Paper considers possible legal frameworks that may be used to address bullying in Tasmania. It assesses both criminal and civil laws and also considers requirements on, and quasi-legal policies of, educational institutions. The approaches to addressing bullying taken in other jurisdictions are considered, including Commonwealth schemes. Internationally, there has been a focus on bullying in schools, which is perhaps unsurprising given the claimed high rates of bullying amongst school-aged children and the potential for early intervention in schools. A number of options for reform are canvassed.

1.2.2 Although the separate frameworks used to address workplace bullying are included in this Issues Paper, options for reform in this area are not considered in detail for two main reasons:

- Public comment on the draft Workplace Bullying Prevention Strategy, commissioned by the WorkCover Tasmania Board, closed on 19 December 2014. The results of this consultation may inform development in this area.
- Anti-bullying provisions in the *Fair Work Act 2009* (Cth) came into effect in January 2014. These provisions were the result of significant consultation, through a parliamentary inquiry into workplace bullying to which over 300 individuals and organisations gave evidence and a report by the House of Representatives Standing Committee on Education and Employment.³ These provisions are not, however, accessible by all Tasmanian workers.⁴

1.2.3 It should be noted that any changes to generally applicable civil or criminal laws could also be applied to bullying in the workplace. The amendments to Victoria's crime of stalking were a response, for example, to a workplace bullying-related death.⁵

Bullying

1.2.4 The parameters of legal definitions need to be clear and able to be applied with certainty. 'Bullying' is difficult to define and is particularly difficult to define for use in a legal framework. The specificity required of a legal definition does, however, depend on the nature of the prescriptive or

¹ Section 51(v) of the *Australian Constitution* gives federal parliament the power to make laws for the 'peace, order, and good government of the Commonwealth with respect to postal, telegraphic, telephonic and other like services', meaning that federal parliament can legislate on behaviour occurring through cyber means. Federal parliament can only legislate on those matters within its constitutional power, and neither the concurrent powers in s 51 nor the exclusive powers in s 52 of the *Constitution* allow it to legislate on anti-social behaviour generally.

² Both the states and the Commonwealth are able to legislate under the concurrent powers (such as 'postal, telegraphic, telephonic and other like services') but where a state law is inconsistent with a Commonwealth law, the Commonwealth law prevails and the state law is invalid to the extent of the inconsistency: see *Constitution* s 109. It does not appear that inconsistency is a problem here as although the Commonwealth Enhancing Online Safety for Children Bill 2014 relates to cyberbullying it does not appear to cover the field of cyberbullying.

³ Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2013, 2906 (Bill Shorten MP, Minister for Employment and Workplace Relations).

⁴ See below at [2.5].

⁵ See below at [2.3.1].

coercive measure with which the definition is concerned. A requirement that schools address bullying in a particular way, for example, may include a broader or more flexible definition than a criminal offence, which requires specific and certain definitions so that the boundaries of criminal responsibility are clearly demarcated.

1.2.5 ‘Bullying’ can refer to an extremely wide range of behaviours, such as social exclusion, name-calling, cyber-harassment, gesturing, physical contact, the spreading of rumours, teasing, publication of materials relating to the victim and masquerading as the victim online. It can permeate almost any social environment, and can be perpetrated and/or experienced by a range of people regardless of their characteristics. The same ‘bullying’ behaviour that has little or no effect on one individual may be incredibly damaging to another.

1.2.6 Before behaviour is labelled ‘bullying’, there tends to be some form of targeted victimisation. Researchers in this area have defined ‘bullying’ as:

- A desire to hurt + hurtful action + power imbalance + an unjust use of power + repetition (typically) + evident enjoyment by the aggressor + generally a sense of being oppressed on the part of the victim;⁶ or
- Intentionality + some repetitiveness + power imbalance;⁷ or
- Aggressive, intentional acts or behaviour carried out by a group or individual repeatedly and over time against a victim who is unable to defend him or herself easily.⁸

1.2.7 There appears to be consensus that bullying involves intentional acts that are repeated (or at least sustained) and that it includes some form of power imbalance, whether this imbalance is pre-existing or is a product of the bullying.⁹

1.2.8 Examples of legal definitions of bullying from other jurisdictions include:

- Behaviour, typically repeated, that is intended to cause or should be known to cause fear, intimidation, humiliation, distress or other harm to another person’s body, feelings, self-esteem, reputation or property, and can be direct or indirect, and includes assisting or encouraging such communication in any way.¹⁰
- Any pattern of gestures or written, electronic or verbal communications, or any physical act or any threatening communication, or any act reasonably perceived as being motivated by any actual or perceived differentiating characteristic, that takes place on school property, at any school-sponsored function, or on a school bus, and that places a student or school employee in actual and reasonable fear of harm to his or her person or damage to his or her property or

⁶ Ken Rigby, *New Perspectives on Bullying* (Jessica Kingsley Publishers, 2002) 51.

⁷ Dan Olweus, ‘Cyberbullying: An Overrated Phenomenon?’ (2012) 9(5) *European Journal of Developmental Psychology* 520, 523.

⁸ See, eg, Shaheen Shariff, *Cyber-Bullying: Issues and Solutions for the School, the Classroom and the Home* (Routledge, 2008) 11; Barbara Spears et al, Hawke Research Institute for Sustainable Societies, *Behind the Scenes: Insights into the Human Dimension of Covert Bullying* (Report prepared for the Department of Education, Employment and Workplace Relations, 2008) 1.

⁹ See generally, Susan Goldsmid and Pauline Howie, ‘Bullying by Definition: An Examination of Definitional Components of Bullying’ (2014) 19(2) *Emotional and Behavioural Difficulties* 210, 211; Alastair Nicholson, Submission to Australian Government, Department of Communications, *Enhancing Online Safety for Children*, March 2014, 8.

¹⁰ In Nova Scotia, see *Ministerial Education Act Regulations*, NS Reg 28/2014, s 47(1A).

creates or is certain to create a hostile environment by substantially interfering with or impairing a student's educational performance, opportunities or benefits.¹¹

1.2.9 'Bullying' can vary widely in form and severity.¹² Any law attempting to deal with the phenomenon must take account of the different types of intent that may accompany the bullying behaviour, the different forms the bullying may take and the range of harms that may be experienced by the victim. Bullying behaviour which occurs over an extended period and which is intended to cause and does in fact cause, serious harm to the victim lies at one end of the spectrum. This behaviour is the kind of bullying that tends to attract community outrage and condemnation, particularly where it is linked to suicide or other forms of victim self-harm. It often manifests in a variety of ways and can be violent, humiliating and for the target seemingly inescapable.

1.2.10 At the other end of the spectrum is bullying behaviour such as insensitive, but comparatively much less harmful, teasing.¹³ A lot of bullying falls within the milder end of the spectrum.¹⁴ Although less serious bullying can still cause harm, it is arguable that legal liability should not attach to this kind of bullying. Even where the bullying is objectively less serious, however, it may be experienced as very serious by the victim.

Cyberbullying

1.2.11 Cyberbullying may be viewed as a distinct category of bullying which, while displaying the same properties as bullying more generally, includes the additional feature that an electronic communication device is the medium for the conduct. Given that cyberbullying is a relatively recent phenomenon there is some debate as to how it is defined.¹⁵ It differs from 'traditional' bullying in that it is likely to involve a single but widely disseminated or indefinitely accessible communication rather than a sustained course of conduct.¹⁶ However, both may be regarded as examples of repetitive behaviour which is a consistent aspect of the general definitions of bullying.

1.2.12 There appears to be particular community concern about cyberbullying,¹⁷ raising the question whether cyberbullying should be treated as a discrete behaviour or simply as another form of bullying. While the cyber-environment can be distinguished from a 'real life' context because of its lack of temporal and locational constraints, those who bully online often also bully 'in person'. One benefit of a state-based legal response to bullying is that it can cover all kinds of behaviours, from cyberbullying to physical bullying.¹⁸

¹¹ See 'bullying or harassing behaviour in public schools prohibited' title 37 (Education) of 2013 Mississippi Code Mississippi; 37 Miss Code Ann § 37-11-67 (2013).

¹² See Rigby, above n 6, 41–2.

¹³ Ibid 41.

¹⁴ Ibid.

¹⁵ See Sheryl A Hemphill and Jessica A Heerde, 'Adolescent Predictors of Young Adult Cyberbullying Perpetration and Victimization among Australian Youth' (2014) 55(4) *Journal of Adolescent Health* 580, 581.

¹⁶ Consider online posts that are accessible indefinitely, or 'viral' communications that reach a large number of individuals; see Barbara Spears et al, above n 8, 18.

¹⁷ See eg, Hannah Martin, 'Call to Dob in Cyber Bullies as Hobart Gossip Page Shut Down', *The Mercury* (online), 11 June 2014 <<http://www.themercury.com.au/news/tasmania/call-to-dob-in-cyber-bullies-as-hobart-gossip-page-shut-down/story-fnj4f7k1-1226949993428>>; 'Editorial: Cyber bully threat real', *The Mercury* (online) 26 February 2014 <<http://www.themercury.com.au/news/opinion/editorial-cyber-bully-threat-real/story-fnj4f64i-1226837592914>>.

¹⁸ Whether cyberbullying should be treated as a discrete behaviour or as another manifestation of bullying more generally is considered below at [2.6.2]-[2.6.5].

Bystanders

1.2.13 Bullying often occurs in the presence of ‘bystanders’, third party observers, who are neither the bully nor the bullied.¹⁹ Bystanders are a significant factor in the problem of bullying because their actions, and sometimes their inactions, can contribute to the escalation or diminution of bullying.²⁰ In some ways, this contribution makes bystanders participants in bullying behaviour.²¹ Although bystanders have the potential to decrease bullying by changing the power dynamics in which it occurs,²² they are often reluctant to intervene when they observe bullying.²³

¹⁹ Megan Paull, Maryam Omari, Peter Standen, ‘Where is a Bystander not a Bystander? A Typology of the Roles of Bystanders in Workplace Bullying’ (2012) 50(3) *Asia Pacific Journal of Human Resources* 351, 363; see also Ken Rigby and Bruce Johnson, ‘Student Bystanders in Australian Schools’ (2005) 23(2) *Pastoral Care in Education* 10, 12.

²⁰ Paull, Omari and Standen, above n 19, 361.

²¹ Ibid.

²² Ibid.

²³ It has been estimated that bystanders are present in about 85% of bullying cases but that bystander intervention only occurs in between 10%-20% of instances of bullying. Bystanders are less likely to intervene where: there are other witnesses; they are fearful of the bully; they have negative/apathetic attitudes towards the victim; see Marie-Louise Obermann, ‘Moral Disengagement among Bystanders to School Bullying’ (2011) 10(3) *Journal of School Violence* 239, 240. Awareness-raising and education programs may limit the reluctance of bystanders to intervene, as may culture change programs within organisations: see Paull, Omari and Standen, above n 19, 363.

Part 2

Current Laws

2.1 Introduction

2.1.1 While there are no specific bullying laws in Tasmania, it may be the case that some bullying behaviours are already covered by existing legislation, depending on where the behaviour occurs, the attributes of the victim and the type of behaviour. This Part examines existing legislation and policy statements and assesses their effectiveness when dealing with bullying. It also considers laws dealing with bullying in other jurisdictions.

2.2 Tasmanian Criminal Offences

2.2.1 The criminal law is the apex of the regulatory system. It is the most punitive tier of the law because of its stigmatising and censuring functions, as well as its potential to deprive offenders of their liberty.²⁴ Criminal liability should arguably attach to only very serious behaviour. Although objectively less serious forms of bullying can still result in significant harm to the victim, the harsh consequences and desire to avoid overreach of the criminal law may suggest that not all bullying should attract criminal liability but less serious examples should be dealt with in some other way.²⁵

2.2.2 Some bullying may engage existing criminal offences. The Tasmanian offences of ‘stalking’,²⁶ ‘assault’,²⁷ ‘public annoyance’,²⁸ ‘observation or recording in breach of privacy’²⁹ and ‘publishing or distributing prohibited visual recording’³⁰ may be enlivened by some bullying behaviours. ‘Written threat to murder’³¹ and ‘sending letters threatening to burn or destroy’³² may also be made out by some instances of bullying, but the scope of these provisions is so narrow that they are not a means to address bullying generally.

Stalking

2.2.3 ‘Stalking’ requires a ‘course of conduct’, pursued with intent to cause another person physical or mental harm or to be apprehensive or fearful. For behaviour to establish a ‘course of conduct’, it must either occur on more than one occasion or be sustained. Whether or not a course of conduct is sustained is a question of fact.

²⁴ See generally Andrew Ashworth, *Positive Obligations in Criminal Law* (Hart Publishing, 2013) 13.

²⁵ See generally Rigby, above n 6, 41 for a discussion of the ‘bullying continuum’.

²⁶ *Criminal Code 1924* (Tas) s 192.

²⁷ *Ibid* s 184.

²⁸ *Police Offences Act 1935* (Tas) s 13.

²⁹ *Ibid* s 13A.

³⁰ *Ibid* s 13B.

³¹ *Criminal Code 1924* (Tas) s 162.

³² *Ibid* s 276.

2.2.4 The behaviours that can amount to a ‘course of conduct’ are set out in s 192(1) of the *Criminal Code* and include following the other person or a third person, sending offensive material to the other person or a third person and using the internet or another form of communication in a way that could be expected to cause the other person to be apprehensive or fearful. A defendant on a stalking charge can elect to be tried in the Magistrates’ Court,³³ meaning that they are liable to a lower maximum penalty than if tried in the Supreme Court.³⁴

2.2.5 *Criminal Code 1924* (Tas) s 192

192. Stalking

(1) A person who, with intent to cause another person physical or mental harm or to be apprehensive or fearful, pursues a course of conduct made up of one or more of the following actions:

- (a) following the other person or a third person;
- (b) keeping the other person or a third person under surveillance;
- (c) loitering outside the residence or workplace of the other person or a third person;
- (d) loitering outside a place that the other person or a third person frequents;
- (e) entering or interfering with the property of the other person or a third person;
- (f) sending offensive material to the other person or a third person or leaving offensive material where it is likely to be found by, given to or brought to the attention of the other person or a third person;
- (g) publishing or transmitting offensive material by electronic or any other means in such a way that the offensive material is likely to be found by, or brought to the attention of, the other person or a third person;
- (h) using the internet or any other form of electronic communication in a way that could reasonably be expected to cause the other person to be apprehensive or fearful;
- (i) contacting the other person or a third person by postal, telephonic, electronic or any other means of communication;
- (j) acting in another way that could reasonably be expected to cause the other person to be apprehensive or fearful –

is guilty of a crime.

Charge:

Stalking.

(2) For the purposes of subsection (1) –

- (a) a person pursues a course of conduct if the conduct is sustained or the conduct occurs on more than one occasion; and

³³ *Justices Act 1959* (Tas) s 72(1)(a).

³⁴ *Sentencing Act 1997* (Tas) s 13.

(b) if the conduct occurs on more than one occasion, it is immaterial whether the actions that make up the conduct on one of those occasions are the same as, or different from, the actions that make up the conduct on another of those occasions.

(3) A person who pursues a course of conduct of the kind referred to in subsection (1) and so causes another person physical or mental harm or to be apprehensive or fearful is taken to have the requisite intent under that subsection if at the relevant time the person knew, or ought to have known, that pursuing the course of conduct would, or would be likely to, cause the other person physical or mental harm or to be apprehensive or fearful.

2.2.6 There is potential for a ‘bully’ to be criminally liable for the offence of ‘stalking’. The mental element of s 192 is an intent to cause another person physical or mental harm or to be apprehensive or fearful. Where this intent cannot be proven, it may be deemed to exist under s 192(3) if actual harm, fear or apprehension was caused and the perpetrator knew or ought to have known that such a consequence would occur or would be likely to occur.

2.2.7 There is some uncertainty as to the parameters of harm, particularly mental harm, in the section.³⁵ It is uncertain whether the current wording of the provision covers a victim’s self-harm that is caused or induced by the offender’s behaviour. There is also uncertainty regarding whether ‘apprehension or fear’ is given a broad interpretation to include things like fear of harm to reputation and embarrassment³⁶ or a narrow interpretation relating only to personal safety or the safety of others.

2.2.8 Compared to other forms of bullying, cyberbullying is well covered by s 192. The insertion of paragraphs (g)–(i) and clarification that ‘stalking’ can be a single sustained act or a series of acts in the 2004 amendments to the section ensure that cyber activity is within the provision.³⁷ Section 192(1)(f) – (j) potentially applies to a range of cyberbullying.

- Paragraph (f) may cover cyber harassment, where the ‘bully’ contacts the target with offensive material.
- Paragraph (i) also governs contact with the victim. There is no requirement that the form of contact is offensive or might reasonably be expected to cause apprehension or fear, and may apply to examples of cyberbullying such as contacting a victim through a false profile.
- Paragraph (g) may cover cyber harassment, as well as the publication of offensive material relating to the target.
- Paragraph (h) may cover cyberbullying that threatens the victim. If ‘apprehension’ is given a wide interpretation, this paragraph may be able to cover cyberbullying that creates apprehension or fear relating to damage to reputation or humiliation. Where the cyberbullying creates apprehension or fear of being physically bullied, this paragraph may allow the interaction between bullying behaviours to be considered.

³⁵ In *RR v The Queen* [2013] VSCA 147 [69] (Ashley JA), the Victorian Court of Appeal considered s 21A of the *Crimes Act 1958* (Vic) in its previous form, which did not define mental harm. The Court held that ‘mental harm’ should be given its ordinary English usage and did not require a medically diagnosed or diagnosable condition, although the court was not required to determine whether ‘mere embarrassment’ was sufficient. This interpretation may be persuasive in Tasmania.

³⁶ There is a lack of Tasmanian authority on this point, but consider the South Australian case of *Police v Gabrielson* [2011] SASC 39, in which s 19AA of the *Criminal Law Consolidation Act 1935* (SA) (‘unlawful stalking’) was considered. An appeal against a finding of no case to answer was successful on the grounds that intention to cause apprehension or fear was not limited to personal safety but could relate to reputation or embarrassment.

³⁷ Tasmania, *Hansard*, House of Assembly, 19 October 2004, 56–7 (Judith Jackson, Minister for Justice and Industrial Relations).

- Paragraph (j) does not expressly relate to cyber bullying but it is drawn sufficiently broadly to potentially cover instances of cyberbullying that do not fall within the more specific paragraphs.

2.2.9 Other than paragraph (i), the sections that may apply to cyberbullying either require proof that the behaviour could reasonably be expected to cause the other person to be apprehensive or fearful³⁸ or that the material is offensive.³⁹ Where the cyberbullying alleged is, for example, a blog with posts about the victim or a ‘hate page’ about the victim or false profile of the victim (except where used only as a means to contact the victim), one of these additional elements must be established.

2.2.10 More direct or physical bullying is not as well addressed by the actions listed in s 192(1). Verbal, face-to-face bullying (such as name-calling, humiliation and harassment) and physical bullying do not fit well within any of the paragraphs of s 192(1). Whether these forms of bullying could establish ‘stalking’ is uncertain, but probably unlikely.

- It could be argued that verbal, ‘in person’ bullying may fit within paragraph (i). The alternative arguments, however, are that: ‘contacting’ implies an initiating communication which may not cover a conversational exchange in a social context; and the express reference to postal, telephonic and electronic means of communication, impliedly excludes ordinary conversation as a form of contact.
- The language used in paragraphs (f) (‘sending’) and (g) (‘publishing’ and ‘transmitting’) also does not appear to cover verbal, ‘in person’ bullying.
- Whether verbal, ‘in person’ bullying falls within paragraph (j) depends on both the content of the statements made and the interpretation given to apprehensive or fearful.⁴⁰
- The only paragraph that could apply to physical bullying — such as pushing, hitting, shoving and throwing objects at the victim — is paragraph (j). However, because paragraph (j) is a more general provision than the preceding paragraphs and none of the more specific paragraphs refer to physical contact, it is arguable that s 192 was not intended to apply to physical contact.

2.2.11 Similar problems were identified with the Victorian stalking provision’s applicability to verbal and physical bullying behaviours, and were ostensibly addressed by the ‘Brodie’s Law’ amendments to the Victorian *Crimes Act*.⁴¹

Assault

2.2.12 Another offence that may be used to sanction bullying behaviour is ‘assault’. Depending on the circumstances, less serious assaults can be charged under the *Police Offences Act*,⁴² and more

³⁸ *Criminal Code 1924* (Tas) s 192(1)(h),(j).

³⁹ *Criminal Code 1924* (Tas) s 192(1)(f),(g).

⁴⁰ Ie, whether it is a threat against safety, an individually ‘trivial’ comment that has serious consequences when viewed as part of a pattern of behaviour or an attempt to humiliate or embarrass, and whether a broad (including fear of humiliation and harm to reputation) or narrow (apprehension or fear relating to physical safety) interpretation is given to ‘apprehensive or fearful’.

⁴¹ See *Crimes Act 1958* (Vic) s 21A; see below at [2.3.3].

⁴² *Police Offences Act 1935* (Tas) s 35.

serious assaults can be charged under the *Criminal Code*.⁴³ The *Code* definition of assault applies in both instances.⁴⁴

2.2.13 Section 182 of the *Criminal Code* defines ‘assault’.⁴⁵ Essentially, an ‘assault’ is:

- The intentional application of force to another person, whether direct or indirect;
- An attempt to apply force to another person;
- A threat by any gesture to apply force to the person of another; or
- The act of depriving another person of his or her liberty.

2.2.14 Words alone cannot constitute an assault,⁴⁶ and an act which is reasonably necessary for the common intercourse of life and not disproportionate to the occasion does not constitute an assault.⁴⁷ Other than in exceptional circumstances an assault is not unlawful where there is consent.⁴⁸

2.2.15 Although some instances of bullying behaviour may establish an assault, ultimately the offence is too problematic to be an effective framework to address bullying.

- ‘Assault’ can only be established where there has been threatened (accompanied by a gesture), attempted or actual physical contact.⁴⁹ The narrow operation of the offence means that, while there is potential for an instance of physical bullying behaviour to be charged as an assault, verbal bullying and cyberbullying are not covered.⁵⁰
- Where the bullying is physical, there may be difficulties distinguishing assault as a form of physical bullying from ‘playful’ conduct, perhaps contributing to reluctance to prosecute.
- The offence of assault does not capture the repeated or sustained nature of bullying. Although multiple counts of assault may be charged it is a ‘single instance offence’, meaning that each instance of behaviour is viewed independently. An instance of physical bullying — considered in isolation from the course of bullying conduct — may appear trivial, and there may be reluctance to prosecute such a complaint.

Public Annoyance

2.2.16 Section 13 of the *Police Offences Act* prohibits public annoyance.⁵¹ Section 13(1) may be engaged by some public bullying behaviour and is punishable by a fine or up to 3 months’

⁴³ *Criminal Code 1924* (Tas) ss 182, 184.

⁴⁴ See *Acts Interpretation Act 1931* (Tas) s 36.

⁴⁵ Section 182 of the *Criminal Code* is included in Appendix A.

⁴⁶ *Criminal Code 1924* (Tas) s 182(2).

⁴⁷ *Ibid* s 182(3).

⁴⁸ The exceptional circumstances are where the assault is injurious to the public, the person assaulted and involves a breach of the peace; see *Criminal Code 1924* (Tas) s 182(4).

⁴⁹ *Criminal Code 1924* (Tas) s 182; note that words alone cannot constitute an assault: *Criminal Code 1924* (Tas) s 182(2).

⁵⁰ Other than in very narrow circumstances where the verbal bullying is threatened physical contact accompanied by a physical gesture.

⁵¹ Section 13(1) of the *Police Offences Act* is included in Appendix A.

imprisonment.⁵² Where the offence is committed within six months of another conviction under the section, the penalty can be doubled.⁵³

2.2.17 For the section to be enlivened, the behaviour must occur in a public place. This requirement is not fatal to the section's usefulness in addressing bullying because 'public place' is defined broadly and inclusively in s 3,⁵⁴ by reference to places including:

- Parks and other places of public recreation;
- Public wharfs, piers or jetties;
- Churches, chapels or other buildings open for divine service;
- Markets;
- Premises specified in a liquor license that are open for the sale of liquor;
- Racecourses, cricket grounds, football grounds, show or regatta grounds or other places to which the public have free access or access on payment of gate money;
- Streets; and
- School buildings.

Although the wide range of areas included in the section mean that its operation is not unworkably limited, cyberbullying is unlikely to fall within the section. Covert bullying and other bullying that does not include an element of public disturbance, even when perpetrated in a public place, is also arguably not covered by the 'public annoyance' provision.

2.2.18 Actions in s 13(1) that are possibly relevant to bullying behaviours occurring in a public place are:

- Section 13(1) (a) — 'a person shall not, in a public place, behave in a violent, riotous, offensive or indecent manner'. Section 13(1)(a) may apply to some verbal and physical bullying in a public place.
- Section 13(1)(c) — 'a person shall not, in a public place, engage in disorderly conduct'. The test as to whether or not conduct is disorderly is whether the conduct, considered with surrounding circumstances, was a substantial breach of public decorum likely to disturb others.⁵⁵ It is not necessary to show actual disturbance and noise, shouting and swearing may amount to disorderly conduct.⁵⁶ This paragraph may apply to bullying behaviours such as shouting insults at a victim in a public place.
- Section 13(1)(d) — 'a person shall not, in a public place, jostle, insult or annoy any person'. Section 13(1)(d) arguably has application to some less serious instances of physical and verbal bullying.
- Section 13(1)(e) — 'a person shall not, in a public place, commit any nuisance'.

⁵² The fine can be up to 3 penalty units, which currently amounts to \$420.

⁵³ *Police Offences Act 1935* (Tas) s 13(3A).

⁵⁴ The full definition of 'public place' in the *Police Offences Act* is included in Appendix A.

⁵⁵ *McDonald v Sherrin* [1998] TASSC 126, cited in *Biddle v Rush* [2013] TASMC 17 [7].

⁵⁶ *Biddle v Rush* [2013] TASMC 17 [7].

Observation, Recording and Distribution in Breach of Privacy

2.2.19 Section 13A(1) of the *Police Offences Act* prohibits the non-consensual observation or visual recording of another person in circumstances where a reasonable person would expect to be afforded privacy, and where the person is either in a private place or engaging in a private act. Section 13B(1) prohibits publication or distribution of a prohibited visual recording of another person.

2.2.20 While ss 13A and 13B of the *Police Offences Act* may be engaged by some instances of cyberbullying — specifically where a victim has been filmed and then humiliated by the publication of the recording — they are too narrow to be an effective way of addressing bullying.⁵⁷

2.2.21 The requirement that (when not in a private place) the complainant must be engaging in a private act excludes from the section's reach bullying behaviour such as filming abuse of a victim in a public place for distribution online.⁵⁸ The definition of prohibited visual recording under s 13B(2) also requires that the recording is of a person in a private place or engaging in a private act in circumstances where a reasonable adult would expect to be afforded privacy.⁵⁹ These provisions are too narrow to address anything but very specific examples of cyberbullying behaviour.

Pursuing and Prosecuting 'Bullying'

2.2.22 While arguably only very serious bullying should attract criminal sanctions, it seems that, under the existing offence framework even severe bullying rarely provokes a criminal justice response. Even where the elements of an offence appear to be made out by bullying behaviour, police and prosecutorial discretion may tend against pursuing criminal charges.

2.2.23 Policing is inherently discretionary.⁶⁰ Much of bullying's harm is attributable to its repeated or sustained nature, and where the offence alleged does not cover the full extent of the behaviour, there may be reluctance to pursue individual complaints. An 'assault', for example, may be made out by a bully pushing his or her victim, but this kind of assault may not be considered serious enough to warrant criminal sanctions especially as the assault provision does not allow consideration of other behaviours making up a course of bullying conduct. Where the alleged offender is a minor, wide police discretion is supported by the *Youth Justice Act 1997* (Tas), which provides options other than court proceedings to deal with young offenders.⁶¹

⁵⁷ Sections 13A and 13B of the *Police Offences Act* are included in Appendix A.

⁵⁸ See *Police Offences Act 1935* s 13A(1)(b)(ii).

⁵⁹ It includes where the recording is a visual recording of the person's genital or anal region, when it is covered only by underwear or is bare, made in circumstances where a reasonable adult would expect to be afforded privacy in relation to that area.

⁶⁰ Simon Bronitt and Phillip Stennig, 'Understanding Discretion in Modern Policing' (2011) 35 *Criminal Law Journal* 319, 320; police discretion includes investigation, arrest, cautioning, charging and prosecution.

⁶¹ See *Youth Justice Act 1997* (Tas) s 8; where a youth admits committing an offence and the police officer is of the opinion that the matter does not warrant formal action, the officer may informally caution the youth against further offending. Where an informal caution is issued, no further proceedings are able to be taken against the youth for the offence; ss 9(1)(a), 10; where a youth admits committing an offence and a police officer is of the opinion that the matter warrants a more formal action than an informal caution, the officer may require that the youth be formally cautioned against further offending. A formal caution may be accompanied by undertakings by the youth and if a formal caution is administered: the police officer must explain to the youth the nature of the caution and that the caution may be taken as evidence of the commission of the offence; and the caution must be administered in the presence of a guardian or responsible adult if practicable, be put in writing, contain information about the offence, offender and caution and be signed by the youth, authorised police officer and the guardian or responsible adult if reasonably practicable; ss 9(1)(b), 13-20; where a youth admits committing an offence and a police officer is of the opinion that the matter warrants a more formal action than an informal caution, the officer may require the Secretary to convene a community conference to deal with the matter; a community conference is a facilitation-based form of restorative justice.

2.2.24 Prosecutors may exercise their discretion and decide not to proceed to prosecution in a case involving allegations of bullying. There are two primary considerations in a decision to prosecute:

- Whether there is sufficient evidence.⁶² Sufficient evidence requires more than a bare case; admissibility of evidence, witness credibility and availability, and the strength of the competing arguments are all important considerations.⁶³
- Whether the prosecution is in the public interest. Factors relevant to the public interest vary from case to case but may include:⁶⁴ seriousness of the offence; circumstances of the offence; circumstances of the offender, complainant or witnesses; culpability; alternatives to prosecution; and the possibility of unduly harsh or oppressive consequences of conviction.

2.2.25 Where the alleged offender is under 16 years of age, it is the policy of the Director of Public Prosecutions that prosecutions should be rare and particular consideration should be given to alternatives.⁶⁵ Where young offenders are involved, the prosecution also faces additional burdens in establishing criminal charges. No act or omission of a person under 10 years is an offence,⁶⁶ and no act or omission of a person between the ages of 10 and 14 is an offence unless it can be shown that he or she had sufficient capacity to know that the act or omission was one that he or she should not have done or made.⁶⁷

2.2.26 The apparent infrequent involvement of the criminal justice system in cases of bullying may also be due to victims' failure to appreciate that an offence may have been committed leading to failure to report potentially criminal behaviour. As this section of the Issues Paper has shown, the patchwork of legislative provisions that might potentially apply is likely to render the law inaccessible to most.⁶⁸

2.3 Criminal Offences in Other Jurisdictions

Victoria

2.3.1 In September 2006, after a sustained period of serious workplace bullying, 19-year-old Brodie Panlock took her own life. The community response to Ms Panlock's death was intensified by the fact that her tormentors were not charged with a criminal offence but were instead fined under the *Occupational Health and Safety Act 2004* (Vic).⁶⁹ The legislative response was to extend the crime of 'stalking' to cover serious bullying.⁷⁰ The crime of stalking is constituted by a 'course of conduct' that is intended to cause physical or mental harm.

⁶² *Criminal Code 1924* (Tas) s 310(4).

⁶³ Director of Public Prosecutions, *The Role of an Independent Prosecutor and Guidelines for the Exercise of the Discretion to Prosecute* (24 April 2014) Crown Law <http://www.crownlaw.tas.gov.au/dpp/prosecution_guidelines>.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Criminal Code 1924* (Tas) s 18(1).

⁶⁷ *Criminal Code 1924* (Tas) s 18(2).

⁶⁸ See below at [3.1.2].

⁶⁹ Victoria, *Parliamentary Debates*, Legislative Assembly, 6 April 2011, 1019 (Robert Clark, Attorney-General).

⁷⁰ See *Crimes Act 1958* (Vic) s 21A.

2.3.2 Prior to the 2011 amendments to Victoria’s stalking provision (known colloquially as ‘Brodie’s Law’) many of the concerns that currently exist with the applicability of s 192 of the Tasmanian *Criminal Code* to bullying also existed with regard to the stalking provision in Victoria. The scope of Victoria’s offence of stalking was considerably broadened by the ‘Brodie’s Law’ amendments in 2011.⁷¹

2.3.3 To address serious bullying as ‘stalking’, s 21A of the *Crimes Act 1958* (Vic) was amended in four key ways:⁷²

- Threats and abusive or offensive words or acts were included in the actions able to establish a ‘course of conduct’, which is an essential element of the offence;
- The description of ‘course of conduct’ was broadened to include conduct that could reasonably be expected to cause the victim to harm himself or herself physically;
- It was made clear that intention to cause the victim to harm himself or herself physically could satisfy the fault element;
- ‘Mental harm’ was inclusively defined by reference to psychological harm and causing a victim to engage in suicidal thoughts.

2.3.4 The *Stalking Intervention Orders Act 2008* (Vic) was also amended to allow serious bullying to be prevented through intervention orders.⁷³ The *Stalking Intervention Orders Act 2008* (Vic) allows an intervention order to be made where the court is satisfied on the balance of probabilities that the respondent has stalked another person and is likely to continue to do so or do so again.⁷⁴ The burden of proof for an intervention order (balance of probabilities) is lower than that required to establish the offence of stalking (beyond a reasonable doubt).

2.3.5 An intervention order may be an effective means to address bullying behaviours as such orders may prevent serious harm and the escalation or continuation of the behaviour. The process to obtain an intervention order is also more efficient than criminal proceedings. An intervention order may impose on the respondent any restrictions or prohibitions that appear to be necessary or desirable in the circumstances.⁷⁵ The definition of ‘stalking’, for the purposes of the *Stalking Intervention Orders Act*, aligns with the definition of stalking in the *Crimes Act*.⁷⁶ An application for an order can be made with or without, and before or after, the commencement of criminal proceedings relating to the same conduct.⁷⁷ Contravention of an order is an offence punishable by a fine, two years’ imprisonment or both.⁷⁸

New South Wales

2.3.6 Section 60E of the *Crimes Act 1900* (NSW) specifically addresses assault, stalking, harassment and intimidation at schools, and could ostensibly be used to address bullying in schools.⁷⁹

⁷¹ The ‘Brodie’s Law’ amendments are outlined in Appendix A.

⁷² Victoria, *Parliamentary Debates*, Legislative Assembly, 6 April 2011, 1019–20 (Robert Clark, Attorney-General).

⁷³ *Ibid* 1020 (Robert Clark, Attorney-General).

⁷⁴ *Stalking Intervention Orders Act 2008* (Vic) s 7(1).

⁷⁵ *Ibid* s 7(2).

⁷⁶ *Ibid* s 4.

⁷⁷ *Ibid* s 24

⁷⁸ *Ibid* s 32. Where the penalty is a fine, the fine may be up to 240 penalty units.

⁷⁹ Section 60E of the *Crimes Act 1900* (NSW) is included in Appendix A.

The provision was not enacted as a response to bullying. The second reading speech makes clear that the section was a response to community concern about intruders entering school premises to assault or intimidate.⁸⁰ It only covers behaviour that occurs where the student or staff member is ‘attending a school’ — meaning that its operation is constrained by the school gates. Although the section’s applicability to bullying has been noted,⁸¹ no reported cases applying the offence to ‘bullying’ were found.⁸² Section 60E does not appear to be an effective means of addressing bullying.

2.3.7 The section provides that a person who assaults, stalks, harasses or intimidates any school student or member of staff of a school while the student or member of staff is attending a school is liable to imprisonment for 5 years.⁸³ Where the assault causes actual bodily harm the offender is liable to imprisonment for 7 years,⁸⁴ and where wounding or grievous bodily harm is caused the offender is liable to imprisonment for 12 years.⁸⁵ These high penalties were imposed in response to community concern about intruders in schools and were not intended as a response to bullying.

New Zealand

2.3.8 In August 2012, the New Zealand Law Commission (NZLC) released a Ministerial Briefing Paper discussing the adequacy of the regulatory environment for dealing with new and traditional media in the digital era.⁸⁶ The Briefing Paper does not deal with ‘bullying’ per se. Its focus is harmful digital communication, of which cyberbullying is a significant form. The Briefing Paper recommended a package of reforms to address harmful digital communications and informed the Harmful Digital Communications Bill 2013, which was introduced into Parliament in November 2013 and is currently still before Parliament.⁸⁷ The Bill proposes a new civil regime to deal with digital communications as well as the creation of an offence of ‘harmful digital communication’.⁸⁸

2.3.9 Relevant to the criminalisation of bullying generally (rather than cyberbullying specifically), section 24 of the Harmful Digital Communications Bill 2013 amends s 179 of the *Crimes Act 1961* (NZ) (‘aiding and abetting suicide’). It provides that a person who incites, counsels or procures another person to commit suicide commits an offence even if the other person does not commit or attempt to commit suicide because of the conduct. This offence is punishable by a term of imprisonment not exceeding three years. In New Zealand, children under 10 years of age are not criminally responsible and children between 10 and 14 years of age are not criminally responsible

⁸⁰ New South Wales, *Parliamentary Debates*, Legislative Assembly, 31 October 2002, 6342–5 (John Watkins, Minister for Education and Training).

⁸¹ See, eg, Communications Law Centre, University of Technology Sydney, Submission No 63 to Joint Select Committee on Cyber-Safety, *High-Wire Act: Cyber-Safety and the Young* (2011), 6 [4.5] <http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jssc/subs.htm>; New South Wales Government, Response to the Report of the Legislative Council General Purpose Standing Committee No 2, *Inquiry into Bullying of Children and Young People* (May 2010) 15 <<https://www.parliament.nsw.gov.au/>>.

⁸² A search of Westlaw AU and LexisNexis AU on 11 December 2014 found no ‘bullying’ cases under s 60E.

⁸³ *Crimes Act 1900* (NSW) s 60E(1).

⁸⁴ *Ibid* s 60E(2).

⁸⁵ *Ibid* s 60E(3).

⁸⁶ New Zealand Law Commission, *Harmful Digital Communications: the Adequacy of the Current Sanctions and Remedies*, Ministerial Briefing Paper (2012).

⁸⁷ The Bill has been considered and recommended by the Justice and Electoral Committee; see Harmful Digital Communications Bill 2013 (NZ) (Commentary) <http://www.parliament.nz/resource/en-nz/50DBSCH_SCR6221_1/b8c4457cbab92a1b7cf49a6fd625063104ecbc0a>.

⁸⁸ See below at [2.8.1]–[2.8.9].

unless it can be shown that they knew either that the act or omission was wrong or that it was contrary to law.⁸⁹

United States

2.3.10 Although there has been some desire for a federal response,⁹⁰ the legislative response to bullying in the United States has been state-based and the only state currently without some form of bullying legislation is Montana. Georgia enacted the first anti-bullying legislation in 1999, partly in response to the killing of 12 students and a teacher at Columbine High School in 1999 and a bullying-related suicide.⁹¹ Since 1999, there has been a proliferation of legislative action — between 1999 and 2010 more than 120 bills were enacted by states to address bullying and related behaviours.⁹²

2.3.11 The type, breadth and effectiveness of legislative approaches differ significantly between states. State legislative approaches to bullying have been streamlined into three categories:⁹³ (1) anti-bullying provisions within education codes; (2) criminal anti-bullying legislation; and (3) extension of existing offences such as stalking.

2.3.12 Although the primary legislative response in the United States has been to impose anti-bullying requirements on schools,⁹⁴ there have also been indications of a trend towards the criminalisation of bullying behaviours.

2.3.13 Massachusetts, for example, has modified its stalking and criminal harassment provisions.⁹⁵ Idaho created the crime of ‘student harassment, intimidation and bullying’, which prohibits a student from intentionally committing, or conspiring to commit, an act of harassment, intimidation or bullying against another student.⁹⁶ ‘Harassment, intimidation or bullying’ means any intentional gesture, written, verbal or physical act or threat by a student that a reasonable person in the circumstances should know will have the effect of harming a student, damaging a student’s property, placing a student in reasonable fear of harm to his or her person or property or that is sufficiently severe, persistent or pervasive that it creates an intimidating, threatening or abusive educational environment for a student.⁹⁷

2.3.14 In response to bullying, the crime of threatening to cause bodily harm or death to a pupil or school employee was modified in Nevada. This crime prohibits, through the use of any means of oral,

⁸⁹ *Crimes Act 1961* (NZ) ss 21(1), 22(1)).

⁹⁰ Samantha Neiman, Brandon Robers and Simone Robers, ‘Bullying: A State of Affairs’ (2012) 41(4) *Journal of Law and Education* 603, 621. The authors note that several attempts have been made to pass federal legislation aimed at school bullying including national anti-bullying legislation proposed in the US House of Representatives in 2004 to amend the Safe and Drug-Free Schools and Communities Act to include measures to prevent bullying and harassment which was referred to the Subcommittee on Education Reform of the House Committee on Education and the Workforce but received no further action and has never been reintroduced, and the introduction of the ‘Megan Meier Cyberbullying Prevention Act’ in 2009 which went to subcommittee hearings but received no further action.

⁹¹ http://www.parliament.nz/resource/en-nz/50DBSCH_SCR6221_1/b8c4457cbab92a1b7cf49a6fd625063104ecbc0a
Victoria Stuart-Cassel, Ariana Bell and J Fred Springer, ‘Analysis of State Bullying Laws and Policies’ (Report prepared for US Department of Education, December 2011) xi <<http://www2.ed.gov/rschstat/eval/bullying/state-bullying-laws/state-bullying-laws.pdf>>.

⁹² *Ibid.*

⁹³ Tracy Tefertiller, ‘Out of the Principal’s Office and Into the Courtroom: How Should California Approach Criminal Remedies for School Bullying?’ (2011) 16 *Berkeley Journal of Criminal Law* 168, 192.

⁹⁴ See below at [2.10.3]–[2.10.7].

⁹⁵ See Mass Gen Laws pt IV tit I ch 265 § 43 (‘stalking’); Mass Gen Laws pt IV tit I ch 265 § 43A.

⁹⁶ 18 Idaho Code Ann §9-18-917A (2014).

⁹⁷ 18 Idaho Code Ann §9-18-917A (2014).

written or electronic communication, including through the use of cyberbullying, knowingly threatening to cause bodily harm or death to a pupil or employee of a school district or charter school with the intent to: intimidate, harass, frighten, alarm or distress a pupil or employee of a school district or charter school; cause panic or civil unrest; or interfere with the operation of a public school, including, without limitation, a charter school.⁹⁸

2.4 Tasmanian Civil Schemes

2.4.1 Civil law sanctions are considered to be less objectively serious than those imposed by the criminal law as they do not have as strong a censuring or stigmatising function. Civil law sanctions are less punitive and are generally limited to damages or injunctive relief. There are a range of existing legislative and non-legislative civil avenues that may offer a means to address bullying behaviours.

Anti-Discrimination Law (Tasmania)

2.4.2 Section 17(1) of the *Anti-Discrimination Act 1998* (Tas) prohibits conduct which offends, humiliates, insults or ridicules another person on the basis of attributes set down in s 16, in circumstances in which a reasonable person would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.⁹⁹ The protected s 16 attributes are: race, age, sexual orientation, lawful sexual activity, gender, gender identity, intersex, marital status, relationship status, pregnancy, breastfeeding, parental status, family responsibilities and disability.¹⁰⁰

2.4.3 The *Anti-Discrimination Act* applies to discrimination and other prohibited conduct by or against a person engaged in or undertaking any activity in connection with: employment; education and training; the provision of facilities, goods and services; accommodation; membership and activities of clubs; the administration of any law of the state or any state program; awards, enterprise agreements or industrial agreements.¹⁰¹

2.4.4 The *Anti-Discrimination Act 1998* (Tas) provides an efficient and accessible legal avenue for the resolution of complaints. Where a complaint is made under the *Anti-Discrimination Act*, the Anti-Discrimination Commissioner decides whether the complaint should be accepted for investigation or rejected.¹⁰² When a complaint is accepted for investigation, the Commissioner notifies the complainant and respondent and provides the respondent with a summary of the complaint and reasons for accepting the complaint.¹⁰³ When a complaint is rejected, the Commissioner informs the complainant of the reasons for rejection and of the right to review by the Tribunal.¹⁰⁴

2.4.5 Parties to a complaint may attempt to resolve the complaint through conciliation and parties may be directed to attend a conciliation conference.¹⁰⁵ Agreements reached at a conciliation

⁹⁸ NV Rev Stat § 392.915 (Justia 2013).

⁹⁹ Section 17(1) of the *Anti-Discrimination Act* is included in Appendix A.

¹⁰⁰ Note that the *Anti-Discrimination Act 1998* (Tas) s 21 provides that a person who knowingly causes another person to contravene the Act is jointly and severally liable for any contravention of the Act.

¹⁰¹ Other than inciting hatred, which also applies in any other area or in connection with any other activity; *Anti-Discrimination Act 1998* (Tas) s 22.

¹⁰² Ibid s 64.

¹⁰³ Ibid s 67.

¹⁰⁴ Ibid s 65.

¹⁰⁵ Ibid ss 74, 75.

conference have the same force as an order of the Tribunal.¹⁰⁶ When a complaint is not resolved in a timely fashion, it is investigated and at the conclusion of the investigation the Commissioner will decide whether the complaint should be dismissed, proceed to conciliation or be referred to the Tribunal for an inquiry.¹⁰⁷ The *Anti-Discrimination Act 1998* (Tas) sets a six-month time limit, requiring referral of the complaint by the Commissioner or an authorised person within six months of notification that the Commissioner has accepted the complaint or within any further period agreed with the complainant.¹⁰⁸

2.4.6 Where bullying is concerned, the opportunity for conciliation and consensus-based solutions may be particularly effective by facilitating discussion about, and strategies to stop, the behaviour. Some bullying behaviour may be captured by this framework. The *Anti-Discrimination Act* only applies, however, to behaviour that is directed at a protected attribute and that occurs in connection with an area of activity. Any person can be bullied, and even where bullying of a particular individual is directed towards one of the protected attributes it may also relate to other characteristics. The limited scope of application of anti-discrimination law means that it will not always provide an effective means of addressing bullying.

Anti-Discrimination Law (Commonwealth)

2.4.7 Commonwealth anti-discrimination legislation also applies in Tasmania, and may capture some bullying behaviour. Relevant sections of the *Age Discrimination Act 2004* (Cth), *Disability Discrimination Act 1992* (Cth), *Racial Discrimination Act 1975* (Cth) and *Sex Discrimination Act 1984* (Cth) may be engaged by bullying directed towards those respective characteristics where it falls within the scope of the laws (for example, discrimination in employment,¹⁰⁹ education,¹¹⁰ and clubs and incorporated associations¹¹¹). As noted above however, in light of the requirement that the behaviour be directed at a particular attribute, anti-discrimination law is arguably an ineffective framework to deal with bullying.

Restraint Orders

2.4.8 Part XA of the *Justices Act 1959* (Tas) deals with restraint orders. An application for a restraint order may be made by:

- a police officer;
- a person against whom — or against whose property — the behaviour that forms the subject matter of the application was directed or — where that person is a child — a parent or guardian; or
- a guardian or administrator of a person who is a represented person within the meaning of the *Guardianship and Administration Act 1995*.¹¹²

¹⁰⁶ Ibid s 76(4).

¹⁰⁷ Ibid s 71(1); the Commissioner does not have the authority to decide whether or not discrimination or other unlawful conduct took place, that is the role of the Tribunal; see *Anti-Discrimination Act 1998* (Tas) s 13.

¹⁰⁸ *Anti-Discrimination Act 1998* (Tas) ss 78(2), 67.

¹⁰⁹ *Disability Discrimination Act 1992* (Cth) s 15; *Age Discrimination Act 2004* (Cth) s 18; *Racial Discrimination Act 1975* (Cth) s 15; *Sex Discrimination Act 1984* (Cth) s 14.

¹¹⁰ *Disability Discrimination Act 1992* (Cth) s 22; *Age Discrimination Act 2004* (Cth) s 26; *Racial Discrimination Act 1975* (Cth) s 9; *Sex Discrimination Act 1984* (Cth) s 21.

¹¹¹ *Disability Discrimination Act 1992* (Cth) s 27; *Sex Discrimination Act 1984* (Cth) s 25.

¹¹² *Justices Act 1959* (Tas) s 106B(2).

2.4.9 In deciding both whether to make a restraint order and the nature of the conditions to be attached to the order, the protection and welfare of the person for whose benefit the order is sought is of paramount importance.¹¹³

2.4.10 Section 106B provides the conditions under which a restraint order may be imposed.¹¹⁴ A restraint order may be imposed where a person has:

- (a) caused personal injury or damage to property; or
 - (b) threatened to cause personal injury or damage to property; or
 - (c) behaved in a provocative or offensive manner and the behaviour is such as is likely to lead to a breach of the peace;
- and, unless restrained, that person is likely to behave in a similar manner or carry out the threat; or
- (d) stalked the person for whose benefit the application is made or caused the person for whose benefit the application is made to feel apprehensive or fearful through the stalking of a third person

2.4.11 Some bullying causes damage to property or psychological harm. Although ‘personal injury’ is not defined in the *Justices Act 1959* (Tas), and there is some uncertainty as to the extent of mental harm required to amount to ‘personal injury’, some bullying behaviour may be captured by s 106B(1)(a) (‘caused personal injury or damage to property’).

2.4.12 Similarly, bullying constituted by some forms of threats (relating to personal injury or damage to property) may fulfil the requirements of s 106B(1)(b) (‘threatened to cause personal injury or damage to property’).

2.4.13 Section 106B(1)(c) (‘behaved in a provocative or offensive manner’) requires that the behaviour is such that it is likely to lead to a breach of the peace. This may limit the paragraph’s applicability to bullying since ‘breach of the peace’ generally involves some element of risk of violence.

2.4.14 To establish s 106B(1)(d) (‘stalking’), the person against whom the order is sought must have stalked the person for whose benefit the application is made, or made that person apprehensive or fearful through the stalking of a third person.¹¹⁵

2.4.15 Like the interaction between ‘stalking’ in the *Crimes Act 1958* (Vic) and the *Stalking Intervention Orders Act 2008* (Vic), the definition of ‘stalking’ used in the *Justices Act 1959* (Tas) aligns closely with that used in the criminal offence of ‘stalking’.¹¹⁶ Stalking as defined in the *Justices Act*, however, is more easily established. ‘Stalking’ under the *Code* requires a sustained or repeated course of conduct. The course of conduct must be intended to cause another person physical or mental harm or to be apprehensive or fearful or, alternatively, harm or apprehension must actually be caused in circumstances in which the perpetrator ought to have known the likelihood of such consequences. The definition in the *Justices Act* only requires that one of the actions in paragraphs (a)–(j) is done without a lawful purpose. Where the stalking is of a third person, the stalking must have made the person for whose benefit the application is made apprehensive or fearful (this is a consequence that must be established, not necessarily something that the perpetrator must have intended). Further, the

¹¹³ Ibid ss 106B(4AAB)(a), 106B(4A).

¹¹⁴ Section 106B of the *Justices Act* is included in Appendix A.

¹¹⁵ The definition of ‘stalking’ from s 106A(1) of the *Justices Act* is included in Appendix A.

¹¹⁶ See *Justices Act 1959* (Tas) s 106A(1); *Criminal Code 1924* (Tas) s 192(1)(a)–(j).

burden of proof under the *Justices Act* is the balance of probabilities, whereas the burden of proof under the *Criminal Code* is beyond a reasonable doubt.

2.4.16 Restraint orders are not limited in their application and can be used against minors.¹¹⁷ They may be a useful way to address some serious bullying by facilitating early intervention and preventing more severe harm from eventuating. ‘Stalking’ — under s 106B(1)(d) of the *Justices Act* — probably covers some forms of bullying, especially cyberbullying, but does not appear to cover such bullying as verbal ‘in-person’ bullying or physical bullying.¹¹⁸ The extent of mental harm required to establish ‘personal injury’ may be a barrier where the behaviour does not fall within the definitional parameters of ‘stalking’.

2.5 Workplace Bullying

2.5.1 A generally accepted definition of ‘workplace bullying’, used by Safe Work Australia in their Draft Code of Practice ‘Preventing and Responding to Workplace Bullying’, is *repeated and unreasonable behaviour directed towards a worker or group of workers that creates a risk to health and safety*.¹¹⁹ There are legal avenues specifically designed to address workplace bullying. More general criminal and civil offences may also be enlivened by some workplace bullying behaviours.

2.5.2 Both Tasmanian and Commonwealth legislation applies to workplace bullying in Tasmania. Under Australia’s system of government, the federal parliament can only legislate on matters over which it has constitutional power. Conditions, rights and responsibilities of employment can be addressed by both state and federal governments, although the federal parliament is not able to legislate with respect to all kinds of employment.¹²⁰

2.5.3 The *Fair Work Act 2009* (Cth) only applies to workers who are bullied at work in ‘constitutionally-covered businesses’.¹²¹ The practical effect of the distinction between ‘constitutionally-covered businesses’ and other businesses is to create disparity in anti-bullying procedures available to workers. The distinction exists because federal parliament can only wield legislative power granted to it by the *Constitution*.¹²² A ‘constitutionally-covered business’ is a business over which the federal government has legislative power. The *Fair Work Act* cannot apply to businesses that are not ‘constitutionally-covered’ simply because the federal government does not have power to legislate with respect to those businesses.

2.5.4 A ‘constitutionally-covered business’ is:¹²³

- a proprietary limited company;
- a foreign corporation;

¹¹⁷ See generally *Justices Act 1959* (Tas) ss 106E(4), 106E(5).

¹¹⁸ See above at [2.2.3]-[2.2.11].

¹¹⁹ Safe Work Australia, ‘Preventing and Responding to Workplace Bullying’ (Draft Code of Practice, Safe Work Australia, 2014) 6; see also, *Fair Work Act 2009* (Cth) s 789FD;

¹²⁰ Note that where there is inconsistency between state and federal legislation on the same matter, the federal legislation prevails; *Australian Constitution* s 109.

¹²¹ *Fair Work Act 2009* (Cth) s 789FD.

¹²² See *Australian Constitution* ss 51, 52.

¹²³ Fair Work Commission, *Glossary* (14 October 2013) <<https://www.fwc.gov.au/glossary>>; see also *Fair Work Act 2009* (Cth) s 789FD(3), which defines a ‘constitutionally-covered business’ as a constitutional corporation, the Commonwealth, a Commonwealth authority, a body corporate incorporated in a Territory or a business or undertaking conducted primarily in a Territory or Commonwealth place.

- a trading or financial corporation formed within the limits of the Commonwealth;
- the Commonwealth;
- a Commonwealth authority;
- a body corporate incorporated in a territory; and
- a business or organisation conducted principally in a territory or Commonwealth place.

2.5.5 Sole traders, partnerships, many state government employers and corporations whose main activity is not trading or financial (for example, some charities, not-for-profit organisations and local councils) are not ‘constitutionally-covered businesses’.

The Fair Work Act 2009 (Cth)

2.5.6 Part 6-4B of the *Fair Work Act 2009* (Cth) addresses workplace bullying by providing a process through which a worker may apply for an order to stop bullying.¹²⁴ The Act defines a worker as *bullied at work* if:¹²⁵

- the worker is at work in a ‘constitutionally-covered business’; and
- an individual or a group of individuals repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and
- the behaviour creates a risk to health and safety.

2.5.7 A worker who reasonably believes that he or she has been bullied at work may apply to the Fair Work Commission for an order to stop the bullying.¹²⁶ The Fair Work Commission must begin dealing with such an application within 14 days of the application being made.¹²⁷ Where the Fair Work Commission is satisfied that a worker has been bullied at work and that there is a risk that the worker will continue to be bullied at work, it may make any order it considers appropriate to prevent the worker from being bullied at work (other than an order requiring the payment of a pecuniary amount).¹²⁸ It is a civil offence to contravene an order to stop bullying.¹²⁹

2.5.8 Orders to stop bullying are consistent with the generally preferred remedy of victims that the bullying simply stop.¹³⁰ Part 6-4B is intended to support prevention, early intervention and the timely resolution of workplace bullying.¹³¹ A wide range of orders may be made under the anti-bullying provisions of the *Fair Work Act*, meaning that solutions can be tailored to the needs of victims, perpetrators and workplaces.

¹²⁴ Part 6-4B was inserted in response to a 2012 Parliamentary Inquiry into workplace bullying and 2013 Government report, Standing Committee on Education and Employment, Parliament of Australia, *Workplace Bullying: ‘We Just Want it to Stop’* (2012): see Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2013, 2906 (Bill Shorten, Minister for Employment and Workplace Relations).

¹²⁵ *Fair Work Act 2009* (Cth) s 789FD(1); s 789FD of the *Fair Work Act* is included in Appendix A.

¹²⁶ *Ibid* s 789FC(1); s 789FC of the *Fair Work Act* is included in Appendix A.

¹²⁷ *Ibid* s 789FE(1).

¹²⁸ *Ibid* s 789FF(1); s 789FF of the *Fair Work Act* is included in Appendix A.

¹²⁹ *Ibid* ss 789FG, 539 item 38 (attracting 60 penalty units).

¹³⁰ See Standing Committee on Education and Employment, above n 124, 95, which states that at least 90% of targets of bullying were more concerned with stopping the bullying than with formal processes or consequences.

¹³¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2013, 2906–7 (Bill Shorten, Minister for Employment and Workplace Relations).

2.5.9 For example, in *Applicant v Respondent* [2014],¹³² the terms of the order to stop bullying required:

- the employee the subject of the application not to exercise on the balcony in front of the applicant's desk between 8:15 am and 4:15 pm;
- the employee the subject of the application not to speak to the applicant in circumstances where there were no other individuals within listening-range;
- the employee the subject of the application to make no comment about the applicant's clothes or appearance;
- the employee the subject of the application not to send any emails to the applicant unless the substance of the correspondence was work-related and one of two specified staff were also addressees;
- the employee the subject of the application not to contact the applicant on her personal telephone unless in relation to an immediate work-related emergency;
- the employee the subject of the application not to raise any issues relating to the applicant's work capabilities or job performance without notifying other specified staff beforehand; and
- the applicant not to arrive at work before 8:15 am.

2.5.10 In *Blenkinsop v Blenkinsop Nominees Pty Ltd & Ors* [2014],¹³³ the orders (by consent) required the applicant and third respondent to:

- refrain from making written and oral statements (other than to their immediate families) that are abusive or offensive about each other;
- be civil to one another and refrain from statements and communications that are abusive, offensive and or disparaging to each other;
- refrain from emailing each other and or each other's legal representatives excessively (judged objectively by the standard of a reasonable person), with all communications limited to those necessary to carry on the business or for the purpose of the application under the *Fair Work Act*;
- only contact each other via email between 9am-5pm, Monday-Friday, limited to three emails a day except in the case of emergency;
- refrain from making Board resolutions that are offensive and or disparaging or contain false or malicious allegations against each other that have not previously been approved by the chairman;
- adhere to the proper and correct process to submit resolutions to the Board; and
- refrain from disparaging each other to the other Board directors and to solicitors, other professionals and third parties engaged to provide services or assistance to their companies or each other.

2.5.11 Because the anti-bullying provisions are limited to 'constitutionally-covered businesses' they are not accessible by all workers. An applicant's claim was recently rejected on the basis that her

¹³² *Applicant v Respondent* [2014] FWC AB2014/1052 (10 September 2014) (Senior Deputy President Drake) <<https://www.fwc.gov.au/documents/awardsandorders/html/pr555329.htm>>.

¹³³ *Blenkinsop v Blenkinsop* [2014] FWC AB2014/60 (15 September 2014) (Commissioner Williams) <<https://www.fwc.gov.au/documents/awardsandorders/html/pr555521.htm>>.

employer (the West Australian Department of Education) was not a constitutional corporation.¹³⁴ Another application was dismissed because, although incorporated, the employer (a government-funded not for profit provider of free services to vulnerable people) was not a ‘constitutionally-covered business’ because its activities were insufficiently commercial to amount to trading activities.¹³⁵

The Work Health and Safety Act 2012 (Tas)

2.5.12 Where a worker is bullied in a workplace that is not a ‘constitutionally-covered business’, legislative recourse may be found in the *Work Health and Safety Act 2012* (Tas). WorkSafe administers work health and safety laws in Tasmania. The *Work Health and Safety Act* is part of a set of uniform occupational safety laws that were brought into effect across Australia to ensure that workers across jurisdictions have equal protections and standards. The *Work Health and Safety Act* does not contain specific anti-bullying provisions but workplace bullying can be treated in the same way as other health and safety issues under the Act.

2.5.13 Essentially, the primary duty of a person conducting a business or undertaking under the Act is to ensure (as far as is reasonably practicable) the health and safety of workers while the workers are at work.¹³⁶ An ‘officer’ of the person conducting the business or undertaking (for example, a partner in a partnership or a person who makes decisions affecting at least a substantial part of the business) must exercise due diligence in ensuring that a person conducting a business or undertaking complies with duties under the Act.¹³⁷

2.5.14 Workers also have duties under the Act, including duties to: take reasonable care for their own health and safety, take reasonable care that their acts and omissions do not adversely affect the health and safety of others, and cooperate with any reasonable policy or procedure of the person conducting the business or undertaking relating to health and safety at the workplace.¹³⁸

2.5.15 Problems that can arise when treating bullying like any other workplace health and safety issue include:

- Lack of awareness of avenues to address workplace bullying — without clear indication that the general health and safety duties of the *Work Health and Safety Act* apply to workplace bullying, victims of workplace bullying may be unaware that the Act may cover such behaviour;
- Difficulties prosecuting workplace bullying. Psychological health and safety issues (like bullying) tend to be more complex to address than physical workplace hazards,¹³⁹ and it may be problematic to treat them in the same way. The primary duty of care under the *Work Health and Safety Act* is to ensure, so far as is reasonably practicable, the health and safety of workers while the workers are at work in the business or undertaking.¹⁴⁰ Mental damage caused by bullying is unlikely to manifest as obviously as a physical injury. Further, the psychological hazards caused by workplace bullies can be covert. It may be difficult to show

¹³⁴ *Ms SW* [2014] FWC 3288 (2 June 2014) [26].

¹³⁵ *Ms Kathleen McInnes* [2014] FWC 1395 (24 March 2014) [59].

¹³⁶ See *Work Health and Safety Act 2012* (Tas) s 19.

¹³⁷ *Ibid* ss 27(1), 4; *Corporations Act 2001* (Cth) s 9.

¹³⁸ *Work Health and Safety Act 2012* (Tas) s 28; see also *Work Health and Safety Act 2012* (Tas) s 29 on duties of other persons at the workplace.

¹³⁹ WorkCover Tasmania, ‘Tasmanian Workplace Bullying Prevention Strategy’ (Draft, November 2014) 18.

¹⁴⁰ *Work Health and Safety Act 2012* (Tas) s 19.

that a person conducting a business or undertaking did not take necessary reasonable steps to protect from the kinds of workplace dangers posed by bullying; and

- Lack of enforcement of the workplace health and safety duties against workplace bullying. Inadequate enforcement of health and safety laws against bullying has been noted,¹⁴¹ and the difficulty prosecuting workplace bullying as a breach of general health and safety provisions is considered to be a reason for poor enforcement of the *Work Health and Safety Act* against bullying.¹⁴²

2.5.16 Discriminatory conduct for a prohibited reason is also addressed under the *Work Health and Safety Act 2012* (Tas).¹⁴³ The ‘prohibited reasons’ under the *Work Health and Safety Act* relate primarily to health and safety roles, duties and issues under the Act.¹⁴⁴ Discriminatory conduct is defined as: dismissal of a worker; termination of a contract for services with a worker; putting a worker to his or her detriment in the engagement of him or her; altering the position of a worker to the worker’s detriment; refusing to engage a prospective worker; treating a prospective worker less favourably than another prospective worker would be treated in offering terms of engagement; terminating a commercial arrangement with another person; or failing to enter into a commercial arrangement with another person.¹⁴⁵ The narrow operation of the prohibition on discriminatory conduct for a prohibited reason means that it is not an effective means to address bullying.

2.5.17 The WorkCover Tasmania Board produced a Draft Tasmanian Workplace Bullying Prevention Strategy, which closed for public comment on December 19, 2014. The strategy seeks to provide a framework to reduce the prevalence of workplace bullying and minimise the effect of bullying behaviour when it does occur. Whilst it is recommended that the objectives are put into effect mainly through training, education and awareness-raising, there is some discussion of external intervention and extension of legislative regimes.¹⁴⁶

2.5.18 Because of the different avenues available to address workplace bullying under the Commonwealth *Fair Work Act* and Tasmanian *Work Health and Safety Act*, the rights and remedies available to Tasmanian workers depend on whether or not the worker is within a ‘constitutionally-covered business’. It is arguably desirable for there to be greater consistency in workplace rights and remedies within Tasmania.

2.5.19 The anti-bullying provisions of the Commonwealth *Fair Work Act* were recently inserted, and only came into effect in January 2014. These provisions were the result of significant consultation.¹⁴⁷ It is therefore unlikely that the *Fair Work Act* anti-bullying provisions will be amended or removed in the foreseeable future. Consideration should perhaps be given instead to whether Tasmanian legislation might be amended to mirror the anti-bullying provisions of the *Fair Work Act* and remove the disparity between legal avenues available to workers who are at work in a ‘constitutionally-covered business’ and those who are not. However, the *Work Health and Safety Act* is part of a set of consistent national legislation and there would be implications for the uniformity of the national scheme if Tasmania decided to go it alone in amending its legislation.

¹⁴¹ Standing Committee on Education and Employment, above n 124, 165.

¹⁴² WorkCover Tasmania, above n 139.

¹⁴³ *Work Health and Safety Act 2012* (Tas) ss 104–09.

¹⁴⁴ See *ibid* s 106.

¹⁴⁵ *Ibid* s 105.

¹⁴⁶ WorkCover Tasmania, ‘above n 139, 17–19.

¹⁴⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2013, 2906 (Bill Shorten MP, Minister for Employment and Workplace Relations).

2.6 Non-Legislative Frameworks

2.6.1 Non-legislative — or partly non-legislative — civil actions may also be enlivened by some bullying behaviours. While these actions form part of the current legal framework potentially able to address bullying, the time and high financial costs associated with these actions (as well as the very high threshold of mental harm required by some, and very limited scope of others) mean that they are not efficient or effective means of dealing with bullying.

Negligence

2.6.2 An employer owes employees a duty to take reasonable care for their safety,¹⁴⁸ and a school owes a duty of care to provide a safe school environment. A school or employer that knows (or ought to know) that a student or employee is being bullied and that fails to take reasonable steps to address the bullying *may* be liable in negligence. Both duties are constrained: ‘safe’ means ‘free of a foreseeable risk of harm’ and the duty is only one to take reasonable care.¹⁴⁹ Negligence in Tasmania is covered by both the *Civil Liability Act 2002* (Tas) and the common law. While this action is potentially a way to address some instances of very severe bullying, it is available in very limited situations. The time and potentially high cost factors associated with an action in negligence also mean that it is rarely a feasible response to bullying.

2.6.3 In 2010 an out-of-court settlement of \$290,000 was reported to have been paid by the Victorian Education Department for bullying and harassment suffered by a 17-year-old girl over an 18 month period at Kerang Technical High School.¹⁵⁰ As a result of the bullying, the girl suffered depression, agoraphobia and eating disorders and required psychological treatment.¹⁵¹ In the 2009 case *Gregory v State of New South Wales*,¹⁵² Mr Gregory was awarded damages for mental harm suffered due to bullying and other mistreatment by fellow students at Farrer Memorial Agricultural High School and damages for economic loss due to diminished earning capacity after graduation from the school.

2.6.4 In order to establish an action in negligence, the plaintiff must show that:

- The defendant owed the plaintiff a duty of care;
- The defendant breached that duty of care; and
- Personal injury or property damage was suffered by the plaintiff as a result of the breach.

2.6.5 Even where there has been serious bullying and severe damage, it does not necessarily follow that a school or employer has breached their duty of care. Where the damage claimed is mental harm, the mental harm must be a recognised psychiatric illness.¹⁵³ There is no duty to take care not to cause another person mental harm unless a reasonable person should have foreseen that a person of normal

¹⁴⁸ In relation to employers’ duty to take reasonable steps to protect employees from reasonably foreseeable risks of psychiatric harm from workplace bullying, see *Nationwide News v Naidu* (2007) 71 NSWLR 471, where it was held that the respondent’s supervisor was in such a position that he was the ‘mind and will’ of Nationwide News with respect to management of security work and that in the circumstances there was a reasonably foreseeable risk of psychiatric injury to the respondent from the supervisor’s extreme bullying, which breached the duty to provide a safe system of work (at [236]–[238], [84] – [86]).

¹⁴⁹ See *NSW v Lepore* (2003) 212 CLR 511, 552 (Gaudron J).

¹⁵⁰ Farrah Tomazin, ‘Bullied Teenager Gets \$290,000 in Settlement’, *The Age*, 11 March 2010.

¹⁵¹ *Ibid.*

¹⁵² [2009] NSWSC 559 (19 June 2009) (Fullerton J).

¹⁵³ *Civil Liability Act 2002* (Tas) ss 33, 35.

fortitude might suffer a recognised psychiatric illness if reasonable care were not taken.¹⁵⁴ This requirement of very serious harm means that an action in negligence cannot facilitate early intervention to prevent or minimise damage. It also excludes a large amount of even very severe bullying from an action.

Intentional Infliction of Personal Injury

2.6.6 It may be possible for a victim of bullying to sue for intentional infliction of personal injury. However, because of the high costs associated with this kind of action and the requirement that a recognised psychiatric injury be shown where the action is for mental harm, this framework is not a realistic way to address bullying. It may also be possible — where, for example, the bullying behaviour is perpetrated by a supervisor in the course of employment duties — to hold an employer vicariously liable for its employee’s intentional conduct.¹⁵⁵

Other Civil Actions

2.6.7 Defamation and breach of confidence have also been suggested as possible avenues to address bullying.¹⁵⁶ Neither action is a feasible or effective legal response to bullying.

2.6.8 Defamation in Tasmania operates under both the *Defamation Act 2005* (Tas) and the general law. An action in defamation could only be triggered by very specific types of verbal bullying. In order to establish defamation, it must be shown that: material is published,¹⁵⁷ the material identifies the person alleged to have been defamed; and the material is defamatory.¹⁵⁸ Triviality, truth and contextual truth may be possible defences to defamation in the bullying context.¹⁵⁹ Since defamation covers instances of publication of particular material — rather than ongoing anti-social behaviour — remedies for an action in defamation would not relate to, or necessarily prevent, future bullying. The high financial and time costs associated with a defamation action also mean that it is not a practical response to bullying.

2.6.9 Breach of confidence is a similarly ineffective and impractical means to address bullying. This framework has a very narrow application, requiring that the information is confidential, the information was imparted in circumstances that import an obligation of confidence and that there has been an unauthorised use or threatened use of the information.¹⁶⁰

2.7 Cyberbullying Frameworks

2.7.1 There are also legal frameworks that may address the problem of cyberbullying, rather than bullying more generally. The federal government does not have power to legislate on general anti-social behaviours (like bullying) but can legislate on *cyberbullying* because it has power to legislate

¹⁵⁴ Ibid s 34.

¹⁵⁵ See *Nationwide News v Naidu* (2007) 71 NSWLR 471 where the corporation was vicariously liable for the tortious misconduct of its officer towards the respondent as the officer’s treatment of the respondent in the course of exercising authority over him in the performance of his duties was sufficiently connected with the officer’s duties.

¹⁵⁶ See NZLC, above n 86, 76 [4.44–4.45].

¹⁵⁷ Ie, communicated to someone other than the person allegedly defamed.

¹⁵⁸ Ie, discredits the person’s reputation.

¹⁵⁹ See *Defamation Act 2005* (Tas) ss 33, 25, 26.

¹⁶⁰ See generally *Coco v A N Clark (Engineers) Ltd* [1968] FSR 415, 419–421 (Megarry J).

on telecommunications and other like services.¹⁶¹ The federal government has recently introduced new legislation dealing with some forms of cyberbullying.¹⁶²

2.7.2 There is some uncertainty as to whether cyberbullying should be dealt with as a distinct practice, or as another manifestation of bullying more generally.

2.7.3 Arguments for treating cyberbullying as a discrete behaviour include:

- Some level of ‘toxic disinhibition’¹⁶³ — where cyberbullies say, publish or post things online that they would not be prepared to say to their target in person — may occur;
- Cyberbullying can be anonymous, meaning it can be difficult for the victim or third party to identify the bully and stop the bullying. This anonymity may also affect the fear and threat of ongoing behaviour felt by the victim, due to uncertainty as to who the perpetrator is and fear of future bullying;
- As cyberbullying does not occur ‘in person’, it is not constrained by time or location. Cyberbullying may also reach a greater audience than other forms of bullying, increasing the humiliation felt by the victim; and
- Some forms of cyberbullying can remain accessible indefinitely, whereas at least the actual occurrence of individual instances of other forms of bullying is temporary.¹⁶⁴

2.7.4 Arguments for treating cyberbullying in the same way as other forms of bullying include:

- Often the seriousness of the harm caused by bullying is exacerbated by its repeated, sustained or escalating nature and the fear of future bullying. By dealing with cyberbullying alone, the broader pattern of bullying may not be addressed and future bullying outside of the ‘cyber sphere’ — and fear of future bullying — may not be prevented; and
- There is evidence suggesting that people who bully ‘offline’ also bully online or by some other form of communication technology, and that victims of ‘offline’ bullying are often also subject to bullying online or by some other form of communication technology.¹⁶⁵ The connection between ‘in person’ bullying and cyberbullying may suggest that technology is a tool of convenience to complement — or simply a different medium for — more general bullying behaviour.¹⁶⁶

2.7.5 One benefit of a state-based response to bullying is that it is able to cover all kinds of behaviours, from cyberbullying to physical bullying. Given that instances of bullying often take a variety of forms, it may be beneficial to consider cyberbullying as a form of bullying more generally in any Tasmanian response.

¹⁶¹ Section 51(v) of the *Australian Constitution* gives federal parliament power to make laws for the peace, order and good government of the Commonwealth with respect to postal, telegraphic, telephonic and other like services, meaning that Federal Parliament can legislate on behaviour that occurs via cyber means.

¹⁶² See below [2.7.13] – [2.7.15].

¹⁶³ Term used in John Suler, ‘The Online Disinhibition Effect’ (2004) 7(3) *Cyberpsychology & Behaviour* 321.

¹⁶⁴ See Naomi Harlin Goodno, ‘How Public Schools Can Constitutionally Halt Cyberbullying: A Model Cyberbullying Policy that Considers First Amendment, Due Process, and Fourth Amendment Challenges’ (2011) 46 *Wake Forest Law Review* 641, 653.

¹⁶⁵ Barbara Spears et al, ‘Research on Youth Exposure to, and Management of, Cyberbullying Incidents in Australia: Part A — Literature Review on the Estimated Prevalence of Cyberbullying Involving Australian Minors’ (Report prepared for Australian Government Department of Communications, Social Policy Research Centre, University of New South Wales, June 2014) 59.

¹⁶⁶ Sameer Hinduja and Justin W Patchin, ‘Cyberbullying: An Exploratory Analysis of Factors Related to Offending and Victimization’ (2008) 29(2) *Deviant Behavior* 129, 149.

Contract/Self-Regulation

2.7.6 Many online network and service providers have terms and conditions to which users agree when contracting to access their services. Some forms of cyberbullying breach these terms, and service providers may be able to enforce their own procedures against such breaches. In response to the NZLC's Ministerial Briefing Paper, *Harmful Digital Communications*,¹⁶⁷ Google and Facebook argued that the first instance response to harmful digital communication should be user empowerment, and that user-empowerment strategies are reinforced by the terms of use agreements to which users are contractually bound.¹⁶⁸

2.7.7 The usefulness of such agreements and the protection they afford are limited by the extent to which they are enforced. Procedures for breaches of codes of conduct may be poorly utilised and ineffective due to a lack of awareness by users or lack of enforcement by service providers.¹⁶⁹ Terms of use agreements are only meaningful when enforced and the Law Commission's Paper notes that reporting and enforcement levels vary greatly.¹⁷⁰ The prevalence of cyberbullying itself is perhaps an indication that self-regulation by service providers does not adequately address this form of bullying. One recent development in this area, a tiered system of regulation proposed by the new *Enhancing Online Safety for Children Act 2015* (Cth), may strengthen self-regulatory mechanisms, although it is noted that the Act only applies to cyberbullying targeted at an Australian child (see [2.7.13] below).

Commonwealth Criminal Code s 474.17

2.7.8 The existing Commonwealth offence of 'using a carriage service to menace, harass or cause offence' could capture some serious forms of cyberbullying.¹⁷¹

2.7.9 In order to establish s 474.17, it must be shown that:¹⁷²

- The offender intentionally used a carriage service; and
- The offender was at least reckless in using the service in a way that a reasonable person would regard as menacing, harassing or offensive.

2.7.10 A child under 10 is not criminally responsible for an offence,¹⁷³ and where a child is aged between 10 and 14 the prosecution must show that the child knew his or her conduct was wrong before criminal responsibility can be established.¹⁷⁴ Although this offence is punishable by three years' imprisonment, imprisonment will not be imposed unless no other sentence is appropriate in all the circumstances of the case.¹⁷⁵ Imprisonment would be expected to be rare where young offenders are involved.¹⁷⁶

¹⁶⁷ NZLC, above n 86.

¹⁶⁸ Ibid 54–5.

¹⁶⁹ Ibid 59–62.

¹⁷⁰ Ibid 66.

¹⁷¹ *Criminal Code Act 1995* (Cth) s 474.17; s 474.17 of the *Criminal Code Act 1995* (Cth) is included in Appendix A.

¹⁷² Ibid ss 474.17, 5.6(1), 5.6(2).

¹⁷³ Ibid s 7.1.

¹⁷⁴ Ibid s 7.2.

¹⁷⁵ The sentencing principle that imprisonment is a sentence of last resort is an example of the principle of parsimony or frugality in punishment: see Kate Warner, *Sentencing in Tasmania* (The Federation Press, 2nd ed, 2002) 75.

¹⁷⁶ Barbara Spears et al, above n 165.

2.7.11 The effectiveness of s 474.17 was recently considered in submissions to the federal government discussion paper, *Enhancing Online Safety for Children*.¹⁷⁷ The Australian Federal Police submitted that s 474.17 is more than adequate to facilitate prosecution of cyberbullying, and that concerns about the harshness of the penalty can be addressed by sentencing discretion and provisions in the *Crimes Act 1914* (Cth) allowing for lower penalties.¹⁷⁸ The Law Council of Australia was unconvinced that a gap in federal law dealing with bullying was made out, suggesting that — applying the definition of ‘cyberbullying’ set out in the Discussion Paper — the most serious forms of cyberbullying would already fall within s 474.17.¹⁷⁹ Google also submitted that existing laws are sufficient to address cyberbullying and noted that s 474.17 has been successfully used against a broad range of internet conduct, including prosecutions of defendants under 18 years of age.¹⁸⁰

2.7.12 On the other hand, some submissions suggested that s 474.17 of the *Crimes Act* is an ineffective means to address cyberbullying. Chloe’s Law submitted that either state or federal laws should be reformed in order to cover cyberbullying specifically;¹⁸¹ the NSW Parents’ Council submitted that it was appropriate to have legislation identifying ‘cyberbullying’ as a crime,¹⁸² and UNICEF submitted that the provision could be amended so that the language is easier to understand and clearly indicates that the provision relates to cyberbullying.¹⁸³

Enhancing Online Safety for Children Act 2015 (Cth)

2.7.13 The *Enhancing Online Safety for Children Act 2015* establishes:¹⁸⁴

- A Children’s e-Safety Commissioner; and
- A complaints system for cyberbullying targeted at an Australian child including a two-tiered system for the removal from large social media services of cyberbullying material targeted at an Australian child.

2.7.14 Under the new system, a social media service provider will be able to apply to the Commissioner for declaration as a tier one service. The Commissioner will be required to make this declaration if the service complies with online safety requirements such as terms of use prohibiting cyberbullying material, a complaints scheme including removal processes and a contact person with whom the Commissioner can deal.¹⁸⁵ There are no direct enforcement measures relating to tier one services, although the Commissioner can request the removal of cyberbullying material targeted at an Australian child within 48 hours and repeated failure to comply over a 12-month period may result in the revocation of tier one status.¹⁸⁶

¹⁷⁷ Department of Communications (Cth), *Enhancing Online Safety for Children* (2014).

¹⁷⁸ Australian Federal Police, Submission to Department of Communications, *Enhancing Online Safety for Children*, March 2014, 4–5.

¹⁷⁹ Law Council of Australia, Submission to Department of Communications, *Enhancing Online Safety for Children*, March 2014, 21.

¹⁸⁰ Google, Submission to Department of Communications, *Enhancing Online Safety for Children*, March 2014, 3–4, 12–13.

¹⁸¹ Chloe’s Law, Submission to Department of Communications, *Enhancing Online Safety for Children*, 2014, 2.

¹⁸² New South Wales Parents’ Council, Submission to Department of Communications, *Enhancing Online Safety for Children*, 2014, 5.

¹⁸³ UNICEF, Submission to Department of Communications, *Enhancing Online Safety for Children*, March 2014, 14.

¹⁸⁴ *Enhancing Online Safety for Children Act 2015* (Cth) s 3.

¹⁸⁵ See *ibid* ss 21, 23.

¹⁸⁶ See *ibid* ss 25, 29.

2.7.15 The Commissioner can recommend that a ‘large social media service’ that is not a tier one social media service be declared a tier two service.¹⁸⁷ Where the social media service provider is a tier two service, the Commissioner will have the power to require removal of cyberbullying material targeted at an Australian child within 48 hours and failure to comply may attract a civil penalty.¹⁸⁸ It is hoped that the tiered system will encourage social media service providers to self-regulate more effectively and result in voluntary or enforced removal of some cyberbullying material. While there may be flow-on effects to more general cyberbullying due to improved self-regulation of social media service providers, the proposed system only applies to material targeting children meaning that the *Enhancing Online Safety for Children Act* does not provide a complete framework to address cyberbullying.

2.8 Responses to Cyberbullying in Other Jurisdictions

New Zealand

2.8.1 The NZLC’s 2012 Ministerial Briefing Paper, *Harmful Digital Communications: The Adequacy of the Current Sanctions and Remedies*,¹⁸⁹ recommended a package of reforms to address the problem of harmful digital communications and provided a comprehensive analysis of the effectiveness of regulatory tiers in the digital era. The briefing paper informed the Harmful Digital Communications Bill, which was introduced into Parliament in November 2013 and was read for a second time in March 2015.¹⁹⁰

2.8.2 With respect to cyberbullying, New Zealand’s Harmful Digital Communications Bill proposes a new civil regime to deal with digital communications, as well as the creation of a new offence. The Bill sets out ten communications principles,¹⁹¹ which scope the types of complaints that can be made under the Bill.¹⁹² Declarations that there has been a breach of a communication principle can be made,¹⁹³ which may at least be persuasive where the communication is outside the jurisdictional reach of the Bill.

2.8.3 A ‘digital communication’ is defined as any form of electronic communication, including any text message, writing, photograph, picture, recording, or other matter that is communicated electronically. ‘Harm’ is defined to mean ‘serious emotional distress’.¹⁹⁴

2.8.4 The first response to a complaint of harmful digital communication under New Zealand’s proposed system is referral to an ‘Approved Agency’, which is intended to resolve most complaints.¹⁹⁵ The functions and powers of the Approved Agency include:¹⁹⁶

¹⁸⁷ See *ibid* ss 30, 31.

¹⁸⁸ See *ibid* ss 35,36.

¹⁸⁹ NZLC, above n 86.

¹⁹⁰ Prior to the second reading, the Bill was considered and recommended by the Justice and Electoral Committee; see Harmful Digital Communications Bill as reported from the Justice and Electoral Committee <http://www.parliament.nz/resource/en-nz/50DBSCH_SCR6221_1/b8c4457cbab92a1b7cf49a6fd625063104ecbc0a>.

¹⁹¹ Harmful Digital Communications Bill 2013 (NZ) s 6.

¹⁹² See eg, s 8(2A) Harmful Digital Communications Bill 2013 (NZ).

¹⁹³ See *ibid* s 17(3)(b).

¹⁹⁴ *Ibid* s 4.

¹⁹⁵ New Zealand, *Parliamentary Debates*, House of Representatives, 14 November 2013, 14747 (Chester Borrowes, Acting Minister of Justice).

- Investigation of complaints, and use of advice, negotiation, mediation and persuasion to resolve complaints;
- Establishing and maintaining relationships with domestic and foreign service providers, online content hosts, and agencies; and
- Providing education and advice on policies for online safety and conduct on the internet.

2.8.5 The Agency may refuse to investigate or cease investigating complaints,¹⁹⁷ and where the Agency decides to take no further action on a complaint it must notify the complainant of the right to apply to the District Council for an order.¹⁹⁸

2.8.6 The next tier of response to harmful digital communication under the Bill is District Court proceedings. Under the proposed framework, the District Court can make orders against a defendant and against an online content host, including:¹⁹⁹

- Orders to take down or disable the material;
- Orders that the conduct be ceased;
- Orders that corrections be published;
- Orders that apologies be published;
- Orders that a right of reply be given to the affected individual; and
- Orders that the identity of the author of an anonymous or pseudonymous communication be released to the court.

2.8.7 ‘Safe harbour’ provisions, specify that no civil or criminal proceedings can be brought against an online content host in respect of content unless the person who provides the content does so on behalf of, or at the direction of, the host, or the host receives a notice of complaint about the specified content and does not comply with complaint and removal procedures.²⁰⁰ A District Court may refer a matter back to the Approved Agency.²⁰¹

2.8.8 The third tier of response to harmful digital communication under the Bill is its criminal apex.²⁰² Failure to comply with a District Court order is an offence punishable by imprisonment of up to six months or a fine of up to \$5000 where the offender is a person, or up to \$20,000 where the offender is a body corporate.²⁰³ Section 19 of the Bill creates the offence of ‘causing harm by posting

¹⁹⁶ Harmful Digital Communications Bill 2013 (NZ) s 8(1).

¹⁹⁷ Ibid s 8(2A), (3).

¹⁹⁸ Ibid s 8(4).

¹⁹⁹ Ibid s 17(1)–(2).

²⁰⁰ Ibid s 20; see also s 20A.

²⁰¹ Ibid s 12.

²⁰² Note that the *Crimes Act 1961* (NZ) ss 21(1), 22(1) provides that children under 10 are not criminally responsible and that a child aged between 10 and 14 is not criminally responsible unless it can be shown that he or she either knew the act or omission was wrong or that it was contrary to law.

²⁰³ Harmful Digital Communications Bill 2013 (NZ) s 18.

digital communication’,²⁰⁴ which is punishable by imprisonment of up to two years.²⁰⁵ The offence of ‘causing harm by posting digital communication’ is committed if:²⁰⁶

- 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 position of the victim; and
- Posting the communication causes harm to the victim.

2.8.9 In the Australian context, a framework like the proposed New Zealand scheme is better suited to the federal arena as, where there is inconsistency between state and federal legislation with respect to telecommunications and other like services, the federal legislation will prevail. Federal parliament has taken a different path with the *Enhancing Online Safety for Children Act 2015*.

United Kingdom

2.8.10 A 2014 report by the House of Lords Select Committee on Communications considered social media and the criminal law.²⁰⁷ The Committee concluded that the criminal law in the UK was adequate and appropriate for the prosecution of offences committed using social media.²⁰⁸ There is no offence of ‘cyberbullying’ (or ‘bullying’ more generally) in the UK,²⁰⁹ but cyberbullying is probably covered by the existing range of communications offences.²¹⁰ The *Communications Act 2003* (UK) s 127,²¹¹ for example, could be used against some cyberbullying and has been used to prosecute a series of racist tweets.²¹²

2.8.11 The offence created by s 127 of the *Communications Act 2003* (UK) is punishable by a fine or up to six months’ imprisonment. The section provides that it is an offence to:

- Send by public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character, or cause such a message to be so sent; or
- For the purpose of causing annoyance, inconvenience or needless anxiety send by means of a public communications network, or cause to be sent, a message known to be false, or persistently make use of a public electronic communications network.

2.8.12 The House of Lords Select Committee on Communications also identified the *Offences Against the Person Act 1861* (UK) s 16 (threats to kill) and ss 4, 2 and 2A of the *Protection from Harassment Act 1997* (putting people in fear of violence, harassment and stalking) as having

²⁰⁴ Ibid s 19(1); see s 19(2) for factors the court may take into account when determining whether a post would cause harm; s 19 of the Harmful Digital Communications Bill (2013) (NZ) is included in Appendix A.

²⁰⁵ Harmful Digital Communications Bill 2013 (NZ) s 19(3).

²⁰⁶ Ibid s 19(1).

²⁰⁷ Select Committee on Communications, *Social Media and Criminal Offences*, House of Lords Paper No 37, Session 2014–15 (2014) <<http://www.publications.parliament.uk/pa/ld201415/ldselect/ldcomuni/37/37.pdf>>.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ Section 127 of the *Communications Act 2003* (UK) is included in Appendix A.

²¹² Martin Wainwright, ‘Man who Racially Abused Stan Collymore on Twitter Spared Prison’, *The Guardian* (online), 22 March 2012 <<http://www.theguardian.com/technology/2012/mar/21/man-racially-abused-collymore-twitter-spared-prison>>.

application to some instances of cyberbullying.²¹³ These are general criminal offences, which may also be enlivened by other forms of bullying.

United States

2.8.13 Although the most common legislative response to bullying in the US is to require school districts to adopt policies regarding bullying,²¹⁴ there has been some suggestion of a trend towards criminalisation. Some states, for example Arkansas, Louisiana and North Carolina, have treated cyberbullying as distinct from other forms of bullying in their legislative responses.

2.8.14 Cyberbullying is a crime in Arkansas; it can result in a term of imprisonment of up to 90 days and a fine of up to \$1000.²¹⁵ ‘Cyberbullying’ — for the purpose of Arkansas’ criminal offence — involves transmitting, sending or posting a communication by electronic means with the purpose of frightening, coercing, intimidating, threatening, abusing, harassing or alarming another person, where the transmission was in furtherance of severe, repeated or hostile behaviour toward the other person.

2.8.15 Cyberbullying is also a crime in Louisiana,²¹⁶ where it is punishable by a fine of up to \$500, imprisonment for not more than six months or both.²¹⁷ For the purpose of this offence, Louisiana defines cyberbullying as the ‘transmission of any electronic textual, visual, written, or oral communication with the malicious and wilful intent to coerce, abuse, torment, or intimidate a person under the age of eighteen’.

2.8.16 North Carolina does not define ‘cyberbullying’ within their cyberbullying offence.²¹⁸ Rather, ‘cyberbullying’ is the label of the offence, which makes it unlawful to (with the intent to intimidate or torment a minor) use a computer or computer network to:

- Build a fake profile or website;
- Pose as a minor in an internet chat room, an electronic mail message or an instant message;
- Follow a minor online or into an internet chat room; or
- Post or encourage others to post on the internet private, personal or sexual information pertaining to a minor.

2.8.17 It is also unlawful to (with the intent to intimidate or torment a minor or the minor’s parent or guardian) use a computer or computer network to:

- Post a real or doctored image of a minor on the internet;
- Access, alter or erase any computer network, computer data, computer program, or computer software, including breaking into a password protected account or stealing or otherwise accessing passwords; or

²¹³ Select Committee, above n 207, Appendix 3, 30.

²¹⁴ See below at [2.10.3]-[2.10.7].

²¹⁵ Ark Code Ann § 5-71-217 (2012); see, for prescribed penalties, Ark Code Ann §§ 5-4-401, 5-4-201 (2010); ‘Cyberbullying’ (Ark Code Ann § 5-71-217 (2012)) is included in Appendix A.

²¹⁶ La Rev Stat Ann § 14:40.7 (2010); ‘Cyberbullying’ (La Rev Stat Ann § 14:40.7 (2010)) is included in Appendix A.

²¹⁷ Unless the offender is under the age of seventeen, in which case the matter is governed exclusively by the provisions of Title VII of the Children’s Code.

²¹⁸ NC Gen Stat § 14-458.1 (2014); ‘Cyber-bullying; penalty’ (NC Gen Stat § 14-458.1 (2014)) is included in Appendix A.

- Use a computer system for repeated, continuing, or sustained electronic communications, including electronic mail or other transmissions, to a minor.

2.8.18 Further, North Carolina’s cyberbullying offence makes it unlawful to use a computer or computer network to:

- Make any statement intending to immediately provoke and that is likely to provoke any third party to stalk or harass a minor;
- Copy and disseminate, or cause to be made, an unauthorised copy of any data pertaining to a minor for the purpose of intimidating or tormenting that minor;
- Sign up a minor for a pornographic internet site with the intent to intimidate or torment the minor; or
- Without authorisation of the minor or the minor’s parent or guardian, sign up a minor for electronic mailing lists or to receive junk electronic messages and instant messages with the intent to intimidate or torment the minor.

2.8.19 Cyberbullying is a Class 1 misdemeanour if the defendant is 18 years or older at the time of offending or a Class 2 misdemeanour if the defendant is under 18 at the time the offence is committed.²¹⁹

Canada (Nova Scotia)

2.8.20 Nova Scotia’s *Cyber-safety Act* establishes cyberbullying as a tort, meaning that a cyberbully can be sued in a civil court.²²⁰ Where the alleged bully is a minor, his or her parents may be held liable.²²¹ Under the *Cyber-safety Act*, the victim, the victim’s parents (where the victim is a minor), police officers and people designated by associated regulations may also apply for a ‘protection order’ in relation to cyberbullying.²²²

2.9 Regulations on Education Providers

2.9.1 International legislative responses to the problem of bullying have commonly focused on the responsibilities of schools when dealing with bullying. Legislation in Tasmania does not currently impose any requirements on schools to have a specific anti-bullying policy, or to deal with the reporting, investigation and resolution of bullying in any particular way.

2.9.2 Schools have an important role in addressing bullying. Intervention to prevent bullying in schools can have broader social implications for bullying in society, as children who bully at school are more likely to become workplace bullies and fall into adult criminal offending than their non-bullying peers.²²³

²¹⁹ The severity range of penalties in North Carolina is dependent on prior convictions; see NC Gen Stat § 15A-1340.23 (2014).

²²⁰ *Cyber-safety Act*, SNS 2013, c 2, s 21; Section 21 of Nova Scotia’s *Cyber-safety Act* is included in Appendix A.

²²¹ *Ibid* s 22(3),(4); Section 22 of Nova Scotia’s *Cyber-safety Act* is included in Appendix A.

²²² See *ibid* ss 5–9.

²²³ See Jodie Lodge, ‘Children Who Bully at School’ (Child Family Community Australia Paper No. 27, Australian Institute of Family Studies, 2014) 5; Ken Rigby, ‘Addressing Bullying in Schools: Theory and Practice’ (Trends and Issues in Crime and Criminal Justice No. 259, Australian Institute of Criminology, June 2003) 1.

2.9.3 Significant attention is given to bullying in schools. There are multiple reasons for this attention:

- The school environment is social and sustained. Students are required to attend school, and it is not easy for students to leave the school environment. This environment allows bully/target relationships to arise.
- While bullying can create severe harms in any situation, the developmental vulnerability of school-aged children and young people means that being bullied or bullying at school may have profound and lasting effects on physical and mental health.
- From a purely practical point of view, schools are easily researched compared to some other social environments because of the large number of potential research participants and identifiable locational and temporal boundaries.

Tasmanian State Government Education Services

2.9.4 The Tasmanian Department of Education's 'Learner Wellbeing and Behaviour Policy' applies to all staff who provide and support learning in early learning settings, schools and colleges.²²⁴ While the policy statement does not impose legal obligations, it is the closest thing to a requirement of anti-bullying procedures or regulations in the Tasmanian state education system. The 'Learner Wellbeing and Behaviour Policy' is intended to ensure that school environments support the active participation of all learners, and are safe, respectful, inclusive and supportive of positive behaviour free from discrimination, harassment and bullying.²²⁵ Responsibilities imposed under this policy include:

- The provision of safe and inclusive learning environments by staff;
- The implementation of the policy and associated documents by the Secretary and Deputy Secretaries;
- The assurance of the creation and maintenance of safe and positive learning environments and the development and implementation of policies and processes for appropriate, fair and effective responses to student behaviour by principals; and
- The adherence to school policies, procedures and guidelines in relation to positive behaviour and contribution to the development of safe and inclusive learning environments by students.

2.9.5 The 'Learner Wellbeing and Behaviour Policy' requires schools to include information about their approaches, policies, plans and procedures for student wellbeing and support within their School Improvement Plans.²²⁶ It does not mandate specific bullying prevention, investigation or resolution procedures.

2.9.6 The Department of Education's 'Conditions of Use Policy for All Users of Information Communication Technology' applies to all users of information and communication technology resources provided by the Department, and may be relevant to some cyberbullying. Activities that are

²²⁴ Tasmanian Department of Education, 'Learner Wellbeing and Behaviour' (Policy Document, Department of Education, 28 August 2012) 2 <<https://www.education.tas.gov.au/documentcentre/Documents/Learner-Wellbeing-and-Behaviour-Policy.pdf>>.

²²⁵ Ibid 3.

²²⁶ Ibid.

considered to be inappropriate or unacceptable by the school or community are prohibited, and users found contravening the policy may have computer access privileges suspended.²²⁷

2.9.7 The *Education Act 1994* (Tas) provides a disciplinary framework that may come into play in cases of bullying in state schools. Section 36(1) of the Act provides that a student of a state school is to behave in a manner acceptable to the principal and s 36(2) provides an inclusive list of unacceptable behaviours. If satisfied that a student has behaved in an unacceptable manner, a principal may suspend the student full-time or part-time for a period of two weeks or less or impose a detention on the student.²²⁸ If a principal is of the opinion that the student's behaviour warrants a more severe punishment he or she may refer the matter to the Secretary.²²⁹ Unacceptable behaviours most relevant to bullying are:

- Behaviour constituting disobedience of instructions which regulate the conduct of students,²³⁰
- Behaviour likely to impede significantly the learning of the other students of the school,²³¹
- Behaviour likely to be detrimental to the health, safety or welfare of the staff or other students of the school;²³² and
- Behaviour likely to cause damage.²³³

Tasmanian Non-Government Schools

2.9.8 There is no direct requirement that non-government schools have anti-bullying policies and procedures. In order for a non-government school to become and remain registered under the *Education Act 1994* however, it must comply with the standards set down by s 53(1) of the *Education Act 1994* (Tas). The Schools' Registration Board determines applications for registration and renewal of registration of non-government schools and is required to review schools to ensure compliance with the standards.²³⁴

2.9.9 The practical effect of the requirements of s 53(1) of the *Education Act* may be that non-government schools applying for registration or renewal of registration must have some form of statement that addresses anti-social behaviour such as bullying, although this 'requirement' is not express in the legislation and no comprehensive policy or procedure is mandated. The Schools Registration Board Handbook, 'Incorporating the Standards and Guidelines for the Registration of Non-Government Schools' provides guidance on the operation of the s 53 standards.²³⁵

²²⁷ Tasmanian Department of Education, 'Conditions of Use Policy for All Users of Information and Communication Technology' (Policy Document, Department of Education, September 2012) 2–3.

²²⁸ *Education Act 1994* (Tas) s 37.

²²⁹ *Ibid* s 38.

²³⁰ *Ibid* s 36(2)(b).

²³¹ *Ibid* s 36(2)(c).

²³² *Ibid* s 36(2)(d).

²³³ *Ibid* s 36(2)(e).

²³⁴ *Ibid* ss 49, 55(1), 56, 57, 58; the Schools' Registration Board Handbook, 'Incorporating the Standards and Guidelines for the Registration of Non-Government Schools' provides guidance on the operation of the provisions of the *Education Act* relevant to registration or renewal of registration of non-government schools and elaboration on the s 53(1) requirements: see Schools' Registration Board, 'Handbook Incorporating the Standards and Guidelines for the Registration of Non-Government Schools' (Handbook, Tasmanian Department of Education, June 2014).

²³⁵ See Schools' Registration Board, above n 234.

2.9.10 In order to comply with s 53(1)(fd) of the *Education Act 1994*, schools must have a process for the management of grievances from any member of the school community, including staff members, students, parents, carers, guardians and the general community.²³⁶ The requirement for clear, comprehensive, equitable and easily available grievance policies and procedures may facilitate the investigation and resolution of reported instances of bullying.

2.9.11 The Handbook also provides that the general requirement for registration and renewal of registration in s 53(1)(g) of the *Education Act* ('any other prescribed matter') includes a requirement that the school publish and apply a code of conduct outlining the behaviour expected of employees when dealing with students, colleagues, parents and community members.²³⁷ A duty of care statement must be included in this document addressing the responsibility of each employee to assist in managing a safe physical and emotional environment free from issues like student bullying and harassment and a statement addressing the responsibility of each employee to ensure that no student is discriminated against.

University of Tasmania

2.9.12 The University of Tasmania's 'Harassment, Bullying and Discrimination Policy' is intended to ensure that the University complies with anti-discrimination legislation and that bullying behaviour that falls outside state and federal legislation is covered by the policy.²³⁸ Reasonable management action taken in a reasonable manner is expressly excluded from 'bullying',²³⁹ which is defined to include:²⁴⁰

- Abusive or insulting behaviour;
- Yelling or screaming;
- Behaviour that humiliates, intimidates, belittles or degrades;
- Teasing or making a person the brunt of jokes;
- Spreading malicious gossip, rumours or innuendo;
- Making improper demands regarding work performance; and
- Covert behaviour that is designed to undermine work performance or to cause personal distress.

2.9.13 The corresponding 'Harassment, Bullying and Discrimination Procedure' provides guidelines and procedures to assist in the prompt, confidential and effective resolution of complaints.²⁴¹ The procedure provides information on informal resolution of complaints and procedures for formal resolution of complaints.²⁴² Where a formal complaint has been made and formal disciplinary action is warranted against a student of the University, disciplinary action can be initiated in accordance with

²³⁶ Ibid 47.

²³⁷ Ibid 48, 56–8.

²³⁸ Director of Human Resources, 'Harassment, Bullying and Discrimination Policy' (Policy document, University of Tasmania, February 2011) 2, [1].

²³⁹ Ibid 4 [3.1.3].

²⁴⁰ Ibid 3–4 [3.1.3].

²⁴¹ Director of Human Resources, 'Harassment, Bullying and Discrimination Procedure' (Procedure document, University of Tasmania, February 2011) 2, [1].

²⁴² Ibid 2–3 [3.1]–[3.3].

the University of Tasmania's Ordinance 9 (Student Discipline).²⁴³ Where a formal complaint has been made and disciplinary action is warranted against a member of the University of Tasmania's staff, disciplinary action can be initiated in accordance with the relevant Enterprise Agreement.

2.9.14 The 'Harassment, Bullying and Discrimination Procedure' explains the role of Contact Officers as a first point of contact for staff and students who need information or advice or want to make a complaint, and requires anti-discrimination training to be provided to all newly appointed staff and Head of Budget Centres and made available to all other staff.²⁴⁴ It also stipulates that, where a complaint has been made to an external tribunal, consideration of a complaint under the 'Harassment, Bullying and Discrimination Procedure' will be suspended until an outcome from the external action is known.²⁴⁵

2.10 Educational Response of Other Jurisdictions

New Zealand

2.10.1 Although not included in the Harmful Digital Communications Bill 2013, one recommendation of the NZLC's 2012 Ministerial Briefing Paper was that legal requirements be imposed on schools when dealing with bullying. The Law Commission recommended that:

- New legal requirements for all New Zealand schools be introduced to help combat bullying, including cyberbullying, by including in the National Administrative Guidelines for public schools a requirement that a school must implement an effective anti-bullying programme and making it a criterion for registration of a private school that the school provide a safe and supportive environment that includes policies and procedures for student welfare;²⁴⁶
- The Ministry of Education consider the development of an agreed definition of bullying, establishment of ongoing and routine data collection systems with standardised methods for defining and measuring bullying, development of measurable objectives and performance indicators for activities intended to improve school safety, and the development of reporting procedures and guidelines;²⁴⁷ and
- Schools explore expanded use of Information and Technology contracts.²⁴⁸

United Kingdom

2.10.2 Under the *School Standards and Framework Act 1998* (UK), all UK state schools are required to have anti-bullying policies.²⁴⁹ The head teacher determines measures to be taken with a view to encouraging good behaviour and respect for others on the part of pupils and, in particular, preventing all forms of bullying among pupils.²⁵⁰ These measures must be publicised by the head teacher in a written document, made generally known within the school and to parents of registered

²⁴³ Council of the University of Tasmania, 'Student Discipline' (Ordinance No 9, University of Tasmania, 28 February 2003) <http://www.utas.edu.au/__data/assets/pdf_file/0006/23991/Ordinance-9-Student-Discipline.pdf>.

²⁴⁴ Director of Human Resources, above n 241, 3–4 [3.5]–[3.7].

²⁴⁵ Ibid 3 [3.4].

²⁴⁶ NZLC, above n 86, 19.

²⁴⁷ Ibid 19–20.

²⁴⁸ Ibid 20.

²⁴⁹ Section 61 of the *School Standards and Framework Act 1998* (UK) c 31, s 61 included in Appendix A.

²⁵⁰ *School Standards and Framework Act 1998* (UK) c 31, s 61(4)(b).

pupils at the school, and the head teacher must take steps to bring the measures to the attention of all pupils, parents and school staff at least once every year.²⁵¹ Similar requirements apply to private schools in England.²⁵²

United States

2.10.3 Most US legislative responses to bullying have been in the form of anti-bullying provisions within education codes.²⁵³ Even in States where there is some form of criminalisation or extension of existing laws, there are anti-bullying educational frameworks.²⁵⁴ Anti-bullying provisions within educational codes vary greatly, with some states' laws lacking in specifics, and others mandating procedures for preventing, reporting, investigating and responding to bullying.²⁵⁵

2.10.4 New Jersey's 'Anti-Bullying Bill of Rights' is considered perhaps the most stringent US legislation dealing with bullying in public schools.²⁵⁶ This legislation is an example of the particularity with which legislative requirements may be imposed on schools. The 'Anti-Bullying Bill of Rights' includes:

- A requirement that each school district adopt an anti-bullying policy containing minimum obligations, including:²⁵⁷
 - A statement prohibiting 'harassment, intimidation or bullying' of a student;
 - A definition of 'harassment, intimidation or bullying' no less inclusive than the legislatively prescribed definition;
 - A description of the type of behaviour expected from students;
 - Consequences and appropriate remedial action for a person who commits an act of 'harassment, intimidation or bullying';
 - A procedure for reporting an act of 'harassment, intimidation or bullying';
 - A statement of how the policy is to be publicised;
 - A requirement that a link to the policy be prominently posted on the home page of the school's webpage and distributed annually to parents and guardians who have children enrolled in the school district; and
 - A requirement that the contact details of the district's anti-bullying coordinator be listed on the home page of each school district and school website and that the contact details of the school's anti-bullying specialist be listed on the homepage of each school's website.
- A timeline for the investigation and resolution of bullying.²⁵⁸

²⁵¹ Ibid s 61(7).

²⁵² *Education (Independent School Standards) (England) Regulations 2013* SI 2003/1910, r 3(2)(a).

²⁵³ Tefertiller, above n 93.

²⁵⁴ Ibid 194.

²⁵⁵ For comparisons of US state responses to bullying, see Justin W Patchin and Sameer Hinduja, 'State Cyberbullying Laws: A Brief Review of State Cyberbullying Laws and Policies' (January 2015) Cyberbullying Research Center <<http://www.cyberbullying.us/Bullying-and-Cyberbullying-Laws.pdf>>.

²⁵⁶ Joseph M Morgese, 'Cultivating the "Anti-Bullying Bill of Rights" Throughout the Nation: What Others Can Learn from the Garden State' (2013) 37(2) *Nova Law Review* 351, 366.

²⁵⁷ NJ Stat Ann § 18A:37-15.

²⁵⁸ See NJ Stat Ann § 18A:37-15b (5),(6),(7); Morgese, above n 256, 367.

- An incident report must be provided to the principal within two days of an incident of ‘harassment, intimidation or bullying’ or within two days of notice of its occurrence;
- An investigation must be conducted within ten days, with two days after the investigation to inform the superintendent of the findings and five days after the investigation to make a report available on the incident.
- A requirement that schools adopt an educational program for bullying prevention;²⁵⁹
- A requirement that schools appoint an ‘anti-bullying specialist’ to lead investigations, address incidents of bullying and work with the district anti-bullying coordinator.²⁶⁰ The district anti-bullying coordinator then collaborates with the superintendent to provide ‘harassment, intimidation and bullying’ data to the Department of Education, establishing an organised line of communication;²⁶¹
- A requirement that newly-certified teachers complete a program in ‘harassment, intimidation and bullying’;²⁶²
- A requirement that schools develop a guidance document about the law and its implementation;²⁶³
- The creation of the ‘Bullying Prevention Fund’ for the Department of Education, to carry out the provisions of the legislation;²⁶⁴ and
- The designation of a ‘Week of Respect’, focussing on preventing ‘harassment, intimidation and bullying’.²⁶⁵

2.10.5 At the other end of the continuum are less interventionist anti-bullying requirements, such as those imposed on public schools in Mississippi. Mississippi’s laws state that:

- A school employee who has witnessed or has reliable information that a student or school employee has been the subject of an act of bullying or harassing behaviour *shall* report the incident to the appropriate school official;²⁶⁶
- A student or volunteer who has witnessed or has reliable information that a student or school employee has been the subject of any act of bullying or harassing behaviour *should* report the incident to the appropriate school official;²⁶⁷ and
- Each local school district *shall* include in its policies a prohibition against bullying or harassing behaviour and have policies for reporting, investigating and addressing the behaviour.²⁶⁸

2.10.6 The most common components of anti-bullying legislation within education codes across US states have been identified as: requirements to develop district policies; statements of scope defining school jurisdictions over bullying acts; definitions of prohibited behaviour; and disciplinary

²⁵⁹ NJ Stat Ann § 18A:37-17a.

²⁶⁰ NJ Stat Ann § 18A:37-20.

²⁶¹ Morgese, above n 256, 368.

²⁶² NJ Stat Ann § 18A:37-22, 23.

²⁶³ NJ Stat Ann § 18A:37-24.

²⁶⁴ NJ Stat Ann § 18A:37-28.

²⁶⁵ NJ Stat Ann § 18A:37-29.

²⁶⁶ Miss Code Ann § 37-11-67(4) (2014).

²⁶⁷ Miss Code Ann § 37-11-67(5) (2014).

²⁶⁸ Miss Code Ann § 37-11-69 (2014).

consequences.²⁶⁹ There is some evidence suggesting that strong anti-bullying provisions in educational codes are related to a decrease in certain bullying-related behaviours.²⁷⁰

2.10.7 It has been noted that anti-bullying legislation regulating schools has had a very limited impact on bullying-related court cases due to a general absence of a private right of action.²⁷¹ Without a legislative ‘bridge to action’, the only impact of the legislation on court actions may be to shape a school’s duty of care in a negligence action.²⁷² The lack of litigation is not necessarily evidence of a flaw in the education-based legislative response, as such a response is not necessarily designed as a legal action.

Canada

2.10.8 Some Canadian provinces have also amended their Education Acts to ensure that bullying is better addressed within schools; requirements on schools have been the primary legislative means to address bullying in Canada.

2.10.9 In Ontario, the *Accepting Schools Act 2012* amendments to the *Education Act*:²⁷³

- Defined bullying and cyberbullying;
- Required anti-bullying policies in schools;
- Provided for the development of a model bullying prevention plan; and
- Provided for the establishment of procedures for reporting incidents of bullying and for consequences of bullying.

2.10.10 Similarly, in Quebec, the *Education Act* and *Act Respecting Private Education* were amended in 2012 to require all public and private educational institutions to adopt and implement anti-bullying and anti-violence plans.²⁷⁴ The anti-bullying and anti-violence plans must:

- Include prevention measures; specify actions to be taken and measures to be offered where bullying or violence is observed, and follow up to be given to any report or complaint of bullying or violence; and
- Determine applicable disciplinary sanctions.

2.10.11 Manitoba²⁷⁵ and New Brunswick²⁷⁶ also amended their education legislation to include specific anti-bullying provisions.

2.10.12 Alberta’s *Education Act* imposes a student responsibility to report bullying directed at others, whether it occurs in the school building, during the school day or by electronic means.²⁷⁷ A student

²⁶⁹ Stuart-Cassel, Bell and Springer, above n 91, 15.

²⁷⁰ Neiman, Robers and Robers, above n 90, 648.

²⁷¹ Diane M Holben and Perry A Zirkel, ‘School Bullying Litigation: An Empirical Analysis of the Case Law’ (2014) 47(2) *Akron Law Review* 299, 326.

²⁷² See *ibid*; In an analysis of US bullying case law from 1992 to 2011 — limited to cases where the bully and the victim were K-12 public school students, the plaintiff was a student and/or the student’s parents, the defendant was a school district and/or its individual employees, and the facts fit within the general accepted definition of bullying — only 6 of 166 reported cases reported anti-bullying law as a legal basis; at 312.

²⁷³ See *Education Act*, RSO 1990, c E-2, ss 1(1), 303.2, 303.1, 301, 310.

²⁷⁴ See *An Act to Prevent and Stop Bullying and Violence in Schools* Q 2012, c 19.

²⁷⁵ *Public Schools Amendment Act (Safe and Inclusive Schools)* SM 2013, c 6.

²⁷⁶ *An Act to Amend the Education Act* NB 2012, c 21.

may be suspended for failure to comply with student responsibilities.²⁷⁸ This obligation to report may go some way to addressing the problem of bystanders. A similar education system based approach was taken in Nova Scotia,²⁷⁹ although Nova Scotia also created a civil action of cyberbullying and a right to apply for a protection order for cyberbullying.²⁸⁰

²⁷⁷ *Education Act A 2012*, c E-0.3, s 31(e).

²⁷⁸ *Ibid* s 36.

²⁷⁹ See *Ministerial Education Act Regulations*, NS Reg 28/2014, rr 47(1A), 47(2).

²⁸⁰ See above at [2.8.20].

Part 3

Need for Reform

3.1 Conclusions on Current Framework

3.1.1 There is no overarching legal framework covering bullying in Tasmania and not all common bullying behaviours are caught by the current laws. Moreover, the piecemeal assortment of legal avenues which may potentially be triggered by claims of bullying also mean that it can be difficult to recognise and enforce legal rights and difficult to understand and abide by legal responsibilities.

3.1.2 The patchwork of laws that are potentially relevant to bullying behaviour raises questions about the accessibility and clarity of the law and consequently about its human rights compliance. Where domestic laws are uncertain, inaccessible or unpredictable in their application, they may fail to comply with human rights principles and requirements. Bullying behaviours may interfere with the right to security of the person.²⁸¹ The right to security of the person imposes obligations on the state to investigate threats to a person and to implement reasonable and appropriate measures to protect people against threats to their personal security.²⁸² Laws that are inaccessible and uncertain are unlikely to meet this obligation.

3.1.3 In the absence of a legal scheme dealing with ‘bullying’, current schemes potentially able to address bullying tend to be limited by location, victim attribute and/or means or form of behaviour. The offence of stalking and the restraint order provisions — although not able to address all common bullying behaviours — are perhaps the best suited of Tasmania’s current legal options to tackle bullying. These options do not, however, appear to have been used frequently or effectively in this context. The following table shows the limitations of current legal frameworks when dealing with bullying, demonstrating that no single avenue currently available offers an answer to the full range of bullying behaviours, victims and locations.

	Legislation	Penalty	Physical Bullying	Verbal Bullying	Cyberbullying	Problems
Stalking	<i>Criminal Code 1924</i> (Tas) s 192	If tried summarily, maximum of 12 months’ imprisonment for a first offence or 5 years’ for a subsequent offence. ²⁸³	No – unlikely to cover physical bullying.	No – unlikely to cover ‘in person’ verbal bullying, but does cover written bullying.	Yes – likely to cover some cyberbullying.	Does not cover all forms of bullying; Possible police and prosecutorial reluctance to pursue a complaint of bullying under this offence.

²⁸¹ See *International Covenant on Civil and Political Rights* opened for signature 16 December 1966, 999 UNTS 171, Article 9 (entered into force 23 March 1976); Jeremy Gans et al, *Criminal Process and Human Rights* (Federation Press, 2011) 106, 247; *Jayawardene v Sri Lanka* (UNHCR, 26 July 2002 UN Doc CCPR/C/75/D/916/2000); *Delgado Paez v Colombo* (UNHCR, UN Doc CCPR/C/39/D/195/1985, 1990).

²⁸² Bullying behaviour may also infringe other human rights, including the right to life, the right to freedom from torture and the right to be treated with dignity.

²⁸³ *Sentencing Act 1997* (Tas) s 13.

	Legislation	Penalty	Physical Bullying	Verbal Bullying	Cyberbullying	Problems
Assault	<i>Criminal Code 1924</i> (Tas) s 184 and <i>Police Offences Act 1935</i> (Tas) s 35	If tried summarily, maximum of 12 months' imprisonment for a first offence or 5 years' for a subsequent offence. ²⁸⁴	Yes – covers actual, threatened and attempted physical contact.	No – must have a physical element; cannot apply to purely verbal behaviours.	No – must have a physical element; cannot apply to purely cyber behaviours.	Only covers physical bullying; As a 'single instance' offence, 'assault' does not capture the repeated or sustained nature of bullying.
Written Threat to Murder	<i>Criminal Code 1924</i> (Tas) s 162	No prescribed maximum; <i>Code</i> maximum applies.	No.	Only threats to murder.	Only threats to murder.	The application of this offence is too narrow to be considered a means of addressing bullying.
Sending Letters Threatening to Burn or Destroy	<i>Criminal Code 1924</i> (Tas) s 276	No prescribed maximum; <i>Code</i> maximum applies.	No.	Only letters threatening to burn or destroy.	Only letters threatening to burn or destroy.	The application of this offence is too narrow to be considered a means of addressing bullying.
Public Annoyance	<i>Police Offences Act 1935</i> (Tas) s 13	Up to 3 months' imprisonment or a fine of 3 penalty units unless a repeat offence within 6 months of conviction.	Yes – may cover physical behaviour but not more covert bullying.	Yes – may cover loud or disruptive behaviours but not more covert bullying.	No – unlikely to cover cyber behaviours because of the requirement of 'public place'.	Limited by requirement of 'public place' – may not cover bullying that does not involve some form of disturbance to the public.
Observation or Recording in Breach of Privacy	<i>Police Offences Act 1935</i> (Tas) s 13A	Up to 12 months' imprisonment or a fine of 50 penalty units or both.	No.	No.	Only in very specific instances.	The application of this offence is too narrow to be considered a means of addressing bullying.
Publishing or Distributing Prohibited Recording	<i>Police Offences Act 1935</i> (Tas) s 13B	Up to 12 months' imprisonment or a fine of 50 penalty units or both.	No.	No.	Only in very specific instances.	The application of this offence is too narrow to be considered a means of addressing bullying.

²⁸⁴ Ibid.

Part 3: Current Laws

	Legislation	Penalty	Physical Bullying	Verbal Bullying	Cyberbullying	Problems
Using a Carriage Service to Menace, Harass or Cause Offence	<i>Criminal Code Act 1995</i> (Cth) s 474.17	Up to three years' imprisonment.	No.	Does not cover 'in person' verbal bullying', only covers cyberbullying.	Yes – cyberbullying that is 'menacing', 'harassing' or 'offensive' may be covered.	Does not cover bullying generally'; Possible reluctance to pursue a complaint of bullying under this offence.
Enhancing Online Safety for Children Act (proposed)	<i>Enhancing Online Safety for Children Act 2015</i> (Cth) ss 29, 35-6	Tier two services may be subject to a civil penalty for failing to comply with a social media service notice; investigation and enforcement powers of Commissioner against individuals.	No.	No.	Yes –covers a wide range of cyberbullying material.	Does not cover bullying generally; Only applies to material targeted at an 'Australian child'; No direct enforcement measures in relation to tier one social media services.
Restraint Orders	<i>Justices Act 1959</i> (Tas) s 106B	A wide range of orders can be made.	Yes – a restraint order may be imposed where a person has caused personal injury or damage to property.	Some verbal bullying covered; a restraint order may be imposed where there has been threats to cause personal injury or damage to property or where 'stalking' is made out.	Yes – likely covers some cyberbullying through 'stalking'.	Not all forms of verbal bullying covered – for example, spreading rumours, teasing; Some uncertainty as to the extent of mental harm required to establish 'personal injury'.
Anti-Discrimination Law	<i>Anti-Discrimination Act 1998</i> (Tas); various Commonwealth legislation.	Variable.	Physical contact not the primary focus of this type of scheme.	Yes – if behaviour is directed at a protected attribute and meets other requirements of legislation (eg 'offends', 'insults', 'humiliates', 'ridicules').	Yes – if behaviour is directed at a protected attribute and meets other requirements of legislation (eg 'offends', 'insults', 'humiliates', 'ridicules').	The behaviour must be directed at a particular attribute, excluding a large proportion of bullying and victims of bullying.

	Legislation	Penalty	Physical Bullying	Verbal Bullying	Cyberbullying	Problems
Workplace Bullying	<i>Fair Work Act 2009</i> (Cth) ss 789FC, s 789FF; <i>Work Health and Safety Act 2012</i> (Tas) s 19	Variable.	Yes.	Yes.	Possibly – depending on the connection to work.	Only covers workers bullied at work; <i>Work Health and Safety Act</i> may be difficult to enforce against bullying; <i>Fair Work Act</i> only applies to ‘constitutionally-covered businesses’.
Negligence	<i>Civil Liability Act 2002</i> (Tas) and general law.	Damages.	Yes – if high threshold of action can be made out.	Yes – if high threshold of action can be made out.	Yes – if high threshold of action can be made out.	Can be very difficult to establish, requires very serious harm, potentially high time and financial costs; Established duties of care for schools and workplaces but probably very difficult to establish a duty of care in other situations.
Education Policy Statements	No direct legislative requirement.	No direct penalty.	Yes.	Yes.	Yes.	Only applies to bullying in schools; No legal requirements or responsibilities, not enforceable; Not consistent between schools.

3.2 Is a Legal Response to Bullying Justified?

3.2.1 Although it is difficult to find data relating to the overall incidence of bullying in society, it has been suggested that Australia is experiencing a resurgence of bullying across the board, including in primary schools, high schools, families, workplaces, commercial and political environments and in the community.²⁸⁵ Recent data on bullying amongst young people reports that around 20% of Australian minors experience cyberbullying each year, and that around 27% of Australian students in

²⁸⁵ Graham Martin, ‘Editorial: On Bullying in Australia’ (2010) 9(1) *Advances in Mental Health* 2, 5.

years 4 to 9 are affected by a form of bullying every week or more often.²⁸⁶ Further, the 2012 Australian Workplace Barometer (SafeWork) reported that 6.8% of respondents to their project had been bullied at work in the previous six months.²⁸⁷ The Workplace Barometer report identified the difficulty in interpreting bullying statistics due to different definitional and collection methods. It noted that in Australia reported workplace bullying statistics vary from 3.5% to 21.5% of workers.²⁸⁸

3.2.2 There is, however, some evidence suggesting that bullying, at least among school children, may actually be decreasing.²⁸⁹ Bullying is most frequently studied in the school environment,²⁹⁰ but this suggested decrease may hold true for bullying more generally. It is possible that the perceived prevalence of bullying may be influenced by the uptake of anti-bullying programs, increased public awareness of the harmfulness of bullying and the emergence of new forms of bullying.²⁹¹ If the actual incidence of cyberbullying has increased with the development and popularity of new technology,²⁹² the rate of cyberbullying may stabilise or decrease as these technologies reach saturation point.

3.2.3 Even if evidence suggesting a potential decrease in the prevalence of bullying is accepted, bullying remains a substantial problem in the community. Bullying can be the systematic targeting of an individual. Because it is not confined by geographical, institutional or technological boundaries,²⁹³ bullying may seem inescapable to the person bullied. The harm caused by bullying can be very ‘victim-specific’ as the consequences of different types of bullying vary widely depending on the victim.²⁹⁴ In relation to mental harm in particular, the same bullying behaviour that causes very serious harm in one victim may be almost entirely ‘brushed off’ by another.

3.2.4 Although anyone can be a victim of bullying, most of the research on the harm caused by bullying relates to bullying within schools.²⁹⁵ There is evidence showing that for many children being bullied at school is a major stressor,²⁹⁶ and that frequently victimised students are significantly more likely to show high levels of anxiety, social dysfunction, depression and physical symptoms than their peers not involved in bully/victim relationships.²⁹⁷ Both young people who are bullied frequently and young people who bully have been shown to have significantly higher suicidal ideation than their peers,²⁹⁸ and a strong connection has been shown between being bullied in the first two years of high

²⁸⁶ Donna Cross et al, ‘Australian Covert Bullying Prevalence Study’ (Report, Child Health Promotion Research Centre, Edith Cowan University, May 2009) xxi.

²⁸⁷ Maureen Dollard et al, ‘The Australian Workplace Barometer: Report on Psychosocial Safety Climate and Worker Health in Australia’ (Report prepared for SafeWork Australia, December 2012) 60
<<http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/748/The-Australian-Workplace-Barometer-report.pdf>>.

²⁸⁸ Ibid.

²⁸⁹ Ken Rigby and Peter Smith, ‘Is School Bullying Really on the Rise?’ (2011) 14(4) *Social Psychology of Education* 441, 451.

²⁹⁰ Although bullying may occur in almost any context where people interact, schools have been the most frequently studied bullying environment: Kenneth W Merrell et al, ‘How Effective Are School Bullying Intervention Programs? A Meta-Analysis of Intervention Research’ (2008) 23(1) *School Psychology Quarterly* 26, 27.

²⁹¹ Rigby and Smith, above n 289, 452.

²⁹² See generally, *ibid* 451.

²⁹³ See generally, Barbara Spears et al, above n 8, 16–17.

²⁹⁴ Rigby, above n 6, 41.

²⁹⁵ Ken Rigby, ‘What Harm Does Bullying Do?’ (Paper presented at the Children and Crime: Victims and Offenders Conference convened by the Australian Institute of Criminology, Brisbane, 17-18 June 1999) 2.

²⁹⁶ *Ibid* 4.

²⁹⁷ *Ibid* 5.

²⁹⁸ *Ibid* 5–6.

school and poor mental and physical health as senior students.²⁹⁹ Recent research in the United States has shown a correlation between bullying victimisation in childhood and increased risk of anxiety disorders in adulthood. It has also shown a correlation between individuals who are at times both victims and bullies in childhood and increased risk of adult depression, panic disorder, agoraphobia and suicidality.³⁰⁰

3.2.5 Bullying is a complex societal problem. Because it is a social problem, addressing it fully requires a change in social attitudes. In part, this social change has already begun; bullying is now perceived as a problem by the media, politicians, businesses, unions, schools, sports clubs and charity organisations, and there has been significant momentum to address bullying in Australian social and educational spheres. The National Centre Against Bullying, for example, runs a biennial conference on bullying, bringing together a range of interested parties and helping to maintain community awareness of the problem of bullying and desire to address it.³⁰¹ Charity partnerships with businesses, clubs and other organisations also have an important role in achieving social change concerning bullying by de-normalising bullying behaviour and ‘role-modelling’ anti-bullying attitudes.³⁰² Other organisations contributing to the social response to bullying include Chloe’s Voice in Tasmania, the Brodie’s Law Foundation, and the Bully Zero Australia Foundation. Initiatives like the ‘National Day of Action against Bullying and Violence’ and ‘Bullying: No Way’ resources also contribute to the social response to bullying by providing an impetus for schools and communities to focus their attention on bullying and strengthen their message that bullying is not an acceptable part of social development.³⁰³

3.2.6 Given the serious harm that can be caused by bullying, however, a social response alone may be insufficient and a legal response may be justified. The law has an important deterrent function and rendering behaviour ‘unlawful’ provides a clear statement of society’s unwillingness to accept the behaviour.³⁰⁴ Recognition of the wrongfulness of the behaviour and provision of accessible legal avenues for resolution of the problem may also be beneficial to victims.³⁰⁵ There appears to be community desire for a legal response. In 2013, a petition with 4575 signatures was presented to the Tasmanian Attorney-General calling for an urgent review of anti-bullying laws.³⁰⁶ In August 2014, a petition of nearly 50,000 signatures was presented to Senator Eric Abetz in support of the introduction of federal cyberbullying laws.³⁰⁷

3.2.7 In considering whether a legal response to ‘harmful digital communication’ was justified, the NZLC concluded that although the causes of cyberbullying and harmful communications are complex

²⁹⁹ Ibid 7.

³⁰⁰ William E Copeland et al, ‘Adult Psychiatric Outcomes of Bullying and Being Bullied by Peers in Childhood and Adolescence’ (2013) 70(4) *JAMA Psychiatry* 419, 424.

³⁰¹ See National Centre Against Bullying, *NCAB Conference (6-7 August 2014)* (August 2014) <<http://www.ncab.org.au/ncabconference2014/>>.

³⁰² For example, that between the Alannah and Madeline Foundation and the Richmond Football Club; see generally, The Alannah and Madeline Foundation, *Richmond Football Club Support* (7 March 2014) <<http://www.amf.org.au/News.aspx?ID=1530>>.

³⁰³ See generally, Bullying No Way, *About the National Day of Action* (2014) <<http://bullyingnoway.gov.au/national-day/about/index.html>>.

³⁰⁴ See NZLC, above n 86, 98.

³⁰⁵ See *ibid*.

³⁰⁶ Tasmanian Parliament, Review of Tasmania’s Stalking Laws (Chloe’s Law) (20th November 2013) House of Assembly E-Petitions <<http://www.parliament.tas.gov.au/EPetitions/House/ClosedEPetition.aspx?PetNum=47&IIndex=-1>>.

³⁰⁷ See Matt Smith, ‘Senator Eric Abetz Pledges Action on Bullies after Receiving 49,000-name petition’, *The Mercury* (online) 7th September 2014 <<http://www.themercury.com.au/news/tasmania/senator-eric-abetz-pledges-action-on-bullies-after-receiving-49000name-petition/story-fnj4f7k1-1227050114149>>.

and the solutions must be social as well as legal,³⁰⁸ citizens should have the right to legal protection and redress when they suffer significant harm as a result of communication abuses.³⁰⁹ The NZLC was persuaded that non-criminal tiers of regulation were insufficient to address the seriousness of the harm of this form of communication, express community condemnation for the behaviour and deter potential offenders.³¹⁰

Question 1:

Do you think that the current legal frameworks available to address bullying are adequate? Why or why not?

Question 2:

Do you think that legislative reform is necessary to address the problem of bullying?

Question 3:

Do you think that the current avenues to address workplace bullying in Tasmania are sufficient? Why or why not?

Question 4:

Should Tasmanian legislation be amended to include anti-bullying provisions that mirror the *Fair Work Act* procedures?

³⁰⁸ NZLC, above n 86, 97–8.

³⁰⁹ Ibid 65–6.

³¹⁰ See ibid 133–4.

Part 4

Options for Reform

4.1 Introduction

4.1.1 The options for reform discussed below, in order of decreasing punitiveness, are:

- A criminal response through either the extension of the offence of stalking or the creation of a specific criminal offence of bullying;
- A civil response through the creation of a civil action of bullying, the right to apply for stop bullying orders or extension of the Anti-Discrimination Commissioner's functions;
- Anti-bullying requirements imposed on schools.

4.1.2 If reform is considered to be necessary, either a tiered response or single reform could be implemented.

4.2 Structure of Reform

4.2.1 'Bullying' may be made out by a wide range of behaviours (from social exclusion, to teasing and the spreading of rumours, to physical contact, to cyberbullying) and in a wide range of locations. It can be perpetrated by or against individuals or groups. The same behaviour that may be brushed off by one victim may be seriously harmful to another, and, depending on the bully, the harm may be intentional or merely reckless.

4.2.2 If legislative reform is desired, it is possible to design a ladder of responses to bullying. Less objectively serious bullying and possibly also the first instance response to some more serious instances of bullying could be dealt with by a relatively lenient response. For example, this bullying could be dealt with by the self-regulation or semi-autonomous response of internet service providers, schools, clubs and other community organisations.

4.2.3 The next tier could be a mediation-based response, focussed on addressing the causes of bullying, stopping the behaviour, and repairing relationships. Where the bullying is more objectively serious or where the preceding tiers have not resolved the bullying, the behaviour could be addressed by a civil or criminal response.

4.2.4 Alternatively, a single-stage reform to bullying could be implemented (ie only one type of legislation). Although this option is simpler to legislate, the range of bullying behaviours, harms and intentionality that can establish bullying mean that it may be difficult to draft one response that captures the full scope of the behaviour. If only one type of reform is implemented, it is perhaps necessary to direct the legal response to only the most objectively serious types of bullying behaviour. Although this leaves a large proportion of bullying uncovered, and may leave most victims of bullying without legal recourse, the educative and deterrent benefit of such a reform may still facilitate a change in social attitudes towards bullying at all levels.

Question 5:

If reform is necessary, what kinds of bullying do you think a legal response should address?

Question 6:

In any legislative response to bullying, should cyberbullying be dealt with as a discrete practice or as one form of more general bullying?

4.3 Criminal Responses

4.3.1 Criminal liability is the most punitive response to bullying. The criminal law is censuring and stigmatising and can result in the deprivation of liberty.³¹¹ The potentially harsh consequences associated with the enforcement of criminal law suggest that it should be reserved for serious wrongdoing that cannot be dealt with in another way.³¹² At a basic level, in order to justify a criminal response to bullying the behaviour should be shown to be harmful and the criminal law should be shown to be able to make a contribution to dealing with the problem that other responses cannot make.

4.3.2 There has been some criminalisation of bullying behaviours in other jurisdictions, although it is uncommon to see the creation of a specific offence of bullying. If a criminal response is implemented in Tasmania, it should perhaps be limited to the most serious instances of bullying; the criminal law is a blunt and severe instrument, and it is unlikely to be in the public interest to impose criminal liability on even all malicious forms of bullying.

Arguments for a criminal response to bullying

- Bullying can cause very serious harm. For a victim, it can be a seemingly inescapable form of targeted abuse.³¹³ The seriousness of the harm and the objective seriousness of some kinds of bullying behaviour may be sufficient to justify a criminal response.
- The criminal law can have substantial educational and deterrent effects that other forms of regulation are not able to provide.³¹⁴ Awareness that bullying may result in criminal punishment may deter potential bullies from the behaviour, and clearly labelling bullying as criminal may educate the community on the wrongfulness of the behaviour and contribute to a change in social attitudes. The benefits of education and deterrence are arguably maximised in this context by the creation of a specific offence of ‘bullying’, which may increase awareness of the problem and warn the community that this behaviour may lead to prosecution.³¹⁵

³¹¹ Ashworth, above n 24.

³¹² See *ibid* 15.

³¹³ Bullying is not confined by social, geographical, institutional or technological boundaries: see generally Barbara Spears et al, above n 8, 16–17.

³¹⁴ Criminal conviction is a greater deterrent than civil liability. Where deterrence is sought to be enhanced, a criminal response may be beneficial: see Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2002) 121–2.

³¹⁵ Alastair Nicholson, ‘Bullying, Young People and the Law: Challenges for the Future’ (Speech delivered at the Queensland Twilight Seminar, Australia & New Zealand Education Law Association, St Joseph’s College, Brisbane, 17th March 2014).

- There is evidence linking bullying as a child with subsequent criminal offending as an adult.³¹⁶ A criminal response to bullying, combined with the restorative justice approach of the *Youth Justice Act 1997* (Tas), may provide an opportunity to divert young people from a path of later offending.³¹⁷

Arguments against a criminal response to bullying

- Although there has been a substantial public response to bullying, part of this response may be a reaction to media coverage of highly-publicised apparently bullying-related suicides rather than a response to an actual increase in the prevalence or harm of bullying. There is some evidence suggesting that the prevalence of bullying may actually be decreasing,³¹⁸ perhaps suggesting that educational and social responses to bullying are already working to address the problem. To avoid overcriminalisation the criminal law should arguably not be offered as an immediate solution to a complex problem.³¹⁹
- The effect of some bullying may depend on the resilience of the victim. The unpredictability of consequences may be an argument against criminal punishment for bullies, or may be an argument to locate liability of a criminal response in the intention of the bully and not the consequences experienced by the victim;
- The criminal law is a blunt instrument; it must be able to be enforced consistently against offenders so that the boundaries of criminal responsibility are clear. Bullying is often symptomatic, or at least indicative, of the perpetrator's behavioural, emotional, social or psychological problems.³²⁰ A non-criminal response may be able to be better adapted to address the cause of the problem, rather than its manifestation.
- Society generally likes to avoid the introduction of young people to the criminal justice system.³²¹ Although not limited by age, bullying is common amongst young people. The criminalisation of bullying behaviours could create a new subset of young offenders.
- Bullying can be a 'communication offence', and there is a tension when criminalising speech between the desire to protect the community from harm and the desire not to infringe on freedom of speech. When considering whether a criminal response to bullying can be justified in Tasmania, freedom of speech arguably is not a significant constraint. There is no absolute right to free speech in Australia.³²² Further, it has been suggested that there are tiers of speech, and that hate speech and personal attacks are the lowest value forms of communication.³²³
- The introduction of a criminal response in isolation from other social, educational or legal responses may be tokenistic or ineffective. The introduction of a tokenistic response may

³¹⁶ See Lodge, above n 223.

³¹⁷ Young offenders involved in restorative justice may be less likely to re-offend: see generally Nancy Rodriguez, 'Restorative Justice At Work: Examining the Impact of Restorative Justice Resolutions on Juvenile Recidivism' (2007) 53(2) *Crime & Delinquency*, 355.

³¹⁸ See above at [3.2.2].

³¹⁹ See, eg, David Brown, 'Criminalisation and Normative Theory' (2013) 25(2) *Current Issues in Criminal Justice* 605, 613-14; Brown et al, *Criminal Laws* (The Federation Press, 5th ed, 2011) 23.

³²⁰ See Lodge, above n 223, 5.

³²¹ See generally Jeremy Prichard, 'Net-Widening and the Diversion of Young People from Court: A Longitudinal Analysis with Implications for Restorative Justice' (2010) 43(1) *Australian & New Zealand Journal of Criminology* 112, 116.

³²² Australia has an implied freedom of political communication, which is a negative right or restraint on legislative power rather than a positive right: see generally *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

³²³ Even against the backdrop of the *New Zealand Bill of Rights Act 1990* (section 14 of which provides that everyone has the right to freedom of expression) the NZLC did not consider the right to freedom of expression to be a practical constraint on an offence of harmful digital communication, concluding that hate speech and personal attacks are the lowest value forms of communication.

quell current community concern without addressing the problem of bullying, thereby distracting attention from more wide-ranging and effective responses.

Question 7:

Do you think that a criminal response to bullying is appropriate? Why or why not?

Possible Forms of Criminal Response

4.3.3 If a criminal response to bullying can be justified, this response could take a number of forms. The best-suited responses to bullying are amendments to the offence of stalking or the creation of a specific offence of bullying.

4.3.4 While it is possible to extend the *Police Offences Act* provisions discussed above, this response would not be an effective way to deal with bullying because of the limited application of these provisions. Public annoyance, prohibited under s 13 of the *Police Offences Act*, is limited by the requirement that the behaviour occur in a public place and it is not possible to remove this requirement without undermining the legislative intent of the provision and possibly causing overreach of the criminal law.³²⁴ Sections 13A and 13B could be amended to better cover visual cyberbullying by changing the requirements around privacy, but this amendment would still only capture very specific instances of cyberbullying that involved observation or recording or publishing or distribution of visual recordings. Even amended, the offence would be too specific to address bullying effectively and would not capture the sustained or repeated nature of bullying.

Extension of s 192 ‘Stalking’

4.3.5 Stalking provisions have frequently been suggested as a means of addressing serious bullying in other jurisdictions. One option for a criminal response to bullying is to amend s 192 of the *Code* (‘stalking’) to extend its application to bullying behaviours. If the stalking provision is amended in this way, it could be retitled to make it clear that it is the intention of the amendments that the provision applies to bullying and to ensure that the provision is easily identified as covering bullying. This kind of retitling would improve awareness of and accessibility to the provision, and would maximise the educative and deterrent benefits available from the amendment of the stalking provision.

4.3.6 Tasmania could enact similar amendments to s 192 of the *Code* as were made to Victoria’s stalking provision. To cover verbal and physical bullying, the ‘Brodie’s Law’ amendments in Victoria added the proscribed ‘actions’ of:

- Making threats to a victim;
- Using abusive or offensive words to or in the presence of the victim;
- Performing abusive or offensive acts in the presence of the victim; and
- Directing abusive or offensive acts towards the victim.

4.3.7 The 2011 Victorian amendments also expressly included self-harm within the stalking provision and inclusively defined ‘mental harm’. Prior amendments to Victoria’s stalking provision,

³²⁴ Given the wide range of behaviours covered by the section and the absence of a mental element, the requirement that the behaviour occur in a public place serves a gatekeeping function and its removal would arguably give rise to overreach of the criminal law.

in 2003, included a variety of cyber-actions in the provision, including ‘publishing on the internet or by an e-mail or other electronic communication to any person a statement or other material relating to the victim or any other person or purporting to relate to, or originate from, the victim or any other person.’³²⁵ Unlike the equivalent Tasmanian paragraph, this action does not require that the material be offensive, meaning it arguably has clearer application than the Tasmanian provision to hate pages and false profiles.

4.3.8 Amendments that could improve the applicability of Tasmania’s stalking provision to bullying include:

- New proscribed actions capable of establishing a course of conduct that clearly apply to verbal and physical bullying;
- A new cyber-based action covering material relating to the victim or purporting to relate to or originate from the victim, which does not require an additional threshold to be met. Although cyberbullying is already well-covered by Tasmania’s stalking provision when compared to other forms of bullying, this kind of cyber action would clearly cover cyberbullying like hate pages or false profiles;
- The inclusion of self-harm as a proscribed intended consequence of a course of conduct; and
- Definitions or statutory guidance in relation to the meaning of ‘mental harm’ and ‘fear and apprehension’ to remove interpretive uncertainty.

Arguments for the extension of ‘stalking’ to include bullying

- If it is determined that a criminal response is appropriate, amendments to the stalking provision are arguably a simpler legislative task than the creation of an entirely new offence. Coupled with this ease of reform is the desirability of using an existing offence where possible, rather than creating a new offence, in order to avoid problems of overcriminalisation. Amendment of the offence of stalking would avoid the creation of an entirely new offence, whilst still addressing community concern and providing a criminal avenue for addressing bullying.
- The offence of stalking is drafted very generally, meaning that it is adaptable to future manifestations of bullying behaviour. Although ultimately dependant on the form of drafting used for a specific offence of ‘bullying’, it is possible that an offence specifically directed at bullying may be drafted too narrowly and may be unresponsive to different forms of bullying in the future.
- There is case law interpreting the offence of stalking, meaning that there is unlikely to be unpredictability in the application of the law. Although there may be some uncertainty relating to the reach of the amendments, the creation of an entirely new offence would mean a complete absence of precedent and perhaps uncertainty as to the law’s reach.

Arguments against the extension of ‘stalking’ to include bullying

- The Tasmanian stalking provision arguably already covers some bullying behaviours, but has not been frequently used against bullying. There is possible police and prosecutorial reluctance to bring a charge of stalking against bullying, especially where young people are involved, and this reluctance is arguably not addressed by simply amending the text of the provision. The dearth of prosecutions for bullying behaviours under the Victorian stalking provision since the ‘Brodie’s Law’ amendments may also suggest that even amending the section to ensure applicability to serious bullying will not necessarily result in the use of the

³²⁵ *Crimes Act 1958* (Vic) s 21A(2)(ba).

section against bullying. On the other hand, it is worth noting the deterrent and educative effect of a criminal offence that clearly applies to bullying behaviours even where prosecutions are uncommon. Even when the stalking provision was initially debated in Tasmanian parliament, it was noted that prosecutions would be expected to be rare for the offence,³²⁶ suggesting that reluctance is not a problem unique to bullying and not a determinative argument against this type of reform.

- Although some educative and deterrent benefits would attach to the amendment of the stalking provision to address bullying (especially if the amendments were accompanied by either an awareness-raising campaign explaining their applicability to bullying behaviours or by the retitling of the offence to include bullying) the greater educative and deterrent effect that would be created by an offence specifically directed at bullying is foregone.
- The amendments required to ensure that serious instances of bullying are covered by the stalking provision are quite extensive. During the second reading speech of the Bill inserting the offence of stalking into the *Code*, the essence of stalking was defined as ‘the intentional harassment and/or intimidation of a person by following them about, sending them articles, telephoning them, waiting outside a house and the like.’³²⁷ Although there are similarities between conduct labelled ‘stalking’ and conduct labelled bullying, there are also significant differences. Bullying behaviours like physical contact, social exclusion and verbal bullying are not traditionally associated with stalking, and stalking behaviours like loitering or surveillance may be too passive to be considered bullying. Stalking may also be associated with a seriousness of intent that bullying does not attract. There was no mention of bullying in parliamentary discussion about stalking, but there was substantial discussion of romantic interest, the predominately female victims of stalking, domestic abuse and the ‘Reclaim the Night’ movement.³²⁸ Internationally, it has been suggested that offences of stalking are rarely applied outside the context of adult romantic relationships.³²⁹

Creation of a Specific Bullying Offence

4.3.9 Another possible criminal response to bullying is the creation of a specific offence of ‘bullying’. Tasmania would be the first state in Australia to take this step. Internationally there appears to be some reluctance to create a generally applicable offence of bullying.

4.3.10 The wide range of intentions, behaviours and consequences that could fall within this offence (some of which are less objectively serious than others) and the suggested prevalence of bullying amongst young people suggest that an offence of bullying should be summary.³³⁰ Crimes triable summarily attract lower maximum penalties than indictable offences,³³¹ and a more serious (indictable) offence may attract reluctance from policing and prosecutorial agencies.

Arguments for the creation of a bullying offence

- If a criminal response is desired, an offence of bullying would be likely to be better able to cover bullying behaviours than amendments to the offence of stalking, as bullying would be the provision’s primary focus. An offence of bullying could be drafted as a ‘course of

³²⁶ Tasmania, *Parliamentary Debates*, House of Assembly, 24 May 1995, 42 (Ronald Cornish, Minister for Justice).

³²⁷ Tasmania, *Parliamentary Debates*, House of Assembly, 24 May 1995, 41 (Ronald Cornish, Minister for Justice).

³²⁸ See *ibid* 41–57.

³²⁹ See Tefertiller, above n 93, 181–82.

³³⁰ A summary offence can be heard by a magistrate, attracts lower maximum penalties and is generally considered to be less serious than an indictable offence.

³³¹ See *Sentencing Act 1997* (Tas) s 13.

conduct’ offence — like the stalking provision in s 192 of the *Code* — rather than as an offence that covers only a single instance of behaviour. Drafting the offence in this way would allow it to apply to a wide range of bullying behaviours, and would capture the repeated or sustained nature of bullying. Further, within a ‘course of conduct’ offence of bullying, additional requirements could be attached to less objectively harmful behaviours to reduce the potential overreach of the law. To prevent the criminalisation of jocular or trivial behaviour, a less serious bullying behaviour like teasing — for example — could be included as a proscribed action capable of establishing a course of conduct with an additional consequence element such as ‘teasing likely to result in mental or emotional harm’. The clarity in application and legislative intention that would come with an offence specifically directed at bullying — and the ability to increase intention or consequence thresholds for less serious behaviours — may lead to less reluctance to use the criminal law against bullying. The lower penalty and perceived severity of a summary offence may also dissuade potential prosecutorial reluctance.

- Although the criminal law should be reserved for the most serious instances of bullying, bullying arises within a wide range of situations and the harm that the bully intends as well as the harm that is caused to the target will often be dependent on social context or circumstances personal to the victim or offender. A benefit of a specific offence of bullying is its potential applicability to a wider range of consequences and intended consequences than the offence of stalking. It could be made clear in the provision that mental harm includes things like self-harm, suicidal ideation and symptoms of psychological conditions like depression and anxiety. Intention to cause physical harm — or knowledge of the likelihood of that result, depending on the mental element — could cover physical bullying. Intention to cause fear and apprehension could be included in the offence and it may be desirable to note that for the purposes of bullying, fear and apprehension relate not only to personal safety and the safety of others but also to things like reputation, social status and humiliation. To cover the wide range of serious bullying behaviours, intention to cause emotional harm could also be included to cover situations where the humiliation or distress that was caused was perhaps too transitory to establish mental harm but was still serious.
- By criminalising bullying behaviour, community condemnation of that behaviour is made clear. The educative and deterrent benefits of specifically providing that bullying is an offence are potentially very strong.

Arguments against the creation of a bullying offence

- ‘Bullying’ is a label for an amorphous group of anti-social behaviours. It is difficult to define, and its forms can change continuously. By expressing what is ‘bullying’ for the purpose of an offence, the legislature may define bullying too narrowly and restrict its ability to address new forms of bullying that may emerge in the future. The ease of reform of amending stalking would also be foregone.
- Care should be taken to ensure that high-profile cases do not determine the development of the criminal law. Where possible, to ensure consistency and consideration in the development of the criminal law, it is arguably better to use existing offences than to create new offences. It is potentially possible to amend the stalking provision in the *Code* to cover particularly serious instances of bullying, although this response may also be problematic.
- There may be some concern with overreach of the criminal law if an offence of bullying is created. For example, the criminalisation of teasing amongst young people during school or jocular behaviour that escalates but is at most reckless may be perceived as unjustified. A specific offence of bullying could, however, be drafted so that criminal liability did not attach to all forms of bullying, mitigating this concern. In this regard, the mental element of an offence of bullying would have an important gatekeeping function. Police and prosecutorial discretion may also prevent criminal liability attaching to behaviour that perhaps should not

be labelled criminal but it is problematic to rely on this discretion to justify overreach of the criminal law. Without a strong argument to the contrary, criminal liability should not attach without some form of fault.³³² Potential mental elements for an offence of bullying are: recklessness, a purely subjective mental element, a mental element with an objective limb, and a deeming provision.

- Simply requiring that a bully was at least reckless as to whether or not harm would be caused may be too low a threshold for criminal liability given the wide range of behaviours that could be caught by an offence of ‘bullying’.³³³ The realisation of the likelihood that another person might suffer harm (rather than the intention to cause harm) could render common banter, joking and teasing criminal. In order to avoid overreach of the criminal law into behaviours that do not justify criminal liability, a higher level of culpability than recklessness is arguably required of the bully.
- A purely subjective mental element could be required for an offence of bullying. This option requires the bully to have intended to cause the consequence stipulated in the offence. This approach is the highest threshold; in order for this mental element to be established it must be shown beyond a reasonable doubt that the bully actually intended that the consequence stipulated in the legislation occur. In the majority of bullying cases, criminal punishment is not appropriate.³³⁴ A purely subjective mental element helps to ensure that only those people who are most culpable are criminally liable.
- An objective limb could be included in the mental element required for an offence of bullying. This option requires that the bully either intended to cause the consequence stipulated in the offence, or that a reasonable person in the bully’s circumstances ought to have known that the consequence would be likely to eventuate. Where the mental element is purely subjective, it is conceivable that a bully could successfully argue that he or she was only joking and escape liability even where very serious harm is caused. An objective limb would limit the availability of this kind of denial of the mental element.
- A deeming provision like s 192(3) of the *Code* (stalking) could be used in an offence of bullying. The offence of stalking requires subjective intent to cause specific harmful consequences but not that those consequences eventuate. Where harm *in fact* is caused the mental element is deemed to exist as long as the perpetrator at least ought to have known that this consequence was likely. Actual intent to harm must usually be shown (serving a gatekeeping function) but the deeming provision means that the mental element may be more easily established where the behaviour was particularly serious and actually caused harm.

Question 8:

If you think that a criminal response is justified, do you prefer amendment to the stalking provision or the creation of a separate offence or bullying? Why?

Question 9:

If you prefer amendment of the stalking provision, how should the provision be amended?

³³² See generally, Andrew Simester and Andreas von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart Publishing, 2011) 30–1.

³³³ ‘Recklessness’ requires that the offender realised that the harm may possibly be caused to the victim by the offender’s actions (foresight) but pursued the action anyway. The offender must have at least realised the possibility of the harm required by the legislation as a consequence of his or her act.

³³⁴ See generally the suggestion that most bullying is at the relatively mild (or grey) end of the continuum in Rigby, above n 6, 41.

Question 10:

If you prefer the creation of an offence of bullying:

- (a) What kinds of behaviour should be included in the offence?
- (b) What kind of consequences should the bully be required to have intended or caused — eg, should the offence be enlivened where an offender has intended to cause serious emotional distress or should a higher threshold be required?
- (c) What form should the mental element take?

4.4 Civil Responses

4.4.1 Civil law is litigated between individuals, rather than between the state and an individual. The civil options discussed below are a civil action of bullying, ‘stop bullying orders’ and an extension of the functions of the Anti-Discrimination Commissioner to allow the Commissioner to deal with bullying. The focus of the first civil option is to compensate for bullying that has occurred, the focus of the second is stopping the escalation or continuation of the bullying, and the focus of the third is primarily consensus-based resolution and involvement of third party organisations in addressing the problem of bullying. These options could be implemented together or individually.

4.4.2 A choice between a criminal and civil response is not necessarily required. While either reform could be implemented independently, or as the apex of a tiered response, a civil and criminal response could also complement each other. For example, civil stop bullying orders could be used to capture most serious bullying, with a criminal response reserved for particularly heinous behaviour, or a civil action or investigation through the Anti-Discrimination Commissioner could be used against most bullying desired to be rendered illegal and a criminal offence could deal with bullying that is either too serious for a civil response or for which the civil response has been ineffective.

Civil Action of ‘Bullying’

4.4.3 Bullying could be made a civil wrong. A victim of bullying could then bring an action against a bully for ‘bullying’. A civil action of bullying could be expressed in a variety of ways. For example, similar to Nova Scotia’s civil offence of cyberbullying,³³⁵ it could simply be prescribed that ‘a person who subjects another person to bullying commits a tort against the person’. The problem with such an approach is the need to define ‘bullying’ with sufficient specificity so that legal liability is certain. Bullying is difficult to precisely define, and precise definitions are important in the legal context so that rights and responsibilities are clear. The risks with too broad a definition are that the law is uncertain and its reach potentially extends too far. The risk with too narrow a definition is that not all manifestations of current and future bullying would be captured, meaning that the framework may not be adaptive or effective.

4.4.4 Another way to express a civil action of bullying is to draft it as a ‘course of conduct’ offence. The discussion relating to the elements of a criminal course of conduct offence also applies to the creation of a civil offence,³³⁶ with the primary difference between the two options being that a civil

³³⁵ *Cyber-safety Act*, SNS 2013, c 2, s 21.

³³⁶ See above at [4.3.10].

action would be a less punitive response. The civil law is less stigmatising and censoring and can result in less serious consequences than the criminal law.

4.4.5 If a civil approach is adopted, the remedies available also need to be determined. The primary remedy under an action of this type is likely to be compensatory damages for harm caused by the behaviour, although a wide range of remedies — including apologies or orders to prevent future bullying — could potentially be available. If desired, evidence of consensus-based solutions through processes like conciliation or mediation could be expressly required before any action reached court.

Arguments for a civil right of action

- The opportunity to receive damages is an advantage of a civil right where a victim of bullying has suffered serious harm and as a result required, or requires, treatment. Whereas criminal punishment tends to focus on the offender, civil remedies can compensate for harm. The legislation creating the action may also provide a wide range of other remedies that are more appropriate to bullying, and more helpful to the victim, than criminal punishment. For example, it may be possible to have cyberbullying material taken down, apologies with or without admissions of legal fault may be facilitated, and orders preventing certain types of behaviour in the future may be possible.
- Bullying commonly occurs amongst young people. Civil liability is less stigmatising, less censoring and less serious than criminal liability. Treating a civil (rather than criminal) action as the apex of a response to bullying may create less problems with respect to the introduction of young people to the legal system. Alternatively, a civil response could be used in addition to a criminal response, with the civil law capturing types of bullying behaviour that fall just short of justifying criminalisation.
- Bullies commonly exhibit underlying mental or developmental health issues, or are experiencing some form of emotional unrest. Although serious, civil liability may be less devastating to future development and rehabilitation than criminal liability.
- The threat of civil liability for bullying serves a deterrent function, although the level of deterrence is likely to be lower than that which attaches to potential criminal liability.³³⁷ The risk of being held liable for bullying could deter potential bullies, and ascribing legal consequences to bullying behaviour may serve a powerful educative role, driving a change in social attitudes by highlighting the serious harm caused by bullying.

Arguments against a civil right of action

- Victims of bullying may choose not to pursue a civil action even when the bullying behaviour and harm caused is severe. The rate of use of a civil action against bullying may be low given both the cost of civil litigation and the ongoing burdens of commencing and then running a civil case as opposed to making a complaint to the police regarding a criminal offence.
- Compensating a victim after bullying has occurred, and probably (depending on the drafting of the action) after harm has been suffered, arguably enlivens the legal response too late. The fact that the bullying must already have reached the level at which it is appropriate to impose legal liability means that a civil action would not facilitate early intervention to prevent the bullying from escalating. The same can be said about a criminal response, although, as a criminal response focuses on the offender rather than the victim, the circumstances that enliven a criminal response are slightly different.
- Although less objectively serious than criminal liability, civil liability is still punitive. A civil action of bullying has the potential to introduce young people and people with underlying

³³⁷ See generally Australian Law Reform Commission, above n 314.

issues into the formal legal system. A more rehabilitative approach may be preferable. A civil action could, however, be introduced in combination with a more rehabilitative approach through schools or through a consensus-based process.

Question 11:

Do you think that bullying should be a civil wrong?

Question 12:

If so, what kind of behaviour should be proscribed?

Question 13:

Is a criminal response also justified or should the civil action be the most severe legal response to bullying?

Stop Bullying Orders

4.4.6 A major problem when applying civil actions or criminal offences to bullying is that legal rights and liabilities are enlivened only after the legal rules have been breached; an offender is punished after committing a crime and a plaintiff seeks a remedy after a civil wrong has been committed against them. However, in the case of bullying which is a repeated or sustained course or pattern of behaviour, and which often arises in the context of enduring social relationships, the preferred remedy is often simply for the bullying to stop.³³⁸

4.4.7 One option for reform is to provide a civil framework for a ‘bullying intervention order’ or ‘stop bullying order’, through amendment to the current restraint order provision,³³⁹ the introduction of a new provision in Part XA of the *Justices Act* or through other legislation. This option has similarities with the ‘stop bullying orders’ available under the *Fair Work Act 2009* (Cth) and the stalking intervention orders available in Victoria. The provision would likely be similar to current restraint order provisions in Tasmania. Nova Scotia’s ‘protection orders’, under the *Cyber-safety Act*,³⁴⁰ are another example of the operation of this type of framework. Under Nova Scotia’s *Cyber-safety Act*,³⁴¹ a justice may make a protection order where the respondent cyberbullied the subject and there are reasonable grounds to believe that the respondent will cyberbully the subject in the future. A protection order may include conditions such as: a provision prohibiting cyberbullying, communication restrictions, restrictions on use of means of electronic communication; and the confiscation of an electronic device used by the respondent for cyberbullying.³⁴²

4.4.8 Facilitating early intervention could prevent more serious harm eventuating for the victim and also support the bully to make changes in their behaviour. Where a continuing relationship between bully and victim is desirable or unavoidable or where a restorative approach is most appropriate, preference could be given to orders that include restorative justice measures (such as mediation).

³³⁸ See generally, Standing Committee on Education and Employment, above n 124, 95, although the statistics relate specifically to workplace bullying.

³³⁹ *Justices Act 1959* (Tas) s 106B.

³⁴⁰ *Cyber-safety Act*, SNS 2013, c 2.

³⁴¹ *Ibid* ss 8, 9; sections 8 and 9 of the *Cyber-safety Act* are included in Appendix A.

³⁴² *Ibid* s 9.

Arguments for 'bullying intervention orders'

- Bullying intervention orders could facilitate early intervention. By providing an avenue for a victim to apply to have the bullying stopped, these orders could protect the victim from serious harm and could also prevent the bully from engaging in potentially criminal behaviour. The orders may be able to facilitate early intervention and prevent bullying from escalating. Applications for 'stop bullying orders' may also be more time and cost effective than a legal action for a civil wrong or criminal offence.
- The conditions of a 'stop bullying order' could be adapted to individual circumstances. For example, conditions may include restorative justice measures such as conferencing or mediation. They may include temporal or geographical restrictions, or they may prohibit cyber contact. The very wide range of orders that could be available is appropriate given that bullying can manifest in many different ways and its effect can be very victim specific.

Arguments against 'bullying intervention orders'

- Bullying, even if recognisable when seen, is incredibly difficult to define. When legislating for an application process to restrain bullying, it would be difficult to avoid defining the term. A general definition of bullying could be used — for example, '*a sustained or repeated course of conduct that is intended to cause, or ought to be known to be likely to cause, fear, humiliation, distress or other harm to a person or damage to his or her property*' — complemented by an inclusive list of common bullying behaviours, but the difficulty legally defining bullying remains a problem.
- One argument against creating an avenue to apply for 'stop bullying orders' is that the floodgates will open and the court system will be overrun with applications of varying merit. This is not a determinative concern for a number of reasons:
 - The types of orders that could be made could deter vexatious applications as the terms of the orders would be aimed at resolving bullying and the prevention of future bullying. Where the only remedies are orders stopping the bullying or resolving the dispute, there is little to be gained from an unmeritorious application. As an (admittedly quite conjectural) estimate of the potential numbers involved, the Annual Report of the Tasmanian Magistrates Court for 2013–14 states that 1057 applications for grant of restraint orders were made in that time.³⁴³ The Report also shows a downward trend in the number of such applications in the past four years,³⁴⁴ suggesting that fears of a flood of applications for 'stop bullying orders' may be unfounded.
 - Costs orders can also serve a gatekeeping function and prevent vexatious or unmeritorious applications. Under s 106H(1) of the *Justices Act 1959* (Tas), other than where an application for an order is made by a police officer, costs may be ordered. The same, or similar, potential for costs orders could apply to 'stop bullying orders'.
 - The predicted flood of applications has not eventuated under similar anti-bullying provisions of the *Fair Work Act*. According to the relevant quarterly anti-bullying reports of the Fair Work Commission, since the introduction of its anti-bullying jurisdiction on January 1, 2014,³⁴⁵ there have been 532 applications for an order to

³⁴³ Chief Magistrate Michael Hill, 'Magistrates Court Annual Report' (Annual Report 2013-14, Magistrates Court Tasmania, 13 October 2014) 35.

³⁴⁴ *Ibid* 35 (2010–11 — 1488; 2011–12 — 1346; 2012–13 — 1184).

³⁴⁵ At the time of publication the second quarter report of 2014–2015 had not been released.

stop bullying.³⁴⁶ Of these applications, only 36 have been finalised by a decision, with the rest being withdrawn early in case management processes, withdrawn prior to proceedings, resolved during the course of proceedings or withdrawn after a conference or hearing.³⁴⁷

- Inconvenience to third parties could be a significant problem. The effect of establishing a right to apply for a bullying intervention order on third parties like schools, employers and sports and other organisations should be taken into account. Creating a stand-alone bullying intervention order, modelled on the *Fair Work Act* provisions, rather than simply annexing the order to s 106B(1) of the *Justices Act 1959* (Tas), is likely to represent less of an impost on third parties. The *Justices Act* provides that the protection of the welfare of the person for whose benefit the order is sought is of paramount importance³⁴⁸ whilst the *Fair Work Act*, contains no such stipulation.³⁴⁹ Given the potential use of bullying intervention orders in contexts in which there is necessarily a continuing relationship between bully and victim, express acknowledgment of the importance of the practicality of any orders and interests of third parties may be appropriate. Under the *Justices Act 1959* s 106G, a third party may apply for leave from the court to make an application for the variation, extension or revocation of a restraint order. It is arguably appropriate that the right of interested third parties (such as schools, workplaces and clubs) to apply to amend a ‘bullying intervention order’ also be expressly recognised, although leave of the court may still be appropriate to ensure that the third party has an interest.

Question 14:

Do you think that it should be possible to apply for a ‘bullying intervention order’?

Question 15:

If so, what considerations do you think should be taken into account in making an order and in setting the conditions that can be imposed under an order?

Extension of the Functions of the Anti-Discrimination Commissioner

4.4.9 It may be possible to extend the functions of the Anti-Discrimination Commissioner to include the investigation and resolution of bullying behaviours that are not of such a serious nature as to warrant criminal sanction. Section 17(1) of the *Anti-Discrimination Act 1998* (Tas) is currently limited by the requirement that prohibited behaviour be directed at a protected attribute. Although it is possible to extend the *Anti-Discrimination Act* to include general bullying behaviours, to do so may undermine the attribute focus of the *Anti-Discrimination Act* and dilute both community understanding and the distinct character of anti-discrimination law. A better approach to this option may be to enact legislation to prohibit bullying and extend the Anti-Discrimination Commissioner’s functions to deal with bullying.

4.4.10 The prohibited bullying behaviour could be defined, for example, by providing that ‘a person must not engage in unreasonable repeated or sustained conduct which offends, humiliates, insults, ridicules or otherwise damages physical or mental health or property on any basis’. A mental element

³⁴⁶ Quarterly anti-bullying reports published online by the Fair Work Commission: see Fair Work Commission, *Quarterly Reports* <<https://www.fwc.gov.au/about-us/reports-publications/quarterly-reports>>; of the 532 total applications, only a small number were Tasmanian (5 in the 4th Quarter 2013–14; 2 in the 1st Quarter 2014–15; no published state breakdown in the 3rd Quarter 2013–14).

³⁴⁷ See *ibid.*

³⁴⁸ *Justices Act 1959* (Tas) ss 106B(4A), 106B(4AAB)(a).

³⁴⁹ *Fair Work Act 2009* (Cth) s 789FF(2).

could be included, for example that ‘a person must not intentionally engage’, or that ‘a person must not recklessly engage’. It may be desirable to limit the area of activity in which the legislation applies so as not to overwhelm the Commissioner with complaints of bullying. For example, s 17(1) of the *Anti-Discrimination Act 1998* (Tas) currently only applies to prohibited behaviour in the areas of: employment; education and training; the provision of facilities, goods and services; accommodation; membership and activities of clubs; the administration of any law of the state or any state program; awards, enterprise agreements or industrial agreements.³⁵⁰ On the other hand, there is no limit on the area of activity for ‘inciting hatred’ under the *Anti-Discrimination Act*.³⁵¹

4.4.11 Given the potential imbalance between the bully and the victim with regard to the ability to produce evidence, a switch in the onus of proof could be considered. For example, once the victim has established there have been repeated ‘bullying’ behaviours, the onus could switch to the alleged bully to show that the behaviour was not unreasonable or that it was not accompanied by the requisite mental element. Alternatively, a more onerous burden of proof could be imposed, requiring the alleged bully to disprove the allegation once a complaint had been made and its evidentiary foundation accepted. This approach may represent too great an infringement on the right to a fair hearing to be generally acceptable. Further, it may open the way to vexatious, intimidatory complaints.

4.4.12 It is arguably desirable to involve third parties in the resolution process, not only to address the causes and contexts of bullying but also to prevent the Anti-Discrimination Commissioner from being inundated with complaints of bullying that would require significant additional funds to address. This process could include third parties by requiring that where the Anti-Discrimination Commissioner receives a complaint of bullying, the Commissioner is to notify the relevant third party who is to attempt to resolve the complaint. Depending on the circumstances, relevant third parties in this regard could include WorkSafe, schools, sports clubs and non-profit organisations with a stakeholder interest in the complaint.

4.4.13 Where the third party is unable to address the bullying, they would refer the complaint back to the Commissioner for investigation. Where the third party is able to resolve the complaint, they would notify the Commissioner of the outcome. Where no third party is involved — that is, where the bullying does not involve an environment like a school, workplace, university, club or organisation — the Commissioner could have the power to deal with the complaint without referral.

Arguments for extension of the Anti-Discrimination Commissioner’s functions

- The consensus-based focus of an investigation by the Anti-Discrimination Commissioner appears to be an effective and efficient way of resolving bullying-type behaviours based on the attributes protected by the *Anti-Discrimination Act*. By extending the Commissioner’s functions to cover non-attribute based bullying, the existing effective resolution process can be utilised as a mechanism to address bullying more generally.
- Commission staff already have expertise in resolving these types of complaints, including the resolution of complaints involving children and the resolution of complaints where an ongoing relationship between the parties is desirable.
- An investigatory and consensus-based process is likely to be appropriate for many forms of bullying behaviour. This kind of process avoids overcriminalisation and the introduction of young people into the formal legal system.
- By involving third parties, it is likely that the procedures for dealing with bullying within these organisations would be improved, and self-regulation of anti-social behaviour would be

³⁵⁰ *Anti-Discrimination Act 1998* (Tas) s 22.

³⁵¹ *Ibid* s 22.

strengthened. Community and organisation involvement may also contribute to changing social attitudes towards bullying.

Arguments against extension of the Anti-Discrimination Commissioner's functions

- There is the potential for the Anti-Discrimination Commissioner to be inundated with complaints, especially if the prohibition is not limited by area. A requirement that where workplace bullying is involved the complaint be referred on to WorkSafe (which has investigation and prosecutorial powers), and that where other third parties are involved the complaint be referred to their investigation and resolution processes may mitigate this concern.
- This type of process may not be sufficient to deal with very dangerous and serious bullying-type behaviours, although the criminal law may catch these behaviours.

Question 16:

Do you think that the Anti-Discrimination Commissioner's functions should be extended to deal with bullying? If so:

- (a) how should the prohibition on bullying be described?
- (b) should the victim have to establish that they have been bullied or should the onus to disprove bullying shift to the alleged bully?

Question 17:

How should third parties be involved in the resolution process?

4.5 School Regulation

4.5.1 Schools have an important role in addressing bullying. Intervention to stop and prevent bullying in schools can have broader social implications, as children who bully at school are more likely to become workplace bullies and more likely to fall into adult criminal offending than their non-bullying peers.³⁵² One option for reform is to legislate to require schools to have some form of anti-bullying policy or procedure. Internationally, some jurisdictions' educational regulations include cyberbullying outside of school hours and school grounds where students are involved.³⁵³

4.5.2 Most Tasmanian schools already have some form of anti-bullying policy, whether specifically addressing bullying or within a more general policy to do with anti-social behaviour. These policies are occasionally published on school websites and are usually available on request. There is, however, variability between schools regarding the specificity and accessibility of these documents and it is expected that there will be variability in the enforcement of these policies and procedures at schools. Further, as there are no uniform reporting requirements, it is difficult to determine which policies and procedures are effective and where bullying is most problematic.

4.5.3 Requiring schools to have anti-bullying policies and procedures would arguably attract strong educative benefits, by sending a clear message to school communities that bullying is not socially acceptable and can be very harmful. This means of addressing bullying also avoids introducing young people to the formal legal system. Given that most bullying is in the less serious range of the bullying

³⁵² See Lodge, above n 223, 5; Rigby, above n 223, 1.

³⁵³ See, eg, New Jersey's 'Anti-Bullying Bill of Rights', which applies to bullying that occurs off school grounds in cases in which a school employee is made aware of the action: NJ Stat Ann 18A: 37-15.3.

spectrum,³⁵⁴ this option may address school bullying that would not be addressed by a purely legal approach.

4.5.4 There is a wide range in the level of particularity with which requirements that schools have some form of anti-bullying policy or procedure could be imposed.

- The least intrusive obligations, for example, could simply require that all government and non-government schools formulate and publish anti-bullying policies and procedures for resolving incidents of bullying, leaving the details of these policies and procedures to schools. A requirement like this would prioritise school autonomy. Requirements on schools in the UK, for example, which require the head teacher to determine and publicise anti-bullying measures do not infringe heavily on school autonomy.³⁵⁵
- In the middle-range of education regulations are requirements such as those in Quebec,³⁵⁶ which — although leaving the final form to schools and school boards — require all public and private educational institutions to have anti-bullying plans that *must include* prevention measures, procedures to investigate and resolve complaints and reports, and disciplinary sanctions.
- More specific legal obligations could require schools' anti-bullying policies and procedures to meet set minimum standards. They could impose specific reporting, investigation and resolution procedures, creating a more consistent approach to bullying within schools and ensuring that anti-bullying policies and procedures are well-known regardless of the school. Uniform definitions of bullying and reporting of information about bullying within schools could be required to facilitate evidence-based consideration of the impact of anti-bullying policies taken by schools and problem areas. An example of stringent requirements on schools is New Jersey's 'Anti-Bullying Bill of Rights'.³⁵⁷ A more stringent approach would be a greater intrusion on school autonomy but would give greater priority to addressing the problem of bullying.

Arguments for requirements on schools

- Bullying is common amongst, and can cause significant harm to, school-aged children. Requiring schools to have policies and procedures that specifically address bullying may address bullying behaviours at an early stage. In some young people, this early intervention may prevent these behaviours developing into adult bullying or criminal offending. In some young people this intervention may prevent serious and lasting psychological harms but it may be enough that it simply encourages the development of more positive social attitudes.
- Although there are mixed opinions, there is evidence suggesting that anti-bullying requirements and procedures imposed on schools internationally have been effective in resolving and reducing incidents of bullying, changing social perceptions of bullying and encouraging bystanders and victims to report the bullying rather than remaining silent. New Jersey's 'Anti-Bullying Bill of Rights' imposes strict reporting requirements, facilitating consideration of the law's effectiveness. Schools and school districts are also graded to measure the implementation and success of the anti-bullying measures and enable comparison between areas and institutions. New Jersey's *Anti-Bullying Bill of Rights Act* has only been in force since 2011, so it may be too early to draw conclusions about its effectiveness. Data published by the New Jersey Department of Education, however, shows that incidents of

³⁵⁴ See generally Rigby, above n 6, 41.

³⁵⁵ See above at [2.10.2].

³⁵⁶ See above at [2.10.10].

³⁵⁷ See above at [2.10.4].

harassment bullying and intimidation have decreased, from 12024 in 2011–12 to 6515 in 2013–14.³⁵⁸ The strict requirements on schools to educate students on bullying, train teachers on bullying, and report and resolve incidences of bullying may be working in New Jersey.

- Requirements on schools avoid exposing young people to formal legal processes as they do not impose civil or criminal liability on children. Anti-bullying procedures in schools could be flexible and responsive to the needs of both the bullied and the bully, unlike legal responses which require greater certainty in enforcement. Given that a continuing relationship between students is generally going to be desirable in the school environment, restorative practices could be preferred.
- Legally requiring that schools have an anti-bullying policy and procedure could improve the effectiveness of current school procedures by decreasing the variability in their enforcement. While most schools already have policies to address anti-social behaviours, by requiring that there is a specific and well — or regularly — publicised policy against and procedure for dealing with bullying, there is likely to be an educational effect, increasing awareness of the harm of bullying and the fact that it can result in punishment. Requiring that schools have policies and procedures to deal with bullying that reach a minimum standard may change social attitudes towards bullying and ensure that there is a clear avenue to address bullying when it does arise.
- Bystanders are a significant contributor to the problem of bullying but, because their involvement is often passive (ie a lack of action to stop the bully), it can be difficult to impose responsibility even where this imposition is warranted. If a whole school approach was required, the problem of bystanders could be addressed by changing social acceptance of bullying and educating students on their responsibility to step in and prevent bullying behaviour.

Arguments against requirements on schools

- Even the least intrusive impositions on schools (requirements that schools formulate, implement and publicise an anti-bullying policy and procedures for dealing with complaints of bullying, for example) decrease schools' autonomy. More stringent requirements may fail to adapt to differences in school sizes, the type of schools and the culture of schools by enforcing uniform procedures.
- Depending on the form of the regulations, there could be significant compliance costs for schools. Training for staff members, specific anti-bullying roles within existing staff descriptions or the creation of new roles, anti-bullying education programmes and thorough investigation and resolution processes create ongoing costs. The cost of requirements on schools has been a problem internationally. School districts in New Jersey claimed to be spending more than \$2 million in 2012 to implement the 'Anti-Bullying Bill of Rights'.³⁵⁹ Although the yearly cost would be expected to decrease once anti-bullying programs are established within schools, there is also a large component of recurrent costs (such as wages for additional staff and reporting, training and anti-bullying education compliance costs).

³⁵⁸ David C Hespe, Susan Martz and Nancy Curry, 'Commissioner's Annual Report to the Education Committees of the Senate and General Assembly on Violence, Vandalism and Substance Abuse in New Jersey Public Schools' (Annual Report 2013–14, New Jersey Department of Education, December 2014) 6 <<http://www.state.nj.us/education/schools/vandv/1314/vandv.pdf>>.

³⁵⁹ Diane D'Amico, 'School Districts Say State's Anti-bullying Law Costs at Least \$2 million to Implement', *Press of Atlantic City* (online), 9 March 2012 <http://www.pressofatlanticcity.com/news/breaking/school-districts-say-state-s-anti-bullying-law-costs-at/article_8474d72c-6989-11e1-b18d-0019bb2963f4.html>.

- Although there may be flow-on effects to the wider community from addressing bullying in schools, imposing requirements on schools to deal with bullying provides access to anti-bullying procedures for a very limited subset of the community. Even with limited application this option may be of some use but if bullying is considered a sufficiently serious social problem generally to justify a legal response, this option on its own may be an inadequate response.

Question 18:

Do you think that schools should be legally required to have anti-bullying policies and procedures? Why or why not?

Question 19:

If yes, how prescriptive should the requirements be? For example, should they stipulate minimum standards in relation to investigative and disciplinary measures within schools and reporting obligations between schools, or should they instead merely require the formulation of statements of principles or targets?

Question 20:

Should the policies and procedures be uniform between schools, or should schools have discretion to create their own within set requirements?)

Question 21:

If reform is desired, should a tiered response be implemented or is only one type of response necessary? If a tiered response is preferred, how should the tiers be structured? Should a tiered response be embodied in one legislative provision or should it be located in different pieces of legislation depending on the type of bullying, its location and who is involved?

Appendix A

Legislation

Criminal Code 1924 (Tas) –

182. Definition of assault

(1) An assault is the act of intentionally applying force to the person of another, directly or indirectly, or attempting or threatening by any gesture to apply such force to the person of another if the person making the attempt or threat has, or causes the other to believe on reasonable grounds that he has, present ability to effect his purpose; or the act of depriving another of his liberty.

(2) Words alone cannot constitute an assault.

(3) An act which is reasonably necessary for the common intercourse of life if done only for the purpose of such intercourse, and which is not disproportionate to the occasion, does not constitute an assault.

(4) Except in cases in which it is specially provided that consent cannot be given, or shall not be a defence, an assault is not unlawful if committed with the consent of the person assaulted unless the act is otherwise unlawful, and the injury is of such a nature, or is done under such circumstances, as to be injurious to the public, as well as to the person assaulted, and to involve a breach of the peace.

192. Stalking

(1) A person who, with intent to cause another person physical or mental harm or to be apprehensive or fearful, pursues a course of conduct made up of one or more of the following actions:

(a) following the other person or a third person;

(b) keeping the other person or a third person under surveillance;

(c) loitering outside the residence or workplace of the other person or a third person;

(d) loitering outside a place that the other person or a third person frequents;

(e) entering or interfering with the property of the other person or a third person;

(f) sending offensive material to the other person or a third person or leaving offensive material where it is likely to be found by, given to or brought to the attention of the other person or a third person;

(g) publishing or transmitting offensive material by electronic or any other means in such a way that the offensive material is likely to be found by, or brought to the attention of, the other person or a third person;

(h) using the internet or any other form of electronic communication in a way that could reasonably be expected to cause the other person to be apprehensive or fearful;

(i) contacting the other person or a third person by postal, telephonic, electronic or any other means of communication;

(j) acting in another way that could reasonably be expected to cause the other person to be apprehensive or fearful –

is guilty of a crime.

Charge:

Stalking.

(2) For the purposes of subsection (1) –

(a) a person pursues a course of conduct if the conduct is sustained or the conduct occurs on more than one occasion; and

(b) if the conduct occurs on more than one occasion, it is immaterial whether the actions that make up the conduct on one of those occasions are the same as, or different from, the actions that make up the conduct on another of those occasions.

(3) A person who pursues a course of conduct of a kind referred to in subsection (1) and so causes another person physical or mental harm or to be apprehensive or fearful is taken to have the requisite intent under that subsection if at the relevant time the person knew, or ought to have known, that pursuing the course of conduct would, or would be likely to, cause the other person physical or mental harm or to be apprehensive or fearful.

(4) Subsection (3) does not apply to a person who, in good faith, pursues a course of conduct of a kind referred to in subsection (1) in the course of performing official duties to –

(a) enforce the criminal law; or

(b) administer an Act; or

(c) enforce a law imposing a pecuniary penalty; or

(d) execute a warrant; or

(e) protect the public revenue.

Police Offences Act 1935 (Tas) –

3. Interpretation

public place includes–

any park, garden, reserve, or other place of public recreation or resort;

any rail infrastructure, railway, or rolling stock, within the meaning of the Rail Safety National Law (Tasmania) Act 2012;

any public wharf, pier, or jetty;

any passenger vessel plying for hire;

any vehicle plying for hire;

any church, chapel, or other building open for the purpose of Divine service;

any public hall, theatre, or room in which any public entertainment or meeting is being held or performed or is taking place;

any market;

any auction room, or mart, or place open for the purpose of a sale by auction;

any premises specified in a liquor licence or liquor permit granted under the Liquor Licensing Act 1990, that are open for the sale of liquor;

any licensed billiard-room;

any racecourse, cricket ground, football, show, or regatta ground, or other such place to which the public have access free or on payment of any gate-money; and includes any portion of such place which is within view of the public;

any open yard, place, allotment, or urinal, closet, lavatory, or other convenience to which the public have access;

any police office or police station, or any court-house or court of petty sessions, or any yard or enclosure used therewith respectively, to which the public have access;

any street as herein defined, notwithstanding that the same may be formed on private property;

any school building or the land or premises used in connection therewith;

any public cemetery;

any banking house, warehouse, shop, office, or similar place, while open for the transaction of business;

...

13. Public annoyance

- (1) A person shall not, in a public place –
- (a) behave in a violent, riotous, offensive, or indecent manner;
 - (b) disturb the public peace;
 - (c) engage in disorderly conduct;
 - (d) jostle, insult, or annoy any person;
 - (e) commit any nuisance; or

(f) throw, let off, or set fire to any firework.

...

(3AA) A person who contravenes a provision of subsection (1), (2), (2A), (2B), (2C) or (3) is guilty of an offence and is liable on summary conviction to –

(a) a penalty not exceeding 3 penalty units or to imprisonment for a term not exceeding 3 months, in the case of an offence under subsection (1) or (3); or

(b) a penalty not exceeding 5 penalty units or to imprisonment for a term not exceeding 6 months, in the case of an offence under subsection (2); or

(c) a penalty not exceeding 10 penalty units or imprisonment for a term not exceeding 6 months, in the case of an offence under subsection (2A), (2B) or (2C).

(3A) A person convicted in respect of an offence under this section committed within 6 months after he has been convicted of that or any other offence thereunder is liable to double the penalty prescribed in respect of the offence in respect of which he is so convicted.

...

13A. Observation or recording in breach of privacy

(1) A person who observes or visually records another person, in circumstances where a reasonable person would expect to be afforded privacy –

(a) without the other person's consent; and

(b) when the other person –

(i) is in a private place; or

(ii) is engaging in a private act and the observation or visual recording is made for the purpose of observing or visually recording a private act –

is guilty of an offence.

Penalty:

Fine not exceeding 50 penalty units or imprisonment for a term not exceeding 12 months, or both.

(2) A person who observes or visually records another person's genital or anal region, in circumstances where a reasonable person would expect to be afforded privacy in relation to that region, when the observation or visual recording is made for the purpose of observing or visually recording the other person's genital or anal region is guilty of an offence.

Penalty:

Fine not exceeding 50 penalty units or imprisonment for a term not exceeding 12 months, or both.

(2A) It is a defence to proceedings for an offence against subsection (2) for the defendant to provide evidence that the observation or visual recording was carried out with the consent of the person observed or visually recorded.

(2B) If a police officer has reasonable grounds to believe that a person is contravening or has contravened subsection (1) or (2), the police officer may, without warrant and using such force, means and assistance as is reasonably necessary –

(a) detain and search that person; and

(b) seize any visual recording, item or instrument found on that person that the police officer considers could be used for observing or visually recording contrary to subsection (1) or (2).

(2C) The court may, if it considers any visual recording, item or instrument that was seized under subsection (2B)(b) may have been used during the commission of an offence against subsection (1) or (2), order that the visual recording, item or instrument be forfeited to the Crown.

(2D) The court may make an order under subsection (2C) whether or not the person is convicted of an offence against subsection (1) or (2).

(2E) On conviction of a person of an offence against subsection (1) or (2), any visual recording, item or instrument seized under subsection (2B)(b) is forfeited to the Crown.

(3) In subsection (2) –

genital or anal region, of a person, means the person's genital or anal region when that region is covered only by underwear or bare.

13B. Publishing or distributing prohibited visual recording

(1) A person who publishes or distributes a prohibited visual recording of another person having reason to believe it to be a prohibited visual recording, without lawful and reasonable excuse (proof of which lies on the first-mentioned person), is guilty of an offence.

Penalty:

Fine not exceeding 50 penalty units or imprisonment for a term not exceeding 12 months, or both.

(1A) If a police officer has reasonable grounds to believe that a person is contravening or has contravened subsection (1), the police officer may, without warrant and using such force, means and assistance as is reasonably necessary –

(a) detain and search that person; and

(b) seize any prohibited visual recording, item or instrument found on that person that the police officer considers could be used for publishing or distributing contrary to subsection (1).

(1B) The court may, if it considers any prohibited visual recording, item or instrument that was seized under subsection (1A)(b) may have been used during the commission of an offence against subsection (1), order that the prohibited visual recording, item or instrument be forfeited to the Crown.

(1C) The court may make an order under subsection (1B) whether or not the person is convicted of an offence against subsection (1).

(1D) On conviction of a person of an offence against subsection (1), any prohibited visual recording, item or instrument seized under subsection (1A)(b) is forfeited to the Crown.

(2) In this section –

distribute includes –

- (a) communicate, exhibit, send, supply or transmit to someone, whether to a particular person or not; and
- (b) make available for access by someone, whether by a particular person or not; and
- (c) enter into an agreement or arrangement to do anything mentioned in paragraph (a) or (b); and
- (d) attempt to distribute;

genital or anal region, of a person, has the same meaning as in section 13A;

prohibited visual recording of another person means –

- (a) a visual recording of the person in a private place or engaging in a private act made in circumstances where a reasonable adult would expect to be afforded privacy; or
- (b) a visual recording of the person's genital or anal region, when it is covered only by underwear or bare, made in circumstances where a reasonable adult would expect to be afforded privacy in relation to that region.

Crimes Act 1958 (Vic) –

21A. Stalking

- (1) A person must not stalk another person.
Penalty: Level 5 imprisonment (10 years maximum).
- (2) A person (the offender) stalks another person (the victim) if the offender engages in a course of conduct which includes any of the following –
 - (a) following the victim or any other person;
 - (b) 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;
 - (ba) publishing on the internet or by an e-mail or other electronic communication to any person a statement or other material –
 - (i) relating to the victim or any other person; or
 - (ii) purporting to relate to, or to originate from, the victim or any other person;
 - (bb) causing an unauthorised computer function (within the meaning of Subdivision (6) of Division 3) in a computer owned or used by the victim or any other person;
 - (bc) tracing the victim's or any other person's use of the internet or of e-mail or other electronic communications;
 - (c) entering or loitering outside or near the victim's or any other person's place of residence or of business or any other place frequented by the victim or the other person;

- (d) interfering with property in the victim's or any other person's possession (whether or not the offender has an interest in the property);
- (da) making threats to the victim;
- (db) using abusive or offensive words to or in the presence of the victim;
- (dc) performing abusive or offensive acts in the presence of the victim;
- (dd) directing abusive or offensive acts towards the victim;
- (e) giving offensive material to the victim or any other person or leaving it where it will be found by, given to or brought to the attention of, the victim or the other person;
- (f) keeping the victim or any other person under surveillance;
- (g) acting in any other way that could reasonably be expected –
 - (i) to cause physical or mental harm to the victim, including self-harm; or
 - (ii) to arouse apprehension or fear in the victim for his or her own safety or that of any other person –

with the intention of causing 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.

- (3) For the purposes of this section an offender also has the intention 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 if –
 - (a) the offender knows that engaging in a course of conduct of that kind would be likely to cause such harm or arouse such apprehension or fear; or
 - (b) the offender in all the particular circumstances ought to have understood 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.

...

(8) In this section –

mental harm includes –

- (a) psychological harm; and
- (b) suicidal thoughts.

Crimes Act 1900 (NSW) s 60E

60E. Assaults etc at schools

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

(2) A person who assaults a school student or member of staff of a school while the student or member of staff is attending a school and by the assault occasions actual bodily harm, is liable to imprisonment for 7 years.

(3) A person who recklessly by any means:

(a) wounds a school student or member of staff of a school, or

(b) inflicts grievous bodily harm on a school student or member of staff of a school, while the student or member of staff is attending a school,

is liable to imprisonment for 12 years.

(4) A person who enters school premises with intent to commit an offence under another provision of this section is liable to imprisonment for 5 years.

(5) Nothing in subsection (1) applies to any reasonable disciplinary action taken by a member of staff of a school against a school student.

Anti-Discrimination Act 1998 (Tas) –

17. Prohibition of certain conduct and sexual harassment

(1) A person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of an attribute referred to in section 16(e), (a), (b), (c), (d), (ea), (eb) and (k), (f), (fa), (g), (h), (i) or (j) in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.

...

Justices Act 1959 (Tas)

106A

(1) In this Part –

...

stalking means the doing of any one or more of the following except when done for a lawful purpose:

(a) following another person;

(b) keeping another person under surveillance;

(c) loitering outside the residence or workplace of another person;

(d) loitering outside a place that another person frequents;

(e) entering or interfering with the property of another person;

(f) sending offensive material to another person or leaving offensive material where it is likely to be found by, given to or brought to the attention of another person;

- (g) publishing or transmitting offensive material by electronic or any other means in such a way that the offensive material is likely to be found by, or brought to the attention of, another person;
- (h) using the internet or any other form of electronic communication in a way that could reasonably be expected to cause another person to be apprehensive or fearful;
- (i) contacting another person by postal, telephonic, electronic or any other means of communication;
- (j) acting in another way that could reasonably be expected to cause another person to be apprehensive or fearful;

...

106B. Restraint orders

(1) Where on an application made under this section, justices are satisfied on the balance of probabilities –

(a) that –

- (i) a person has caused personal injury or damage to property; and
- (ii) that person is, unless restrained, likely again to cause personal injury or damage to property; or

(b) that –

- (i) a person has threatened to cause personal injury or damage to property; and
- (ii) that person is, unless restrained, likely to carry out that threat; or

(c) that –

- (i) a person has behaved in a provocative or offensive manner;
- (ii) the behaviour is such as is likely to lead to a breach of the peace; and
- (iii) that person is, unless restrained, likely again to behave in the same or a similar manner; or

(d) that a person has stalked the person for whose benefit the application is made or a third person the stalking of whom has caused the person for whose benefit the application is made to feel apprehension or fear –

they may make an order imposing such restraints upon that person as are necessary or desirable to prevent the person from acting in a manner specified in this subsection.

(2) An application for a restraint order may be made –

(a) by a police officer;

(b) by a person against whom, or against whose property, the behaviour that forms the subject-matter of the application was directed, or, where that person is a child, a parent or guardian of that child; or

(ba) by the guardian or administrator of a person who is a represented person within the meaning of the Guardianship and Administration Act 1995; or

(c) by a person to whom leave is granted under subsection (3).

(3) A person other than a person referred to in subsection (2)(a) or (b) may apply to justices for leave to make an application for a restraint order.

(4) An application referred to in subsection (3) may be made in the absence of the respondent to the application.

(4AA) An application for a restraint order must include information of any relevant family contact order, or of any pending application for a relevant family contact order, of which the applicant is aware.

(4AAB) In deciding whether or not to make a restraint order, the justices –

(a) must consider the protection and welfare of the person for whose benefit the order is sought to be of paramount importance; and

(b) must consider whether access between the person for whose benefit the order is sought, or the person against whom the order is sought, and any child who is a member of the family of either of those persons is relevant to the making of the restraint order; and

(c) must consider any relevant family contact order of which the justices have been informed.

(4AAC) A restraint order is not invalid merely because –

(a) the applicant fails to inform the justices of any relevant family contact order, or of any pending application for a relevant family contact order; or

(b) the justice fail to consider access or any relevant family contact order as required by subsection (4AAB).

(4A) In determining the nature of the orders which may be included in a restraint order, the justices hearing the application for the order must consider the protection and welfare of the person for whose benefit the order is sought to be of paramount importance.

(4B) Without limiting the nature of the orders which may be included in a restraint order, the justices hearing the application for the order may include in the restraint order one or more of the following orders:

(a) an order directing the person against whom the order is made to vacate premises, restraining that person from entering premises, or limiting that person's access to premises, whether or not that person has a legal or equitable interest in the premises;

(b) an order prohibiting or restricting the possession by the person against whom the order is made of all or any firearms specified in the order or directing the forfeiture or disposal of any firearms in the possession of that person;

(c) an order prohibiting the person against whom the order is made from stalking the person for whose benefit the order is made;

(d) an order prohibiting the person against whom the order is made from causing another person to engage in conduct restrained by justices.

(5) Before making an order of a kind referred to in subsection (4B)(a), the justices must consider –

- (a) the effect of making or declining to make the order on the accommodation of the persons affected by the proceedings; and
- (b) the effect of making or declining to make the order on any children of, or in the care of, the persons affected by the proceedings; and
- (c) the need for suitable arrangements to be made to allow the person against whom the order is sought to take possession of personal property on the premises.

(5A) Without limiting the nature of the orders which may be made under this section, if justices make a restraint order, the justices may include in that order any one or more of the following orders:

- (a) an order directing the person against whom the restraint order is sought to deliver property, in the manner specified in the order, to a person for whose benefit the restraint order is made or to allow a person for whose benefit the restraint order is made, in the manner specified in the order, to recover possession of property or have access to property;
- (b) an order directing the person for whose benefit the restraint order is made to allow a person against whom the restraint order is made, in the manner specified in the order, to recover possession of property or have access to property.

(5B) A restraint order that affects possession of or access to premises or property does not affect any legal or equitable interest held by any person in the premises or property.

(6) A restraint order shall remain in force for such period as justices consider necessary to protect the person for whose benefit the order is made or until an order is made revoking the restraint order.

(7) A restraint order may –

- (a) cancel or suspend any licence or other permit relating to the possession of a firearm by the person against whom the order is made; and
- (b) prohibit the person from applying for, or being granted or issued, any such licence or other permit during the period specified in the order.

Fair Work Act 2009 (Cth) –

789FC Application for an FWC order to stop bullying

(1) A worker who reasonably believes that he or she has been bullied at work may apply to the FWC for an order under section 789FF.

(2) For the purposes of this Part, worker has the same meaning as in the Work Health and Safety Act 2011, but does not include a member of the Defence Force.

Note: Broadly, for the purposes of the Work Health and Safety Act 2011, a worker is an individual who performs work in any capacity, including as an employee, a contractor, a subcontractor, an outworker, an apprentice, a trainee, a student gaining work experience or a volunteer.

(3) The application must be accompanied by any fee prescribed by the regulations.

(4) The regulations may prescribe:

- (a) a fee for making an application to the FWC under this section; and
- (b) a method for indexing the fee; and
- (c) the circumstances in which all or part of the fee may be waived or refunded.

789FD When is a worker *bullied at work*?

(1) A worker is bullied at work if:

(a) while the worker is at work in a constitutionally-covered business:

- (i) an individual; or
- (ii) a group of individuals;

repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and

(b) that behaviour creates a risk to health and safety.

(2) To avoid doubt, subsection (1) does not apply to reasonable management action carried out in a reasonable manner.

(3) If a person conducts a business or undertaking (within the meaning of the Work Health and Safety Act 2011) and either:

(a) the person is:

- (i) a constitutional corporation; or
- (ii) the Commonwealth; or
- (iii) a Commonwealth authority; or
- (iv) a body corporate incorporated in a Territory; or

(b) the business or undertaking is conducted principally in a Territory or Commonwealth place;

then the business or undertaking is a constitutionally-covered business.

789FF FWC may make orders to stop bullying

(1) If:

(a) a worker has made an application under section 789FC; and

(b) the FWC is satisfied that:

- (i) the worker has been bullied at work by an individual or a group of individuals; and
- (ii) there is a risk that the worker will continue to be bullied at work by the individual or group;

then the FWC may make any order it considers appropriate (other than an order requiring payment of a pecuniary amount) to prevent the worker from being bullied at work by the individual or group.

- (2) In considering the terms of an order, the FWC must take into account:
- (a) if the FWC is aware of any final or interim outcomes arising out of an investigation into the matter that is being, or has been, undertaken by another person or body—those outcomes; and
 - (b) if the FWC is aware of any procedure available to the worker to resolve grievances or disputes—that procedure; and
 - (c) if the FWC is aware of any final or interim outcomes arising out of any procedure available to the worker to resolve grievances or disputes—those outcomes; and
 - (d) any matters that the FWC considers relevant.

Criminal Code Act 1995 (Cth) –

474.17 Using a carriage service to menace, harass or cause offence

- (1) A person is guilty of 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.

Harmful Digital Communications Bill 2013 (NZ)

19 Causing harm by posting digital communication

- (1) A person commits an offence if –
- (a) the person posts a digital communication with the intention that it cause harm to a victim; and
 - (b) posting the communication would cause harm to an ordinary reasonable person in the position of the victim; and
 - (c) posting the communication causes harm to the victim.
- (2) In determining whether a post would cause harm, the court may take into account any factors it considers relevant, including –
- (a) the extremity of the language used;
 - (b) the age and characteristics of the victim;
 - (c) whether the digital communication was anonymous;
 - (d) whether the digital communication was repeated;
 - (e) the extent of circulation of the digital communication;

- (f) whether the digital communication is true or false;
- (g) the context in which the digital communication appeared.

(3) A person who commits an offence against this section is liable on conviction to imprisonment for a term not exceeding 2 years.

(4) In this section, victim means the individual who is the target of a posted digital communication.

Communications Act 2003 (UK) –

127 Improper use of public electronic communications network

- (1) A person is guilty of an offence if he –
 - (a) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or
 - (b) causes any such message or matter to be so sent.
- (2) A person is guilty of an offence if, for the purposes of causing annoyance, inconvenience or needless anxiety to another, he –
 - (a) sends by means of a public electronic communications network, a message that he knows to be false,
 - (b) causes such a message to be sent; or
 - (c) persistently makes use of a public electronic communications network.
- (3) A person guilty of an offence under this section shall be liable, on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale, or to both.
- (4) Subsections (1) and (2) do not apply to anything done in the course of providing a programme service (within the meaning of the Broadcasting Act 1990 (c.42)).

Arkansas Code, Title 5, Chapter 71 (2012) –

§ 5-71-217. Cyberbullying

- (a) As used in this section:
 - (1) “Communication” means the electronic communication of information of a person’s choosing between or among points specified by the person without change in the form or content of the information as sent and received; and
 - (2) “Electronic means” means any textual, visual, written, or oral communication of any kind made through the use of a computer online service, internet service, telephone, or any other means of electronic communication, including without limitation to a local bulletin board

service, an internet chat room, electronic mail, a social networking site, or an online messaging service.

- (b) A person commits the offense of cyberbullying if:
 - (1) He or she transmits, sends, or posts a communication by electronic means with the purpose to frighten, coerce, intimidate, threaten, abuse, harass, or alarm another person; and
 - (2) The transmission was in furtherance of severe, repeated, or hostile behavior toward the other person.
- (c) The offense of cyberbullying may be prosecuted in the county where the defendant was located when he or she transmitted, sent, or posted a communication by electronic means, in the county where the communication by electronic means was received by the person, or in the county where the person targeted by the electronic communications resides.
- (d) Cyberbullying is a Class B misdemeanour.

Louisiana Revised Statutes, Title 14 –

§ 40.7. Cyberbullying

A. Cyberbullying is the transmission of any electronic textual, visual, written, or oral communication with the malicious and wilful intent to coerce, abuse, torment, or intimidate a person under the age of eighteen.

B. For the purposes of this Section:

- (1) ‘Cable operator’ means any person or group of persons who provides cable service over a cable system, or who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system’
- (2) ‘Electronic textual, visual, written, or oral communication’ means any communication of any kind made through the use of a computer online service, internet service, or any other means of electronic communication, including but not limited to a local bulletin board service, internet chat room, electronic mail, or online messaging service.
- (3) ‘Interactive computer service’ means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including a service or system that provides access to the internet and such systems operated or services offered by libraries or educational institutions.
- (4) ‘Telecommunications service’ means the offering of telecommunications for a fee directly to the public, regardless of the facilities used.

C. An offense committed pursuant to the provisions of this Section may be deemed to have been committed where the communication was originally sent, originally received, or originally viewed by any person.

D. (1) Except as provided in Paragraph (2) of this Subsection, whoever commits the crime of cyberbullying shall be fined not more than five hundred dollars, imprisoned for not more than six months, or both.

(2) When the offender is under the age of seventeen, the disposition of the matter shall be governed exclusively by the provisions of Title VII of the Children's Code.

E. The provisions of this Section shall not apply to a provider of an interactive computer service, provider of a telecommunications service, or a cable operator as defined by the provisions of this Section.

F. The provisions of this Section shall not be construed to prohibit or restrict religious free speech pursuant to Article I, Section 8 of the Constitution of Louisiana.”

North Carolina General Statutes, Chapter 14 –

§ 14-458.1. Cyber-bullying; penalty

(a) Except as otherwise made unlawful by this Article, it shall be unlawful for any person to use a computer or computer network to do any of the following:

(1) With the intent to intimidate or torment a minor:

a. Build a fake profile or Web site;

b. Pose as a minor in:

1. An internet chat room;

2. An electronic mail message; or

3. An instant message;

c. Follow a minor online or into an internet chat room; or

d. Post or encourage others to post on the internet private, personal, or sexual information pertaining to a minor.

(2) With the intent to intimidate or torment a minor of the minor's parent or guardian:

a. Post a real or doctored image of a minor on the internet;

b. Access, alter or erase any computer network, computer data, computer program, or computer software, including breaking into a password protected account or stealing or otherwise accessing passwords; or

c. Use a computer system for repeated, continuing, or sustained electronic communications, including electronic mail or other transmissions, to a minor.

(3) Plant any statement, whether true or false, tending to provoke or that actually provokes any third party to stalk or harass a minor.

(4) Copy and disseminate, or cause to be made, an unauthorized copy of any data pertaining to a minor for the purpose of intimidating or tormenting that minor (in any form, including, but not limited to, any printed or electronic form of computer data, computer programs, or computer software residing in, communicated by, or produced by a computer or computer network).

(5) Sign up a minor for a pornographic internet site.

(6) Without authorization of the minor or the minor's parent or guardian, sign up a minor for electronic mailing lists or to receive junk electronic messages and instant messages, resulting in intimidation or torment of the minor.

(b) Any person who violates this section shall be guilty of cyber-bullying, which offense shall be punishable as a Class 1 misdemeanor if the defendant is 18 years of age or older at the time the offense is committed. If the defendant is under the age of 18 at the time the offense is committed, the offense shall be punishable as a Class 2 misdemeanor.

(c) Whenever any person pleads guilty to or is guilty of an offense under this section, and the offense was committed before the person attained the age of 18 years, the court may, without entering a judgement of guilt and with the consent of the defendant, defer further proceedings and place the defendant on probation upon such reasonable terms and conditions as the court may require. Upon fulfilment of the terms and conditions of the probation provided for in this subsection, the court shall discharge the defendant and dismiss the proceedings against the defendant. Discharge and dismissal under this subsection shall be without court adjudication of guilt and shall not be deemed a conviction for the purposes of this section or for purposes of disqualifications or disabilities imposed by the law upon conviction of a crime. Upon discharge and dismissal pursuant to this subsection, the person may apply for an order to expunge the complete record of the proceedings resulting in the dismissal and discharge, pursuant to the procedures and requirements set forth in G.S. 15A-146.

Cyber-safety Act, SNS 2013, c 2 –

21. Tort

A person who subjects another person to cyberbullying commits a tort against the person.

22. Remedies and parental responsibility

22. Remedies and parental responsibility

- (1) In an action for cyberbullying, the Court may
 - (a) award damages to the plaintiff, including general, special, aggravated and punitive damages;
 - (b) issue an injunction on such terms and with such conditions as the Court determines appropriate in the circumstances; and
 - (c) make any other order that the Court considers just and reasonable in the circumstances.
- (2) In awarding damages in an action for cyberbullying, the Court shall have regard to all of the circumstances of the case, including
 - (a) any particular vulnerabilities of the plaintiff;
 - (b) all aspects of the conduct of the defendant; and
 - (c) the nature of any existing relationship between the plaintiff and the defendant.
- (3) Where the defendant is a minor, a parent of the defendant is jointly and severally liable for any damages awarded to the plaintiff unless the parent satisfies the Court that the parent was exercising reasonable supervision over the defendant at the time the

defendant engaged in the activity that caused the loss or damage and made reasonable efforts to prevent or discourage the defendant from engaging in the kind of activity that resulted in the loss or damage.

- (4) For the purpose of subsection (3), in determining whether a parent exercised reasonable supervision over the defendant at the time the defendant engaged in the activity that caused the loss or damage or made reasonable efforts to prevent or discourage the defendant from engaging in the kind of activity that resulted in the loss or damage, the Court may consider
- (a) the age of the defendant;
 - (b) the prior conduct of the defendant;
 - (c) the physical and mental capacity of the defendant;
 - (d) any psychological or other medical disorders of the defendant;
 - (e) whether the defendant used an electronic device supplied by the parent, for the activity;
 - (f) any conditions imposed by the parent on the use by the defendant of an electronic device;
 - (g) whether the defendant was under the direct supervision of the parent at the time when the defendant engaged in the activity;
 - (h) in the event that the defendant was not under the direct supervision of the parent at the time when the defendant engaged in the activity, whether the parent acted unreasonably in failing to make reasonable arrangements for the supervision of the defendant; and
 - (i) any other matter that the Court considers relevant.

School Standards and Framework Act 1998 (UK) c 31 –

61 Responsibility of governing body and head teacher for discipline

(1) The governing body of a maintained school shall ensure that policies designed to promote good behaviour and discipline on the part of its pupils are pursued at the school.

(2) In particular, the governing body—

(a) shall make, and from time to time review, a written statement of general principles to which the head teacher is to have regard in determining any measures under subsection (4); and

(b) where they consider it desirable that any particular measures should be so determined by the head teacher or that he should have regard to any particular matters—

(i) shall notify him of those measures or matters, and

(ii) may give him such guidance as they consider appropriate;

and in exercising their functions under this subsection the governing body shall have regard to any guidance given from time to time by the Secretary of State.

(3) Before making or revising the statement required by subsection (2)(a) the governing body shall consult (in such manner as appears to them to be appropriate)—

- (a) the head teacher; and
- (b) parents of registered pupils at the school.

(4) The head teacher shall determine measures (which may include the making of rules and provision for enforcing them) to be taken with a view to—

- (a) promoting, among pupils, self-discipline and proper regard for authority;
- (b) encouraging good behaviour and respect for others on the part of pupils and, in particular, preventing all forms of bullying among pupils;
- (c) securing that the standard of behaviour of pupils is acceptable; and
- (d) otherwise regulating the conduct of pupils.

(5) The head teacher shall in determining such measures—

- (a) act in accordance with the current statement made by the governing body under subsection (2)(a); and
- (b) have regard to any notification or guidance given to him under subsection (2)(b).

(6) The standard of behaviour which is to be regarded as acceptable at the school shall be determined by the head teacher, so far as it is not determined by the governing body.

(7) The measures determined by the head teacher under subsection (4) shall be publicised by him in the form of a written document as follows—

- (a) he shall make the measures generally known within the school and to parents of registered pupils at the school; and
- (b) he shall in particular, at least once in every school year, take steps to bring them to the attention of all such pupils and parents and all persons employed, or otherwise engaged to provide their services, at the school.