Cyber Bullying

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ABOUT THE AUTHOR

David Ford is the senior partner at Emil Ford & Co - Lawyers of Sydney. He practises mainly in commercial and education law. He has advised well over 50 educational institutions throughout Australia. David is also often engaged by schools to investigate allegations against members of staff.

David is a Director of the Australia & New Zealand Education Law Association (ANZELA) and President of its NSW Chapter. He is a member of the American and South African Education Law Associations and of the Editorial Board of the CCH *School Principals Legal Guide.* He is the editor of *Education Law Notes,* which keep schools throughout Australia up-to-date with education law developments. David is also a former Chairman of the Council of MLC School, an independent school for girls in Sydney.

David has presented at conferences in the United Kingdom, South Africa, Belgium, New Zealand and throughout Australia, and published numerous papers on topics as varied as student rights; teachers' liability; tort law reform; investigations; risk management; teachers, school counsellors and confidentiality; bullying; outdoor education; multiculturalism in education; discrimination; and child protection. He regularly presents in-school seminars for both teachers and administrators on education law matters. He also consults to schools and their boards on governance issues.

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What is this paper about?

This paper is about cyber bullying. What is cyber bullying? To understand cyber bullying, one must first have a definition of bullying. The following definition of bullying has stood the test of time and will be used for the purposes of this paper:

> *Repeated intimidation, over time, of a physical, verbal or psychological (including indirect and relational bullying) nature of a less powerful person by a more powerful person or group of persons.*[1]

And so, in this context, what is cyber bullying? By cyber bullying, I am referring to bullying carried out with the aid of recent technologies such as the internet (e-mails, chat rooms, discussion groups and instant messaging) and the mobile phone (texting or short messaging service (SMS)). These technologies allow the bully (or a group of bullies) to intimidate other students, for example, by:

1. teasing and making fun of them online;
2. spreading rumours about them online;
3. insulting and ridiculing them in chat rooms (known as "flaming");
4. putting photos of them on the web accompanied by nasty comments;
5. tricking them into sharing private information and then sharing it online;
6. sending unwanted messages.

[1] This definition was used by Professor Phillip Slee and me almost 10 years ago: Slee, PT and Ford, DC, "Bullying is a Serious Issue – It is a Crime!" (1999) 4(1) *Australia & New Zealand Journal of Law & Education* 23 at 28

These technologies also allow the bullies to act anonymously. While this is not new (for example, the now almost obsolete landline telephone has been used by bullies in much the same way), the scope for bullying has widened enormously as the new technologies have become easily accessible to school students. There would be very few students today who do not use the internet or have a mobile phone.

Cyber stalking is another form of cyber bullying. The expression "cyber stalking" is often used when the bully harasses or stalks another person by e-mail or some other electronic messaging system, usually very frequently and intrusively, and often involving threats.

While bullying has traditionally been associated with school, bullying behaviour among children has also occurred in the home and the local neighbourhood. Cyber bullying can clearly occur anywhere and at any time. This paper therefore focuses on the extent to which schools have a responsibility to take steps to minimise the risk of their students being bullied in cyberspace. The paper also considers the potential liability on schools where they fail to fulfil that responsibility.

The paper also examines the situations in which cyber bullying might be criminal behaviour and then considers what schools ought to do when this occurs.

Basis for Tort Liability

Duty of Care

It is clear that a school has a duty to care for its students while they are at school during usual school hours[2]. As Mason J said in the High Court of Australia:

> *A school authority owes to its pupil a duty to ensure that reasonable care is taken of them whilst they are on the school premises during hours when the school is open for attendance.*[3]

It is arguably less clear whether the duty exists beyond the school gate and before or after school hours. The law does not impose a duty on everyone to everyone else. Rather, to fall within the class of people to whom a duty

[2] This paper concentrates on the common law duty of care but schools ought not forget the very onerous statutory duty placed on them by the *Occupational Health and Safety Act 2000 (NSW)*

[3] *The Commonwealth v Introvigne* [1982] HCA 40; (1982) 150 CLR 258

of care is owed, such people must be "neighbours" - those who might reasonably be affected by my actions or inactions. There are notions of foreseeability and proximity to satisfy.[4] Foreseeability does not automatically lead to a duty of care. There must also be a relationship of proximity. The question is whether the relationship is so close that the common law should recognise a duty of care. Each case has to be determined by examining its facts.

In *Koffman*[5], it was unsuccessfully argued by the school that it did not owe the student a duty of care. In that case, the student had left his primary school at the end of the school day and had walked some 300 to 400 metres to a bus stop outside a nearby high school, intending to board the bus to travel home. He was injured before he boarded the bus when a student from the high school threw a stick at him and injured his left eye.

Mahoney P rejected the notion that a duty of care had not arisen. While referring to the need for proximity, he accepted that when a school accepts a student, it owes to the student a duty of care, in the sense that it assumes obligations towards the student such as to take appropriate care for the student's safety. Mahoney P therefore felt that this was a case requiring a determination of what the school's obligation required it to do rather than a case requiring a determination as to whether or not the school had an obligation in the first place. Sheller JA agreed, saying:

> *The relationship of employer and employee imposes duties of care upon the employer to the employee. The relationship exists from the day the employee is "employed" to the day the employee is dismissed or terminates the employment. Ordinarily the employer will owe a duty to the employee in the workplace and not for accidents occurring in the employee's home. This is not because the relationship ceases when the employee leaves work for the day but because the duty does not extend to ensuring, for example, that the floor in the employee's bathroom at home is not slippery. Similarly I do not think the relationship of teacher and pupil begins each day when the pupil enters the school ground and terminates when the pupil leaves the school ground. Undoubtedly however a particular duty of care arises because of the pre-existing relationship.*

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[4] *Jaensch v Coffey* (1984) 155 CLR 549

[5] *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman* (1996) ATR ¶81-399

> *In my opinion the extent and nature of the duty of the teacher to the pupil is dictated by the particular circumstances. I do not think its extent is necessarily measured or limited by the circumstance that the final bell for the day has rung and the pupil has walked out the school gate.*

The High Court of Australia has more recently confirmed that the duty of care arises as a result of the special relationship between teacher and student. Gleeson CJ put it nicely in *Lepore*:

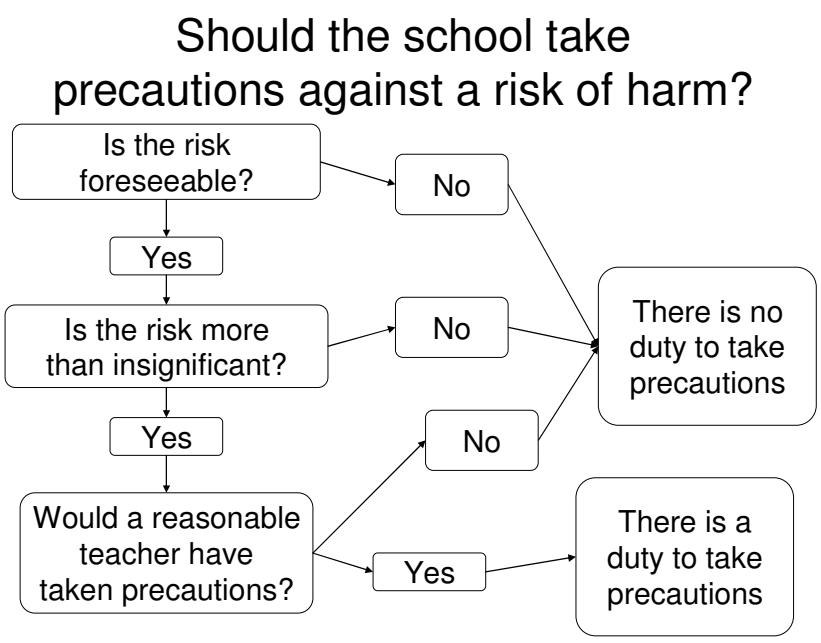
> *The legal responsibilities of* [a school] *include a duty to take reasonable care for the safety of pupils. ... The relationship between school authority and pupil is one of the exceptional relationships which give rise to a duty in one party to take reasonable care to protect the other from the wrongful behaviour of third parties even if such behaviour is criminal. Breach of that duty, and consequent harm, will result in liability for damages for negligence.*[6]

It is worth noting at this point the little phrase used by the Chief Justice: "even if such behaviour is criminal". As I shall show later in this paper, many forms of cyber bullying amount to criminal behaviour. This in itself does not relieve a school of potential liability.[7]

Breach of Duty

The courts consider whether the school has fulfilled its obligations by asking several questions to determine if the school or its teachers have failed to take the precautions that a reasonable person in their shoes would have taken[8]. If they have not, they will be in breach of their duty of care. These questions are set out in the following chart:

[6] *New South Wales v Lepore; Samin v Queensland; Rich v Queensland* [2003] HCA 4 (6 February 2003) at paragraph 2; (2003) 212 CLR 511
[7] See also *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [2000] HCA 61; (2000) 205 CLR 254 and *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman* (1996) ATR ¶81-399
[8] Based on sections 5B and 5C of the *Civil Liability Act 2002 (NSW)*



When we are considering bullying, there are no real issues with foreseeability or probability. The substantive issue for schools is what reasonable precautions ought to be taken to minimise the risk of harm to students through bullying.

A recent example of where there was a failure to take reasonable precautions against the relevant risk was found in *Cox v State of NSW*[9]. Ben Cox was in kindergarten when he was exposed to an older boy, who, over about 18 months, subjected Ben to repeated harassment, with various incidents of bullying. Mrs Cox told teachers and Department officers what was happening. Mrs Cox was told that the teachers would keep an eye on Ben and try to keep him away from the bully. She was also told that the bully had Attention Deficit Disorder and that this probably explained his behaviour. One of the officers told her that bullying builds character and that he thought it was a good thing that Ben got bullied. The full history of what happened to Ben is too long to include in this paper but deserves to be read by every teacher.[10]

Not surprisingly, the Court found the teachers and the Department in breach of their duty of care to Ben because they had failed to take any reasonable steps to protect him from repeated harassment and bullying. The Court

[9] [2007] NSWSC 471
[10] A detailed summary can be found in Emil Ford & Co's *Education Law Notes* for Term II, 2007

noted "that the conduct of [the bully] was expressly and repeatedly brought to the attention of various teachers, including at the highest level in the school. ...this was not an isolated incident, which occurred unexpectedly, and which the school could not reasonably be expected to have foreseen. This conduct was conduct which was not only foreseeable, but of which the school had actual and repeated notice. As a consequence, it was necessary that the school take greater than normal steps to eliminate the bullying in this case." The Court also said that "the suggestions that [the bully] suffered from Attention Deficit Disorder imply that the staff were well aware of his behavioural problems.... [The bully's] propensities were known to the school authorities independently of anything brought to their attention by Mrs Cox; and even if that were not so, the school was thoroughly on notice after Mrs Cox's repeated complaints about the behaviour of [the bully] towards [Ben]." There was no evidence to suggest that the school had done anything to implement effective anti-bullying programs, to educate staff and students, to have a management plan for eradicating bullying, or anything else. Basically, the Court said "The staff made no attempt to deal with a serious problem." And "The school authorities responded quite inadequately to an escalating problem and failed to take such steps as were reasonably required to protect [Ben] from the conduct of a plainly behaviourally disturbed older pupil."

Bullying out of school

Ben Cox was bullied at school and so there was no question that the school had obligations toward him. Where the bullying takes place outside school hours or beyond the school gate, what factors will be relevant in deciding what, if anything, it is reasonable for a school to do? This is particularly important when considering cyber bullying.

In giving some examples to illustrate what a school is required to do to fulfil its duty to care for the safety of its students, Mahoney P in *Koffman* said:

> *Thus, if the school was made aware that, at that place, the student was habitually molested, it might arguably have an obligation, inter alia, to draw that matter to the attention of the parents, the police or others.*[11]

Sheller JA gave a similar example:

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[11] *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman* (1996) ATR ¶81-399 at p 63,589

> *… if a school were aware that a particular bus driver, who transported its children, was a dangerous driver or that on a particular journey older children habitually and violently bullied younger children, the duty may well extend so far as to require the school to take preventative steps or to warn parents.*[12]

As these passages indicate, an important factor is the awareness of the school. Even when bullying takes place at school, the school's awareness is significant in considering the school's liability. As Lord Maclean said in *Scott v Lothian Regional Council*[13] "Its hidden nature makes [bullying] especially difficult for teaching staff to discover and deal with." In that case, Deborah Scott, who was subjected to the most appalling bullying in school, failed in her negligence claim against her teachers primarily because she did not report the relevant incidents, either to the school or to her parents. Accordingly, where a school is not aware of the occurrence of cyber bullying, wherever it is occurring, the school is unlikely to be liable.

However, it must be remembered that a school could be liable for injury occurring where it was aware of the risk (as opposed to the actual activity) and did nothing about it. In *Watson v Haines*[14], the Education Department was aware that it was risky for boys with long thin necks to play in the front row of a rugby scrum. As the Department had not taken steps to warn coaches of this risk, the Department was found negligent when a boy who clearly did not have a front rower's physique was allowed to play there and then suffered spinal injury.

In *Leah Bradford-Smart v West Sussex County Council*[15], the English Court of Appeal was dealing with a situation where the school was not aware of any bullying taking place within the school (indeed, it was found that no bullying was taking place at school) but was aware of bullying taking place on the bus to and from school and in Leah's neighbourhood. The Court of Appeal agreed with the trial judge that the school was not liable for the injury to Leah caused by the bullying outside of school. The trial judge said:

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[12] *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman* (1996) ATR ¶81-399 at p 63,597
[13] [1998] ScotCS 14 (29 September 1998)
[14] [1987] ATR ¶80-094
[15] [2002] EWCA Civ 7

> *I have come to the conclusion that granted a school knows that a pupil is being bullied at home or on the way to and from school, it would not be practical let alone fair just and reasonable, to impose upon it a greater duty than to take reasonable steps to prevent that bullying spilling over into the school.... I would regard the duty as going no further than to prevent the bullying actually happening inside the school; in other words, to take effective defensive measures. If the school chooses, as a matter of judgment, to be proactive then that is a matter of discretion not obligation.*[16]

This may not reflect the position in New South Wales given that Sheller JA said in *Koffman*: "the duty may well extend so far as to require the school to take preventative steps or to warn parents."

The English Court of Appeal in *Bradford-Smart* accepted that a school's duty to care encompassed both what it called a "health and safety" duty and an "educational" duty. Bullying could be an issue for either or both these duties. The Court of Appeal said:

> *The school does not have the charge of its pupils all the time and so cannot directly protect them from harm all the time. At a day school that charge will usually end at the school gates, although the school will have a duty to take reasonable steps to ensure that young children who are not old enough to look after themselves do not leave the school premises unattended.…One can think of circumstances where it might go beyond that, for example if it were reasonable for a teacher to intervene when he saw one pupil attacking another immediately outside the school gates. It will clearly extend further afield if the pupils are on a school trip, educational, recreational or sporting.* ***But the school cannot owe a general duty to its pupils, or anyone else, to police their activities once they have left its charge. That is principally the duty of parents and, where criminal offences are involved, the police.*** [my emphasis][17]

This observation is particularly apt in relation to cyber bullying. Parents and the community at large must accept their responsibility. The Australian Government, through NetAlert, recognises this by seeking on its website to

[16] *Bradford-Smart v West Sussex County Council,* Unreported 8 November 2000 at page45
[17] *Bradford-Smart v West Sussex County Council* [2002] EWCA Civ 7 at para 32

give practical advice to parents.[18] However, this is not to say that there is nothing schools can or should do when they know their students are having problems outside school. This, as I have said, was Leah's situation.

> *Her teacher knew about the problems outside school and was taking thoroughly sensible and well balanced steps both to prevent the same thing happening in school and to counteract any effects upon her educational performance and development.*[19]
>
> *The nub of the complaint made on her behalf is not what the school did in relation to Leah herself but what it did not do in relation to the bullies who were pupils in the same school albeit in a different class. In general A has no duty to prevent B deliberately causing harm to C. But there are exceptions where A is in control of B…. A day school is not directly in control of the activities of its pupils once they have left its charge: that is the responsibility of their parents.*[20]

Nevertheless, the Court of Appeal recognised that teachers could use their disciplinary powers against a student who had attacked another child outside school. The Court also recognised that there could be circumstances in which a failure to exercise those powers would be a breach of the school's duty of care to another student. In considering such a situation, all the usual factors had to be taken into account: foreseeability, the extent of the risk, the magnitude of the harm, and the practicality and likely effectiveness of any steps which could be taken. The Court said that:

> *…the school's duties arise because of its educational duties towards the child. Indeed those duties are also owed to all the other children in the school. Like any parent, the school will often be faced, in this or in any other context, with the problem of balancing one child's interests with another's. There will also be difficult questions of judgment as to how far the school should seek to step in where the parents or other agencies such as the police and social services have not done so. Above all, an ineffective intervention may in fact make matters much worse for the victim because she cannot be protected while she is out of school. It cannot be a breach of duty to fail to take steps which are unlikely to do much good.*[21]

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[18] www.netalert.net.au
[19] *Bradford-Smart v West Sussex County Council* [2002] EWCA Civ 7 at para 33
[20] *Bradford-Smart v West Sussex County Council* [2002] EWCA Civ 7 at para 34
[21] *Bradford-Smart v West Sussex County Council* [2002] EWCA Civ 7 at para 35

A school's failure to discipline students who bully others will only give rise to liability if, on the balance of probabilities (that is, if it is more likely than not) that disciplinary action would have prevented the injury. In *Warren v Haines*[22], the trial judge held that a school, by failing to restrain the school bully, was in breach of its duty to a female student injured by the bully. On appeal, the judges discussed the issue of the school's responsibility for disciplining and supervising the bully. One of the appeal judges argued that if the bully had been detained in the classroom until his behaviour improved then, by the time of the incident, his behaviour would have improved or he would have been detained inside. But another appeal judge felt that reasonable care did not entail the use of disciplinary measures which, if pursued, would have prevented the incident and that it was only speculative as to whether lesser measures, such as detaining the bully, would have succeeded in eliminating his anti-social behaviour.

In *Bradford-Smart*, the English Court of Appeal concluded:

> *There is no magic in the term bullying. Any school has to have sensible disciplinary policies and procedures if it is to function properly as a school at all. It will no doubt take reasonable steps to prevent or deal with one-off acts of aggression between pupils and also recognise that persistent targeting of one pupil by others can cause lasting damage to the victim. In seeking to combat this it is always helpful to have working definitions such as those contained in the documentation we have seen. The problem is now well enough recognised for it to be reasonable to expect all schools to have policies and practices in place to meet it….We agree that such policies are of little value unless they are also put into practice. But in order to hold the school liable towards a particular pupil, the question is always whether the school was in breach of its duty of care towards that pupil and whether that breach caused the particular harm which was suffered.*[23]

Recommendations for the taking of reasonable steps

As a lawyer, I cannot pretend to be an expert on what steps the reasonable teacher ought to take to minimise the risk of injury from cyber bullying materialising. Nevertheless, having acted for more than 50 educational

[22] (1987) ATR ¶80-115)
[23] *Bradford-Smart v West Sussex County Council* [2002] EWCA Civ 7 at para 38

institutions over several decades, I am going to recommend that schools give serious consideration to the following:

Learn about cyberspace and about cyber bullying

Even today, there are many in school leadership positions who are quite naive when it comes to knowing what is happening in cyberspace. Likewise, many school leaders are relying upon anti-bullying strategies of a previous generation. In Australia, we currently have available many good research-based programs for the prevention of bullying. It is important that school leaders familiarise themselves both with the world of cyberspace and with the materials and programs available to schools and students to assist them to deal with the down side of cyberspace while enjoying its benefits.

Amend your policies

Government schools in New South Wales already have comprehensive policies dealing with discipline and bullying. Non-government schools ought to have as the requirements for their registration include having a safe and supportive environment for students by means that include school policies and procedures that make provision for the welfare of students[24]. These policies must be reviewed and, where necessary, re-written to take into account cyber bullying.

Train your staff

In relation to bullying, the National Safe Schools Framework[25] recommends training for all staff in:

a. understanding what is happening in the school, making use of appropriate information gathering methods and related discussion;

b. positive student management;

c. knowledge and skills relating to methods of addressing bullying and harassment;

d. identifying and dealing with prejudice and discrimination, for example, as they relate to gender, race, sexuality, disability and other factors; and

[24] Section 47(g)(i) of the *Education Act 1990*
[25] http://www.mceetya.edu.au/verve/_resources/natsafeschools_file.pdf

e. understanding the effects of bullying and harassment on children and young people.

Implement bullying prevention activities

One of the guiding principles in the National Safe Schools Framework is the implementation of programs and processes to nurture a safe and supportive school environment. Garland J, the trial judge in *Bradford-Smart*, emphasised the importance of having in place procedures for detecting and dealing with bullying.[26] He observed that the school's procedures reflected best practice at the time.

Educate and warn your parents

As the Court of Appeal in England has already noted, parents have significant responsibilities in relation to bullying. Schools ought to bring this to the attention of their parents, warning them of the dangers to their children of life in cyberspace and either helping the parents to know how to help their children or, at least, pointing the parents to other sources of help.

Educate and warn your students

There is much good material available to help schools to do this. A starting point could be the information about the National Safe Schools Framework on the website of the Department of Education, Science and Training. More can be found on the NetAlert site mentioned above.

Strengthen your pastoral care programs

Leah Bradford-Smart's teacher, Mrs Ashworth, was a great example for those aspiring to good pastoral care:

> *Leah was closely and affectionately monitored by Mrs Ashworth, who saw to it that any threats raised at home were never fulfilled, and unostentatiously contrived to give Leah the support and encouragement she needed to deal with the problems which confronted her at school. Without the dedication and experience of Mrs Ashworth, or a teacher like her, the problems at home might well have developed into bullying at school. As it was they did not.*[27]

[26] *Bradford-Smart v West Sussex County Council,* Unreported 8 November 2000 at page7
[27] *Bradford-Smart v West Sussex County Council* [2002] EWCA Civ 7 at para 25

Damages caused by the breach

The injured student must show that the breach by the school or teacher has caused psychiatric illness. The English Court of Appeal in *Bradford-Smart* said:

> *We would add that in all these cases it is necessary to identify with some precision any breach of duty found. It is also important to consider whether the steps proposed would have been effective in preventing the bullying. It is not enough to find that there has been bullying, to find some breach of duty, and then to find that the bullying caused the injury.* ***There must be a causal connection between the breach of duty and the injury.*** *That will often be difficult to prove.* [my emphasis][28]

In *Mount Isa Mines Ltd v Pusey,*[29] Windeyer J said:

> *It is, however, today a known medical fact that severe emotional distress can be the starting point of a lasting disorder of mind or body, some form of psychoneurosis or a psychosomatic illness. For that,* ***if it be the result of a tortious act,*** *damages may be had.* [my emphasis]

The applicable general principles are set out in section 5D of the *Civil Liability Act*. Essentially, bullied students must establish that, but for one or more of the school's or teacher's negligent acts or omissions, they would not be suffering their psychiatric condition. The school will often seek to point to other causes of the bullied student's condition. For example, in *Cox*, the Department argued that the true cause of Ben's condition was to be found in either or both of his genetic history and the unintentionally malign influence of his mother who had a long history of depression and psychiatric difficulties.[30] However, the Court found that the bullying events were **a** cause of Ben's condition. In other words, the negligence on the part of the school teachers and the Department was found to be a necessary condition of the occurrence of the harm to Ben.

What liability is there to pay damages for mental harm?

The bullied student must suffer some harm for which the law will compensate. It is well settled that physical injury will be compensated. It is

[28] *Bradford-Smart v West Sussex County Council* [2002] EWCA Civ 7 at para 37
[29] (1970) 125 CLR 383 at 394-395
[30] [2007] NSWSC 471 at para 120

also clear that a bullied student can recover compensation for psychiatric illness which results from physical injury negligently inflicted by the defendant.[31] But will the law compensate for pure mental harm? Section 31 of the *Civil Liability Act* provides:

> *There is no liability to pay damages for pure mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness.*

In *Cox*, the Department sought to argue that Ben could only recover damages if he could prove that by virtue of some physical injury caused by the bullying he suffered from a recognisable psychiatric illness. On the basis of section 31, the Court had no difficulty in rejecting this argument and concluding that Ben was entitled to an award of damages because there was ample evidence that he suffered from a recognisable psychiatric illness.

Cyber bullying really is a crime!

While this paper is directed primarily to the responsibilities schools have in relation to cyber bullying, it is important to understand that certain forms of cyber bullying are criminal. Although bullying as we traditionally have understood it has also potentially involved criminal action (for example, assault), some forms of cyber bullying are more likely to be crimes. Both the *Commonwealth Criminal Code* and the *Crimes Act 1900 (NSW)* contain relevant provisions.

Commonwealth Criminal Code

Under our federal system of government, the States have the main responsibility for crime. However, because the Australian Government exercises constitutional powers in relation to postal, telegraphic, telephonic, and other like services[32], Part 10.6 (sections 473.1 to 475.2) of the *Commonwealth Criminal Code* contains criminal offences concerning telecommunications services.

Under section 474.15(1) of the *Commonwealth Criminal Code*, a person (the first person) is guilty of an offence if:

[31] *Jaensch v Coffey* (1984) 155 CLR 549 per Brennan J at 565
[32] Australian Constitution paragraph 51 (v)

(a) the first person uses a carriage service to make to another person (the second person) a threat to kill the second person or a third person; and

(b) the first person intends the second person to fear that the threat will be carried out.

The maximum penalty is imprisonment for 10 years.

Under section 474.15(2), a person (the first person) is guilty of an offence if:

(a) the first person uses a carriage service to make to another person (the second person) a threat to cause serious harm to the second person or a third person; and

(b) the first person intends the second person to fear that the threat will be carried out.

The maximum penalty is imprisonment for 7 years.

"Carriage service" has the same meaning as in the *Telecommunications Act 1997*. Section 7 of the Act has these definitions:

> *"carriage service" means a service for carrying communications by means of guided and/or unguided electromagnetic energy.*
>
> *"carry" includes transmit, switch and receive.*
>
> *"communications" includes any communication:*
>
> *(a) whether between persons and persons, things and things or persons and things; and*
>
> *(b) whether in the form of speech, music or other sounds; and*
>
> *(c) whether in the form of data; and*
>
> *(d) whether in the form of text; and*
>
> *(e) whether in the form of visual images (animated or otherwise); and*
>
> *(f) whether in the form of signals; and*
>
> *(g) whether in any other form; and*
>
> *(h) whether in any combination of forms.*

The reference to the carriage of communications by means of "guided electromagnetic energy" includes the carriage of communications by means of a wire, cable, waveguide or other physical medium used, or for use, as a continuous artificial guide for or in connection with the carrying of the communication. The reference to the carriage of communications by means of "unguided electromagnetic energy" covers communications by means of radiocommunication. The term "carriage service" therefore includes a fixed or mobile telephone service, an Internet service or an Intranet service.

In a prosecution for an offence against section 474.15, it is not necessary to prove that the person receiving the threat actually feared that the threat would be carried out.[33] In this section, "fear" includes apprehension, and "threat to cause serious harm to a person" includes a threat to substantially contribute to serious harm to the person.[34] "Serious harm" means harm (including the cumulative effect of any harm) that endangers, or is likely to endanger, a person's life; or that is or is likely to be significant and longstanding.[35]

Under section 474.17(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.

The maximum penalty is imprisonment for 3 years.

This section was discussed in a case involving an allegation that an owner of a unit in a strata building was making telephone calls to adjoining owner in the early hours of the morning and then hanging up as soon as the calls were answered.[36] The Adjudicator considered that reasonable persons would regard the receipt of "dead phone calls" at 4 a.m. as menacing, harassing or offensive.

This provision was also the subject of an appeal to the Queensland Court of Appeal in March 2007.[37] It was alleged that, in two telephone calls, the

[33] Section 747.15(3)
[34] Section 474.15(4)
[35] Definition from Dictionary of the *Commonwealth Criminal Code*
[36] *The Groves No. Four Minyama* [2006] QBCCMCmr 317 (19 June 2006)
[37] *Crowther v. Sala* [2007] QCA 133 (20 April 2007)

defendant had spoken to the complainant in a way that reasonable persons would regard as being both menacing and offensive. It was accepted that the telephone calls amounted to the use of a carriage service. It was also found that, objectively, the words used were menacing. However, the Court of Appeal allowed the defendant's appeal because neither of the lower courts had turned their mind to the issue of criminal intent or, as it is called in the *Commonwealth Criminal Code*, the fault element. Philip McMurdo J said:

> *By s 5.6(2) if the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, then the corresponding fault element is recklessness. Under s 5.4(4) a person is reckless with respect to a circumstance if she is aware of a substantial risk that the circumstance exists and having regard to what is known to her, it is unjustifiable to take that risk. Similarly, a person is reckless with respect to a result if she is aware of a substantial risk that the result will occur and having regard to what is known to her, it is unjustifiable to take the risk. By s 5.4(4) if recklessness is a fault element, then proof of intention, knowledge or recklessness will satisfy that element. A person has an intention with respect to a circumstance if she believes it exists or will exist and with respect to a result if she means to bring it about or is aware that it will occur in the ordinary course of events.*[38]

Accordingly, as section 474.17 does not exclude the fault element for the circumstance described in s 474.17(1)(b), what had to be proved in this case was that the defendant was at least aware of a substantial risk that a reasonable person would regard her conduct as menacing and that it was unjustifiable to take that risk. At the least, that required the proof that she realised that her words could be sensibly understood as a genuine threat.

It will clearly be important not to overlook the necessity to prove the fault element if this provision is used to prosecute a school bully.

A person is also guilty of an offence if the person uses a carriage service to transmit child abuse material.[39] The maximum penalty is imprisonment for 10 years. "Child abuse material" means material that depicts a person, or a representation of a person, who:

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[38] *Crowther v. Sala* [2007] QCA 133 at para 45
[39] Section 474.22(1)

(a) is, or appears to be, or is implied to be, under 18 years of age; and

(b) is, or appears to be, or is implied to be, a victim of torture, cruelty or physical abuse;

and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive.[40]

Crimes Act 1900 (NSW)

Section 60E of the *Crimes Act* has primarily received attention since its introduction in 2003 because of the behaviour of adults towards both staff and students at schools. However, it is readily applicable to bullying. There are four separate offences that the bully might commit:

(1) A person who assaults, stalks, harasses or intimidates any school student while the student 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 while the student is attending a school and by the assault occasions actual bodily harm is liable to imprisonment for 7 years.

(3) A person who maliciously by any means:

(a) wounds a school student, or

(b) inflicts grievous bodily harm on a school student,

while the student 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 the section is liable to imprisonment for 5 years.

The remaining provisions of the *Crimes Act* to be mentioned are less obviously directed towards cyber bullying than the provisions noted above in the *Commonwealth Criminal Code*. Nevertheless, it is important to keep these provisions in mind when cyber bullying occurs because, unlike section 60E, the student victim does not have to be attending a school.

Section 545B of the *Crimes Act* states:

[40] Section 473.1

(1) Whosoever:

(a) with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, or

(b) in consequence of such other person having done any act which he had a legal right to do, or of his having abstained from doing any act which he had a legal right to abstain from doing,

wrongfully and without legal authority:

(i) uses violence or intimidation to or toward such other person … or does any injury to him …, or

(ii) follows such other person about from place to place, or

(iii) hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof, or

(iv) (Repealed)

(v) follows such other person with two or more other persons in a disorderly manner in or through any street, road, or public place,

is liable, on conviction before a Local Court, to imprisonment for 2 years, or to a fine of 50 penalty units, or both.

(2) In this section:

***Intimidation** means the causing of a reasonable apprehension of injury to a person or to any member of his family or to any of his dependants, or of violence or damage to any person or property, and intimidate has a corresponding meaning, and*

***Injury** includes any injury to a person in respect of his property, business, occupation, employment, or other source of income, and also includes any actionable wrong of any nature.*

Even with a few words removed, this provision is complicated and, at first sight, may appear to have little if anything to do with bullying. Abbreviating it and using some plain English may help: *whoever intimidates somebody because they did what they were entitled to do commits a crime*. It is not uncommon for the bully to intimidate another child just because that child has done something he or she was perfectly entitled to do. For example, the bully may pick on someone because they have sat in the bully's seat on the bus. Quite clearly, the bully is not able to claim a seat exclusively for him or herself and so the other child is entitled to sit there. In cyberspace, the intimidation may be effected by text messages or e-mail.

Section 545AB of the *Crimes Act* states:

> *(1) A person who stalks or intimidates another person with the intention of causing the other person to fear physical or mental harm is liable to imprisonment for 5 years, or to a fine of 50 penalty units, or both.*
>
> *(2) For the purposes of this section, causing a person to fear physical or mental harm includes causing the person to fear physical or mental harm to another person with whom he or she has a domestic relationship.*[41]
>
> *(3) For the purposes of this section, a person intends to cause fear of physical or mental harm if he or she knows that the conduct is likely to cause fear in the other person.*
>
> *(4) For the purposes of this section, the prosecution is not required to prove that the person alleged to have been stalked or intimidated actually feared physical or mental harm.*
>
> *(5) For the purpose of determining whether a person's conduct amounts to intimidation, a court may have regard to any pattern of violence (especially violence constituting a domestic violence offence) in the person's behaviour.*

Intimidation of a person means[42]:

> (a) conduct amounting to harassment or molestation of the person, or

[41] Domestic relationship is defined in section 562B *Crimes Act 1900*
[42] Section 562D(1) *Crimes Act 1900*

(b) an approach made to the person by any means (including by telephone, telephone text messaging, e-mailing and other technologically assisted means) that causes the person to fear for his or her safety, or

(c) any conduct that causes a reasonable apprehension of injury to a person or to a person with whom he or she has a domestic relationship, or of violence or damage to any person or property.

Stalking includes the following of a person about or the watching or frequenting of the vicinity of or an approach to a person's place of residence, business or work or any place that a person frequents for the purposes of any social or leisure activity.[43]

What must teachers do when faced with criminal conduct?

Generally, teachers and school administrators, like the rest of the community, are not obliged to inform the police of a crime unless they know (not just suspect) that a serious offence has been committed.

Section 316(1) of the *Crimes Act* reads:

> *If a person has committed a serious indictable offence [an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more] and another person who knows or believes that the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for it fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority, that other person is liable to imprisonment for 2 years.*

A prosecution for an offence against this subsection cannot be commenced against a person without the approval of the Attorney General if the knowledge or belief that an offence has been committed was formed or the information referred to in the subsection was obtained by the person in the course of practising or following a profession, calling or vocation prescribed by the regulations[44] which include:

[43] Section 562A *Crimes Act 1900*
[44] Section 316(4) and (5) *Crimes Act 1900*

1. a social worker, including a counsellor who treats persons for emotional or psychological conditions suffered by them;
2. a member of the clergy of any church or religious denomination;
3. if the serious indictable offence referred to in section 316(1) is an offence under section 60E, a school teacher, including a principal of a school.

Serious indictable offences, as indicated above, are essentially offences punishable by imprisonment for five years or more. Such offences may exist under legislation other than the *Crimes Act*, including the legislation of other states and the *Commonwealth Criminal Code*. The offences under sections 60E and 545AB of the *Crimes Act* and most of the offences under the *Commonwealth Criminal Code* mentioned in this paper are serious indictable offences. Accordingly, if a bullying incident arises which fits within one of these provisions, and if the remaining elements of section 316 are satisfied, a teacher or school administrator must report the matter to the police or other appropriate authority (such as, for example, the Department of Community Services).

Section 316 was introduced into the *Crimes Act* in 1990 and is still to receive any detailed judicial analysis. For a person to be convicted of an offence under section 316, the prosecution would have to prove beyond reasonable doubt that:

1. a person had committed a serious indictable offence; and
2. the person being prosecuted:
    a. knew or believed that the offence had been committed; and
    b. had information which might be of material assistance in securing:
        i. the offender's apprehension; or
        ii. his prosecution; or
        iii. his conviction for the offence; and
    c. failed without reasonable excuse to bring the information to the attention of the Police or other appropriate authority.

In *R v Crofts*[45], the Court of Criminal Appeal was considering an appeal by Mr Crofts against the severity of his sentence. Mr Crofts had pleaded guilty to a charge under Section 316. Mr Crofts knew that either or both of his stepbrother and another man had murdered someone because his stepbrother had told him. Meagher JA said:

> *This section is a comparatively new section and this is the first case, so far as one knows, which has been brought under it. It is a section which has many potential difficulties, the chief of which is the meaning of the words "without reasonable excuse", difficulties which are magnified when one endeavours to contemplate how those words would apply to the victim of the crime.*

Gleeson CJ added:

> *... it may be extremely difficult to form a judgment as to whether a failure to provide information to the police was "without reasonable excuse".*

Because Mr Crofts had pleaded guilty, the Court did not have to decide what might amount to a reasonable excuse. However, it is obvious that the judges of the Court of Criminal Appeal in NSW are concerned at the difficulties thrown up by section 316. The High Court of Australia has said:

> *… what is a reasonable excuse depends not only on the circumstances of the individual case but also on the purpose of the provision to which the defence of "reasonable excuse" is an exception.*[46]

> *… when legislatures enact defences such as "reasonable excuse" they effectively give, and intend to give, to the courts the power to determine the content of such defences. Defences in this form are categories of indeterminate reference that have no content until a court makes its decision. They effectively require the courts to prescribe the relevant rule of conduct after the fact of its occurrence.*[47]

[45] NSW Court of Criminal Appeal, 10 March 1995, unreported
[46] *Taikato v The Queen* (1996) 186 CLR 454 at 464
[47] *Taikato v The Queen* (1996) 186 CLR 454 at 466

Accordingly, one cannot be definite about what might be considered a reasonable excuse for the purposes of section 316. Nevertheless, I suggest that reasonable excuses could include:

a) doubt as to whether a person has committed an offence;

b) the contrition of the person who has committed the offence together with restitution of property where theft is involved;

c) the age, health and family circumstances of the person who has committed the offence;

d) where students are involved, the ability of their families and the school to deal with the situation.

In my view, a teacher or school administrator who fails to disclose information obtained during their employment is unlikely to be charged with this offence. The recent addition of section 316 (4) and (5) make it necessary for the Attorney General to first give his or her approval before a school teacher or school principal who obtained the information in the course of their employment can be prosecuted for this offence. This makes the likelihood of a charge even more remote.

What other reporting obligations do teachers have?

Cyber bullying, just as with any form of bullying, may lead to teachers having an obligation to notify the Department of Community Services. Similarly, cyber bullying could lead a principal to have to report to the NSW Ombudsman. I have written about this in more detail elsewhere[48] but to summarise:

1. A teacher must notify the Department if, in the course of his or her employment, the teacher has reasonable grounds to suspect that a child (being a person under the age of 16 years) is at risk of harm as that expression is defined in section 27 of the *Children and Young Persons (Care and Protection) Act 1998 (NSW).* A child who is the subject of cyber bullying may well be at risk of harm.

2. A principal must notify the Ombudsman if an allegation of reportable conduct is made against a school employee[49]. Reportable conduct includes neglect of a child (in this case being a person under

[48] David Ford, "The Law: A Help or a Hindrance for the Bullied Student?" LAAMS Publications May 2001
[49] Section 25C of the *Ombudsman Act 1974 (NSW)*

> the age of 18 years) or behaviour that psychologically harms the child[50]. Failure to take reasonable steps to prevent bullying of any type could amount to such reportable conduct.

Other Remedies for the Victims of Cyber Bullying

It is beyond the scope of this paper to explore this topic in detail as my focus has been a consideration of what schools and teachers ought to do in response to cyber bullying. I have on another occasion written about possible remedies available to victims of bullying generally[51]. Much of this is equally applicable to victims of cyber bullying. The possibilities include:

1. victims compensation claims;
2. discrimination claims;
3. defamation;
4. apprehended personal violence orders;
5. civil assault claims;
6. claims under the *Trade Practices Act* or the *Fair Trading Act (NSW)*;
7. sexual or racial harassment claims;
8. vilification claims.

Where to from here?

Only last year, Professor Ralph Mawdsley of Cleveland State University, Ohio, USA wrote of the situation in the United States[52]:

> *Although school officials have access to proven strategies to reduce the prevalence of bullying, they have failed to take advantage of those strategies. In most schools, bullying continues unabated.*

He then quoted Anne Garrett in her article *Bullying in American Schools* (2003) 49:

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[50] Section 25A of the *Ombudsman Act 1974 (NSW)*
[51] David Ford, "The Law: A Help or a Hindrance for the Bullied Student?" LAAMS Publications May 2001
[52] Ralph Mawdsley & Joy Cumming, "Legal responsibilities in bullying from Australian and USA perspectives" ANZELA National Conference Papers, Hobart 2006

> *The most common way that schools deal with bullying is to ignore it. One Columbine student reported, 'Teachers would see them pushing someone into a locker, they'd ignore it.' A junior at Columbine said, 'I can't believe the faculty couldn't figure it out. It was obvious something was wrong.'*

While I believe that the situation in Australia is much healthier than Dr Mawdsley reports in the United States, schools and their teachers here cannot afford at any stage to rest on their laurels. Children can and do find new ways of bullying. The challenge for schools and for communities is to keep on top of what is happening, to do the research, to develop the strategies to minimise the risks, and to implement them.

The law has its part to play. It is by no means perfect. Indeed, as I have observed previously, the law is more often a hindrance than a help to the bullied student. Law reform must follow once the results of research point the way.

Contrary to the beliefs of at least one officer of the Department of Education and Training a little over 10 years ago, bullying does not build character. It destroys it. Bullying is, as Simpson J said in *Cox*, "a serious problem". It must not be ignored.