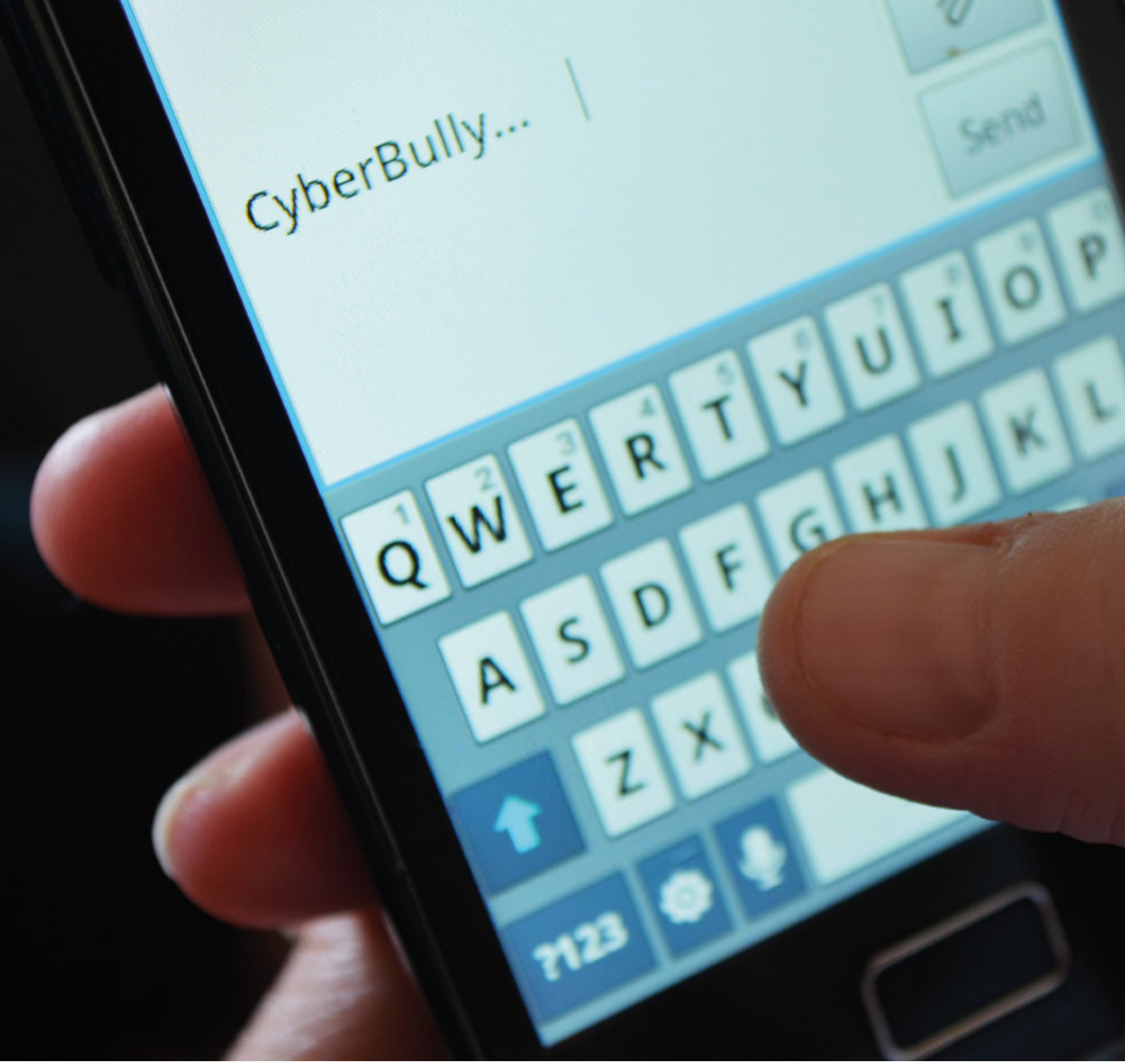

Submission to the Senate Standing Committee on Environment and Communications Inquiry into Enhancing Online Safety for Children Bill 2014 and the Enhancing Online Safety for Children (Consequential Amendments) Bill 2014

Chris Berg

Institute of Public Affairs
THE VOICE FOR FREEDOM
ESTABLISHED–1943

January 2015

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The Institute of Public Affairs is an independent, non-profit public policy think tank, dedicated to preserving and strengthening the foundations of economic and political freedom.

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His latest book is *In Defence of Freedom of Speech: from Ancient Greece to Andrew Bolt*. A monograph, *The Growth of Australia's Regulatory State*, was published in 2008. He is also the editor of *100 Great Books of Liberty* (with John Roskam) published by Connor Court Publishing in 2010, and *The National Curriculum: A Critique (2011)*.

Introduction

Bullying is a serious problem for Australian children. The consequences of bullying can be severe, and in some cases can lead to severe trauma or tragedy.

However, the government's proposed bills to tackle bullying on the internet, *Enhancing Online Safety for Children Bill 2014* and *Enhancing Online Safety for Children (Consequential Amendments) Bill 2014* are unlikely to have a material difference on the experience and harm caused by bullying. Furthermore, they have the potential to present an undue and disproportionate limitation on freedom of expression online.

Attached to this submission is an Institute of Public Affairs paper, *A Social Problem, Not a Technological Problem: Bullying, Cyberbullying and Public Policy*, outlining the evidence around cyberbullying and its policy significance, and the IPA's submission to the Department of Communications consultation in March 2014.[1]

They constitute the bulk of the IPA's research into bullying and cyberbullying, and a fuller analysis of the policy challenge posed by online bullying. This submission addresses some of the specifics of the proposed legislation. For elaboration, please refer to the larger IPA research attached.

[1] Chris Berg and Simon Breheny, "Submission to the Department of Communications Discussion Paper 'Enhancing Online Safety for Children'," (Melbourne: Institute of Public Affairs, 2014); "A Social Problem, Not a Technological Problem: Bullying, Cyberbullying and Public Policy," (Melbourne: Institute of Public Affairs, 2014).

The Proposed Scheme

The legislation establishes a two tiered regulatory system for social media sites. It is designed to exploit social media sites' need for strong consumer reputations, and if that fails, give a new office of the Children's e-Safety Commission to power to remove "cyber-bullying material".

Sites on Tier 1 would participate voluntarily. Social media sites would choose to submit applications to the Commissioner demonstrating they had robust complaints management systems, clear terms of use governing bullying behaviour, and a point of contact for the Commissioner. The government's intention is that sites would choose to participate in Tier 1 as a reputation building mechanism. There would be a public register of Tier 1 sites, and any site could choose to participate. The Commissioner would be able to revoke a site's Tier 1 status if they failed to take down material that violated to their bullying code.

Tier 2 status would be declared by the Minister for Communications at the recommendation of the Commissioner. Only "large social media services" would be eligible for Tier 2 status. Tier 2 status sites would be liable for a civil penalty of $17,000 per day if they failed to comply with a notice from the Commissioner to remove content within 48 hours.

The upshot of this scheme is that the government hopes all social media sites will comply with directions from the Commissioner voluntarily under the Tier 1 system, but if the Commissioner decides that a large site is failing to comply, then that site will be placed under the Tier 2 and coercive regulatory powers will be used by the Commissioner to assure compliance.

It is notable and welcome that the government has not gone ahead with the proposed criminal cyberbullying offence. It is also notable that the legislation before parliament is markedly more complex than was originally suggested by the *Enhancing Online Safety for Children Discussion Paper* in early 2014, and the tiered scheme is obviously designed to give its regulatory framework an element of "voluntariness".

The tiered system does very little to eliminate the coercive regulatory elements of the new scheme. It devolves the decision about which social media sites are to be covered away from parliament and to the Minister of Communications, and lets the Minister choose the time when they would like to impose the regulation. This is an example of the sort of grey-letter, discretionary approach to regulation which the IPA has criticised elsewhere.[2]

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[2] Chris Berg, *The Growth of Australia's Regulatory State: Ideology, Accountability and the Mega-Regulators* (Melbourne, Australia: Institute of Public Affairs, 2008).

Despite the government's claims, "rapid removal" will do little to address the harm from cyberbullying.

Cyberbullying material is either highly ephemeral – such as a text message or a post which can be blocked or deleted – or resilient to deletion – such as the extremely rare but well-known instances of "viral" cyberbullying material, that is endlessly shared and reposted. The 48 hour window which the government has granted is far too long to prevent any of the harm that would come from a single instance of bullying.

But it also must be said that it is unlikely that any bureaucratic mechanism consistent with the rule of law would be able to operate at a faster pace. Given these basic and undeniable limitations of legislative action, the efficacy of anti-cyberbullying policy is very doubtful.

Nor is a "cyber" focused anti-bullying scheme likely to make any dent in the bullying problem. The research evidence is quite clear that the vast bulk of bullying among children occurs in a "traditional" context. Cyberbullying, while worryingly prevalent, is a small element in a larger bullying problem. Furthermore the children who are bullied online are almost invariably bullied at school.[3] Treating bullying online as a distinct behaviour, that can be prevented in isolation to its social context, as the government's policy does, will provide children little protection against the harm of bullying.

The proposed policy continues to downplay remedies offered by existing legislation. The government's major critique of section 474.17 of the *Criminal Code Act 1995*, which creates a criminal offense for a person to use a carriage service in a menacing, harassing or offensive way, is that the phrase "carriage service" is poorly understood. One problem the government has identified, which the IPA also noted in its submission, is the low level of knowledge among law enforcement about the legal framework governing social media. Remedying this skill gap ought to be a priority for state law enforcement agencies. Furthermore, the laws of defamation, stalking and harassment are evolving to provide both a legal remedy for online bullying and a deterrent effect for future bullying.

The government is right to point out that a reliance on these existing remedies has limitations. It would not be helpful to the development of children for bullying to be escalated to law enforcement or civil litigation in anything but the most extreme circumstances.

One reason existing remedies are hard to use is that what constitutes bullying is highly opaque to outsiders. Research into bullying has emphasised that much bullying constitutes "relational aggression" – activity like social exclusion

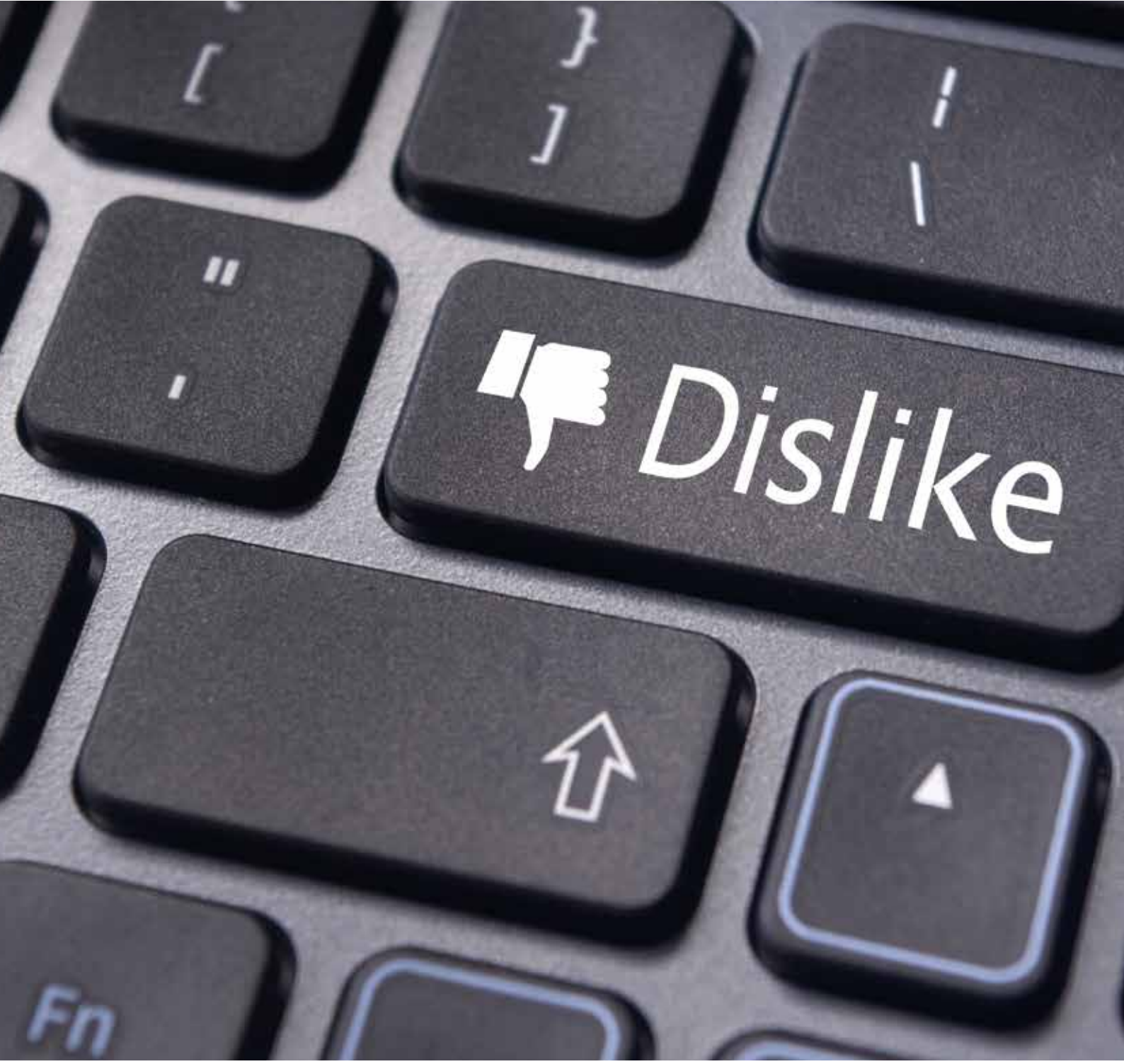
[3] This research is outlined in Berg and Breheny, "A Social Problem, Not a Technological Problem: Bullying, Cyberbullying and Public Policy," 8-9.

which is sometimes called “shunning” or the “silent treatment”. No legislative or bureaucratic tool is going to be able to distinguish this sort of activity even if it is very real to bully victims.

Even if the government’s rapid removal proposal were effective, it is easy to see how bullies would move into less easily recognisable bullying behaviour, or migrate their bullying off major social media sites.

But the serious limitations of the government’s proposal suggests that the most effective strategy for tackling bullying online and off-line is the involvement of teachers, parents and guardians. The most important thing for children who are being bullied to do is talk to an adult.

Finally, the government needs to recognise that what it is introducing is a censorship power over large social media sites. Freedom of speech is a vitally important democratic value. The government ought not to be introducing new schemes by which free speech can be limited. The likelihood that such schemes will be extended by future governments is quite high – particularly in the case of a scheme that focuses on social media, which is susceptible to regular bursts of popular “outrage”.+



A social problem, not a technological problem

Bullying, cyberbullying and public policy

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Institute of Public Affairs
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August, 2014

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His latest book is In Defence of Freedom of Speech: from Ancient Greece to Andrew Bolt.

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Simon has been published in The Australian, the Sydney Morning Herald, the Herald Sun, the Punch, the Canberra Times and the Sunday Tasmanian. He is regularly interviewed on radio around the country in relation to legal rights and rule of law issues and has appeared on ABC's Lateline and News Breakfast, ABC News 24, Channel 7's Weekend Sunrise and Sky News' Lunchtime Agenda and PM Agenda.

Simon has also appeared as a witness to give expert evidence before the Senate Standing Committee on Environment and Communications, NSW Legislative Council Standing Committee on Law and Justice, Senate Legal and Constitutional Affairs Legislation Committee and the Parliamentary Joint Committee on Intelligence and Security.

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Introduction

Bullying among children is a significant and serious issue. In recent years, the phenomenon described as "cyberbullying" has received a large amount of social, political, and academic attention.

The Commonwealth government has announced that it is seeking legislative change to deal with cyberbullying. The government plans to institute a Children's e-Safety Commissioner with power to takedown harmful content directed at children from the social media sites.

The Children's e-Safety Commissioner is a serious threat to freedom of speech.

The purpose of this paper is to outline the scope of the cyberbullying problem, the conceptual framework within it must be understood, and develop principles by which policymakers can address the cyberbullying problem. Without understanding the cyberbullying phenomenon it is impossible to devise effective policy that will not have unintended consequences and threaten basic liberties like freedom of speech. Unfortunately it is not clear that the government has clearly understood the causes, consequences, and characteristics of cyberbullying.

The Commonwealth government's proposed e-Safety commissioner offers little protection for victims of bullying.

This paper argues that cyberbullying is a subset of bullying. It is bullying by electronic means. It is not a problem of a different kind from bullying in an offline environment.

Cyberbullying is a social problem, not a technological one.

There are a number of possible responses to bullying. Traditional bullying (of the offline kind) has been dealt with through various prevention programs, mostly run directly through schools.

Furthermore, many existing legislative controls are readily available to individuals who feel they are being unlawfully cyberbullied. Australians are already protected from bullying and bullying-like behaviour through threats of violence and stalking offences, defamation and privacy law, and a host of laws directed at offensive and harassing conduct. Unfortunately these existing remedies are poorly understood by the community – and, it appears, policymakers.

The Commonwealth government's proposed e-Safety commissioner will add little protection to victims of bullying. Furthermore, it poses a serious threat to freedom of speech and digital liberties.

Parts of this paper are drawn from the Institute of Public Affairs' submission to the Department of Communications 2014 inquiry Into the 'Coalition's Policy to Enhance Online Safety for Children',[1] the article 'The Cyberbullying Moral

[1] C Berg & S Breheny, *Submission to the Department of Communications Discussion Paper 'Enhancing Online Safety for Children'* Institute of Public Affairs, Melbourne, 2014.

Panic', published in the April 2014 edition of the *IPA Review*,[2] and 'Combatting the cyberbully myth' published in the *Sunday Age* on 23 March 2014.[3]

Bullying and cyberbullying

Bullying is a social phenomenon found in all societies and all age groups. Bullying is found throughout the developed and developing world. It is found in affluent nations as well as within tribal communities.[4] Indeed, bullying is not limited to human beings. Bullying-like behaviour has been observed in rats and mice, baboons, and chimpanzees.[5]

The incidence of bullying is strongly tied to age. Researchers have noted that reports of bullying decline substantially between the ages of 8 and 16 years, consistent among a number of countries. Bullying appears to peak between the ages of 11 to 13.[6]

These are not however the only circumstances in which bullying can occur.

In recent years there has been an increasing focus on bullying in the workplace. We focus here on bullying among children for three reasons. First, bullying is most common in child groups. Second, children are more vulnerable. Third, public policy has distinguished, for the most part, between bullying among children, and bullying incidents where adults are the bullies. The existence of workplace bullying underlines that bullying is endemic to human social interaction, and that constancy, we will argue, has significance for public policy that aims to prevent bullying.

A further important category of bullying concerns bullying where the victim is a child and the aggressor is an adult. This form of bullying, which can be particularly damaging, raises complex questions of supervision, trust, and duty of care, and also requires distinct public policy approaches.

For the purposes of this paper, the word bullying will refer to bullying among children.

The use of the word 'bully' to refer to a 'harasser of the weak' dates from the seventeenth century.[7] The historical record suggests that bullying has long

The use of the word 'bully' to refer to a 'harasser of the weak' dates from the seventeenth century.

[2] C Berg & S Breheny, 'The cyberbullying moral panic', *IPA Review*, vol. 66, no. 1, 2014.
[3] C Berg, 'Combatting the cyberbully myth', review, *The Sunday Age,* 23 March 2014.
[4] P Due, Holssein, Bjørn E., J Lynch, F Diderichsen, SN Gabhain, P Scheidt, C Currie, & The Health Behaviour in School-Aged Children Bullying Working Group, 'Bullying and symptoms among school-aged children: international comparative cross sectional study in 28 countries', *European Journal of Public Health*, vol. 15, no. 2, 2005; H Sherrow, 'The Origins of Bullying', 15 December 2011, Scientific American, <http://blogs.scientificamerican.com/guest-blog/2011/12/15/the-origins-of-bullying/>.
[5] Sherrow, 'The Origins of Bullying'
[6] PK Smith, KC Madsen, & JC Moody, 'What causes the age decline in reports of being bullied at school? Towards a developmental analysis of risks of being bullied', *Educational Research*, vol. 41, no. 3, 1999.
[7] D Harper, *bully*, <http://www.etymonline.com/index.php?term=bully>.

been a feature of childhood social interaction, and, as a consequence, has clustered around the school environment.

Bullying among children has been a matter of long standing literary interest, reflecting its existence as part of the social experience. The quasi-autobiographical novel *Tom Brown's Schooldays*, published in 1847, details the bullying and abuse at a British public school. George Orwell and Roald Dahl famously documented bullying at school. The 1954 novel *Lord of the Flies* is a dystopian exploration of bullying among children.

In whatever form it occurs, bullying can cause significant psychological harm.

Bullying was first explored in the academic literature in 1897.[8] This paper distinguished between *bullying* and *teasing*. Bullying in this view was seen as physical harassment, whereas teasing was classed as verbal activity. As Hyojin Koo points out, in recent decades "the meaning of bullying has been expanded and now includes direct verbal taunting and social exclusion."[9] Our understanding of what constitutes bullying behaviour is now focused more on its non-physical manifestation. In part this reflects more general decline in violent behaviour over time, and associated lower toleration of interpersonal violence, and in part this is due to the increasing emphasis on the importance of mental health in contemporary society.

Given the current emphasis on the psychological elements of bullying behaviour, what constitutes bullying has been the subject of much debate. The Norwegian bullying prevention expert Dan Olweus provides a standard three part definition. Bullying constitutes intentionally aggressive behaviour between one individual to another. Bullying reflects an imbalance of power between bully and victim. Furthermore, bullying is usually a sustained and repeated phenomenon.[10]

The implication here is that bullying is a form of aggressive behaviour, but not all aggressive behaviour can be described as bullying. Aggressive behaviour between two individuals of equal power – however defined – is not bullying behaviour, and ought not to be treated as such. Smith and Sharp give a short definition of bullying as "the systemic abuse of power".[11]

One further important addition to distinguishing bullying behaviour is the intention to hurt. Bullying need not be physical or verbal, but can be manifest in what has been described as 'relational aggression'; for example, social exclusion, 'shunning', or the 'silent treatment'. The psychological harms from such behaviour are significant but relational bullying is particularly hard for parents and supervisors to detect. It is easy to identify a child who has been physically abused, but much harder for adults to identify patterns of relational aggression.

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[8] FL Burk, 'Teasing and Bullying', *Pedagogical Seminary*, vol. 4, no. 3, 1897.
[9] H Koo, 'A Time Line of the Evolution of School Bullying in Differing Social Contexts', *Asia Pacific Education Review*, vol. 8, no. 1, 2007.
[10] See http://www.violencepreventionworks.org/public/bullying.page.
[11] PK Smith & S Sharp, 'The problem of school bullying', in Peter K. Smith & Sonia Sharp (eds.), *School bullying: insights and perspectives,* Routledge, London, 1994.

In whatever form it occurs, bullying can cause significant psychological harm. Children who have been bullied tend to be lower on levels of self-esteem. Bully victims are more likely to have depressive tendencies. Children suffering from the effects of bullying often struggle with concentration and learning in the classroom. Furthermore, in more severe instances, the effects of bullying can create psychological challenges for years to come. At the worst end of the spectrum, there have been a number of high profile cases of children taking their own life where bullying has been implicated.[12]

Nevertheless, the very real harm bullying can cause should be treated with two substantial caveats. First, the dynamics of social relationships among children are extremely opaque to outsiders. Second, those relationships are highly fluid. These two factors add substantially to the public policy challenge.

The sociologist danah boyd has documented the wide variety of social behaviours that children distinguish between. For instance, 'bullying', 'teasing', 'drama', and 'pranks' are all discrete acts with different social implications. The distinctions between these activities are not obvious to outsiders, and can vary according to age and social group. These distinctions reflect young peoples' sense of the seriousness of the harm they are causing or being subject to. As boyd writes,

> Nuance often gets lost in the panic. News reports do not explain, for example, why teens … use different language to describe interpersonal conflict or why the dynamics that they describe are so common … few people consider how broader cultural practices and attitudes help shape teens' logic.[13]

The social dynamics of bullying mean that often individual children are, at various times in their adolescence, the bullies and the victim. Furthermore, they are often both bullies and victims depending on their social circle. A bully in one social context can be a victim in another, and vice-versa.[14]

Some researchers suggest that bullying by text or multimedia message is a more significant problem than bullying over social networks.

What is 'cyberbullying'?

Bullying, we have suggested, is endemic to human social interaction, and bullying has been a constant historical feature of educational institutions. The question confronting our policymakers is whether the evolution of digital technologies over the last two decades has altered anything about the nature, harm, or extent of bullying that is policy-relevant.

The distinction here is between traditional bullying – physical, verbal, relational – and cyberbullying, in which verbal and relational bullying are

[12] Ibid.

[13] d boyd, *It's complicated : the social lives of networked teens*, Yale University Press, 2014. p. 131.

[14] MK Holt, D Finkelhor, & GK Kantor, 'Hidden Forms of Victimization in Elementary Students Involved in Bullying', *School Psychology Review*, vol. 36, no. 3, 2007; JD Unnever, 'Bullies, Aggressive Victims, and Victims: Are They Distinct Groups?', *Aggressive Behavior*, vol. 31, no. 2, 2005; DL Espelage, K Bosworth, & TR Simon, 'Examining the Social Context of Bullying Behaviors in Early Adolescence', *Journal of Counseling & Development*, vol. 78, no. 3, 2000.

conducted using modern technologies. That technology can include social media networks such as Twitter, Facebook and Google Plus, webpages, blogs, and niche sites like Snapchat and Pinterest. But it also includes older technologies such as text messages, and 'traditional' phone calls. Indeed, some researchers suggest that bullying by text or multimedia message is a more significant problem than bullying over social networks, despite the latter's larger profile in the popular press.[15]

A policy that purports to tackle 'cyberbullying' ought to be clear about the nature of the behaviour it is seeking to tackle.

There are a wide variety of definitions of cyberbullying used in the academic literature, which reflects a lack of consensus about cyberbullying's essential features. Some researchers have defined cyberbullying as a form of individual insult: "The use of the Internet or other digital communication devices to insult or threaten someone" or "Sending or posting harmful or cruel texts or images using the Internet or other digital communication devices."[16] This seems to be needlessly abandoning the behavioural precision which has evolved in discussions about bullying. If cyberbullying is simply insulting or offending somebody online then why describe it as 'bullying'?

It is more coherent, and more analytically valuable, to transpose the standard definition of bullying onto cyberbullying: that is, intentionally aggressive digital communication characterised by an imbalance of power sustained over a period of time with the intention to cause harm. Definitions are not semantics. A policy that purports to tackle 'cyberbullying' ought to be clear about the nature of the behaviour it is seeking to tackle.

Some researchers have argued that cyberbullying is materially different from bullying, and requires a specific public policy approach. The argument is as follows. Unlike traditional bullying, cyberbullying is not constrained by proximity to other children. Cyberbullying can follow children home – that is, intrude into their safe space. As a consequence it is "more pervasive and more insidious".[17] Digital technologies have a limitless potential audience. Content can go 'viral', reaching an enormous number of viewers in a rapid amount of time. There have been a number of high profile cases of extremely viral content widely distributed – the *Star Wars Kid* video being one of the most dramatic cases. The potential harm from bullying, the argument suggests, increases exponentially as its potential electronic audience increases.

These arguments have obvious intuitive merit. However, they can be criticised on a number of grounds. First, some of these claims do not find support in the empirical work on the significance and harm of cyberbullying. Second, it is not clear that bullying online *is* more pervasive and insidious than school ground bullying.

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[15] A Srivastava, R Gamble, & J Boey, 'Cyberbullying in Australia: Clarifying the Problem, Considering the Solutions', *International Journal of Children's Rights*, vol. 21, 2013.
[16] RS Tokunga, 'Following you home from school: A critical review and synthesis of research on cyberbullying victimization', *Computers in Human Behavior*, vol. 26, 2010.
[17] Srivastava, Gamble, & Boey, 'Cyberbullying in Australia: Clarifying the Problem, Considering the Solutions'.

A more significant issue for policymakers is this: even if it is demonstrated that cyberbullying is uniquely harmful it does not necessarily follow that there is a public policy approach which would be able to tackle that harm.

Cyberbullying is less common than 'traditional' bullying

Determining the prevalence of bullying and cyberbullying is fraught with difficulty. One Australian paper, surveying a variety of studies, found the prevalence of cyberbullying among student populations between 4.9 per cent and 30 per cent. Studies into bullying rely almost uniformly on self-reported data. Student perceptions of the prevalence of cyberbullying diverge from the survey evidence. For example, student focus groups have reported that students expect between 70 and 100 per cent of other students would have experienced cyberbullying, whereas studies of that same population found less than a quarter had in fact done so.[18]

One 2008 paper found that "cyberbullying is substantially less frequent" than traditional bullying.

Furthermore, surveys are extremely sensitive to the definitions of bullying behaviour a) applied by researchers and b) the understanding of what constitutes bullying among students themselves. This makes it particularly hard to make cross-cultural or international assessments of the prevalence of bullying.[19]

Nevertheless, the survey evidence, of which there is a great deal, allows us to closely determine the relationship between bullying and cyberbullying. While it is hard to get data that is comparable between studies, evidence within studies consistently suggests that cyberbullying is less prevalent than traditional bullying.

For example, one 2008 paper in the *Journal of Child Psychology and Psychiatry* found that "cyberbullying is substantially less frequent" than traditional bullying.[20] Another 2008 study found that cyberbullying was half as frequent as traditional bullying.[21] One further study argued that "more adolescents experienced being bullied inside school than outside school."[22] One more suggested that "cyberbullying and cybervictimization were found to occur rather infrequently compared with traditional forms."[23] While there is disagreement between studies on the magnitude of the different prevalence

[18] PK Smith, J Mahdavi, M Carvalho, S Fisher, S Russell, & N Tippett, 'Cyberbullying: its nature and impact in secondary school pupils', *Journal of Child Psychology and Psychiatry*, vol. 49, no. 4, 2008.
[19] Due, Holssein, Lynch, Diderichsen, Gabhain, Scheidt, Currie, & The Health Behaviour in School-Aged Children Bullying Working Group, 'Bullying and symptoms among school-aged children: international comparative cross sectional study in 28 countries'.
[20] Smith, Mahdavi, Carvalho, Fisher, Russell, & Tippett, 'Cyberbullying: its nature and impact in secondary school pupils'.
[21] R Slonje & PK Smith, 'Cyberbullying: Another main type of bullying?', *Scandinavian Journal of Psychology*, vol. 49, 2008.
[22] G Steffgen & A König, 'Cyber bullying: The role of traditional bullying and empathy', in *Cyber bullying: The role of traditional bullying and empathy*, City, 2009.
[23] P Gradinger, D Strohmeier, & C Spiel, 'Traditional Bullying and Cyberbullying: Identification of Risk Groups for Adjustment Problems', *Zeitschrift fur Psychologie / Journal of Psychology*, vol. 217, no. 4, 2009.

between bullying and cyberbullying there is a consistent agreement that the former is more prevalent than the latter.

Dan Olweus has summed up this research by arguing "there is very little scientific support to show that cyberbullying has increased over the past five to six years, and this form of bullying is actually a less frequent phenomenon".[24]

Cyberbullying is an aspect of bullying, not a discrete problem

Responses that focus on cyberbullying without being integrated into a larger general response to the bullying problem are unlikely to be effective.

Studies comparing cyberbullying and bullying also demonstrate something else fundamental to understanding the cyberbullying problem – the two forms of bullying co-exist. That is, children who experience bullying at school are more likely to experience cyberbullying, and children who have been cyberbullied are almost always suffering bullying at school. Some children report being bullied at school but not bullied online, whereas almost no children report being solely cyberbullied.

For example, one study found that:

> The relationship between traditional and electronic victimization was such that only six of the electronic victims were not involved as traditional victims … Analyses showed that most electronic bullies were also traditional bullies … [S]tudents involved in electronic bullying are a subset of those involved in traditional bullying. This suggests that bullying starts offline and then sometimes (but not always) continues online. This pattern also implies that bullying does not start online.[25]

Another study concluded that:

> hardly any students are exclusively cybervictims. Instead, most of the cybervictims were at the same time traditional victims. These results highlight the overlapping nature of traditional and cyberforms of victimization. Therefore, to consider traditional victimization and cybervictimization simultaneously is crucial to not bias results.[26]

This is a consistent finding across the literature. As Olweus argues,

> the new electronic media have actually created few 'new' victims and bullies … To be cyberbullied or to cyberbully other students seems to a large extent to be part of a general pattern of bullying where use of electronic media is only one possible form, and, in addition, a form with low prevalence.[27]

This co-occurrence of bullying and cyberbullying has significance for the way we understand the cyberbullying problem. It emphasises that the cyberbullying problem is a subset of the bullying problem in general. Responses that focus

[24] D Olweus, 'School Bullying: Development and Current Status', paper presented to American Psychological Association's 120th Annual Convention, 4 August 2012.
[25] J Raskauskas & AD Stoltz, 'Involvement in Traditional and Electronic Bullying Among Adolescents', *Developmental Psychology*, vol. 43, no. 3, 2007.
[26] Gradinger, Strohmeier, & Spiel, 'Traditional Bullying and Cyberbullying: Identification of Risk Groups for Adjustment Problems'.
[27] Olweus, 'Short School Bullying: Development and Current Status'.

on cyberbullying without being integrated into a larger general response to the bullying problem are unlikely to be effective.

Responding to cyberbullying

Children who are being bullied online have more, rather than less, mechanisms to protect themselves and reduce the harm from being bullied than those suffering from traditional bullying.

The arguments that cyberbullying is more insidious and pervasive rarely consider the counterpart: the insidiousness and pervasiveness of traditional bullying. For instance, two students noted in one focus group that 'you can be more damaged by face-to-face bullying than cyber bullying, that's just words', 'a text is easier to ignore than something that happened in a specific place.'[28] Cyberbullying excludes the possibility of physical bullying. It also reduces the opportunity for relational bullying –the highly complex and opaque bullying that plays out through social interaction, such as shunning.

The arguments that cyberbullying is pervasive rarely consider the insidiousness and pervasiveness of traditional bullying.

The students' concern that cyberbullying may follow them home demonstrates that the school is ground zero for bullying in the first place; the concern they have is that the trauma experienced at school might be experienced at home as well.

We shall therefore first review some of the best-practice responses to bullying to determine what lessons can be drawn for bullying online.

Responding to traditional bullying

Not all anti-bullying programs are the same. There is a high degree of differentiation between anti-bullying initiatives. One survey of anti-bullying program evaluations found that only half detected significant positive effects. In fact, after the implementation of some anti-bullying programs in some studies, bullying increased.[29]

The Olweus Bullying Prevention Program has been independently verified to be an effective framework, or starting point, for the development of anti-bullying policies.[30] Such a program is explicitly designed not just to quarantine bullying from the school-yard but to prevent bullying both in and out of school. As Olweus writes, the absolute first and most important attribute of a successful bullying program is that the adults in a school or home setting

[28] Smith, Mahdavi, Carvalho, Fisher, Russell, & Tippett, 'Cyberbullying: its nature and impact in secondary school pupils'.
[29] AC Baldry & DP Farington, 'Effectiveness of Programs to Prevent School Bullying', *Victims & Offenders: An International Journal of Evidence-Based Research, Policy, and Practice*, vol. 2, no. 2, 2007.
[30] MM Ttofi & DP Farrington, 'What works in preventing bullying: effective elements of anti-bullying programmes', *Journal of Aggression, Conflict and Peace Research*, vol. 1, no. 1, 2009.

become aware of the extent of the bullying in their environment and decide themselves to seriously change that situation.[31]

The principles underlying a successful bullying program are simple and intuitive. Adults – particularly adults at school such as teachers and parents – should be positive and involved in children's lives, should set firm boundaries for unacceptable behaviour, should police those boundaries firmly with nonphysical negative consequences, and should strive to be both authority figures and positive role models.

The single most significant barrier to tackling bullying is the fact that most young people being bullied remain silent.

As one research paper finds, the interventions that are correlated with reduced bullying are those which involve parents, schools, and teachers in bullying prevention:

> The most important programme elements that were associated with a decrease in bullying were parent training, improved playground supervision, disciplinary methods, school conferences, information for parents, classroom rules and classroom management.[32]

The success of an anti-bullying program is dependent on the consistency with which it is pursued.[33] One of the worst responses to bullying is when adults detect bullying behaviour or victimisation yet fail to respond firmly; in the mind of both bully and victim this can equate to consent to the behaviour.[34]

The research shows that the single most significant barrier to tackling bullying is the fact that most young people being bullied remain silent – that is, they do not tell teachers or parents. A large Western Australian study found that 38 per cent of children bullied did not speak to anybody else about their victimisation.[35] This is of great concern because adult intervention is the most effective mechanism for reducing both bullying and the harm from bullying.

Protecting children against cyberbullying

The principles behind anti-bullying programs are clear but their implementation in schools in Australia and around the world is still a work in progress. Nevertheless, as cyberbullying is a form of bullying, rather than a discrete behaviour, the most effective techniques developed for the latter are likely to be the most effective techniques for the former.

That is, effective anti-bullying interventions require the involvement of adults as the most important and absolutely necessary step. For cases of severe bullying, the most tragic consequences are those that occur in circumstances

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[31] D Olweus, *Bullying at school : what we know and what we can do*, Blackwell, Oxford, 1993.

[32] Ttofi & Farrington, 'What works in preventing bullying: effective elements of anti-bullying programmes'.

[33] K Rigby, 'How Successful are Anti-Bullying Programs for Schools?', paper presented to The Role of Schools in Crime Prevention Conference Melbourne, 30 September to 1 October 2002.

[34] Olweus, *Bullying at school : what we know and what we can do*.

[35] Joint Select Committee on Cyber-Safety, *High-Wire Act Cyber-Safety and the Young, Interim Report,* Parliament of Australia, 2011.

where parents and teachers are either unaware or unengaged. Children are aware of this. Focus groups with children report that "telling was often recommended: 'talk to someone trustworthy', 'always tell an adult', 'tell someone, police, teachers, parents'; and specifically for cyberbullying, 'get police to track down the withheld number', 'report abuse on message board'."

One of the most compelling reasons cyberbullying does create a challenge for anti-bullying programs and interventions is this: there is evidence to suggest that children who are being cyberbullied are less likely to report their problem to adults than those who have been traditionally bullied.[36]

The distinction between bullying and cyberbullying is not always as clear as it is presented.

However when considering this, it is important to recall the co-occurrence of both forms of bullying. Furthermore, one major reason that students do not notify adults is that they fear having their electronic equipment confiscated by parents, or being forced to remove themselves from social media. Once again, this suggests that educating parents and students about the harm and unacceptability of bullying is essential.

The distinction between bullying and cyberbullying is not always as clear as it is presented. The popular understanding of cyberbullying assumes a stark division between school, where supervision is available and expected, and home, where supervision is sporadic. However, much online activity happens within school hours and on school grounds. This can happen on computers owned by schools or via portable devices such as mobile phones and tablets.

This provides challenges for teachers and parents but also opens up opportunities for intervention. Schools implementing anti-bullying programs need to think holistically about the environments where bullying behaviour may occur. They need to provide comprehensive online acceptable use policies for school networks, as well as adequate supervision of equipment and internet access. Most importantly, they need to be alert to the social and interpersonal signals of bullying and victimisation. Just as the growing recognition of the significance of relational bullying requires teachers and parents to recognise symptoms of bullying – such as academic decline, sadness, withdrawing from social situations, and school avoidance – so too do adults need to be aware of the symptoms of cyberbullying, such as being upset after using digital devices.

In the next section we outline some of the tools available to children and adults to prevent, mitigate and reduce the harm from cyberbullying. But the most important step in preventing bullying is the first step – talking to adults who are willing to intervene to prevent bullying, to help the child through the experience of victimisation, to talk to the bully or the bully's supervisors and insist on negative consequences for harmful behaviour, and to provide a positive role model for both bully and victim. Without that initial step, few technological or institutional solutions are going to be effective at preventing

[36] Smith, Mahdavi, Carvalho, Fisher, Russell, & Tippett, 'Cyberbullying: its nature and impact in secondary school pupils'.

the harm caused by the *repeated* instances of aggression which define bullying.

Tools to mitigate cyberbullying

There are a wide variety of tools available for children to mitigate cyberbullying. All major social media sites offer mechanisms and tools to deal with online harassment and bullying.

There are a wide variety of tools available for children to mitigate cyberbullying.

Facebook's 'Family Safety Centre' includes information on bullying and a graduated series of responses that include removing users from abusive tags, unfriending and blocking other Facebook users, and reporting abusive content, which specifically includes bullying, after which Facebook will take it down. The Facebook Community Standards include a prohibition on bullying and harassment that reads:

> Facebook does not tolerate bullying or harassment. We allow users to speak freely on matters and people of public interest, but take action on all reports of abusive behavior directed at private individuals. Repeatedly targeting other users with unwanted friend requests or messages is a form of harassment.

Twitter has a graduated system to deal with harassment. Users can unfollow accounts, and block them to prevent them from sending tweets or reading a user's tweets. Private account settings also prevent unapproved users from reading tweets. Finally, Twitter has a service to report users who engage in targeted abuse or harassment. Users who have violated the Twitter terms of service – which includes a prohibition on targeted abuse – have their accounts deactivated.

Google Plus also has a safety centre with anti-bullying information for parents and teenagers. Users can block other users, remove others from their posts, and report others for violating Google Plus' Community Standards, which include restrictions on hate speech, impersonation and disclosing private information.

As we have seen, cyberbullying is not restricted to social media sites; indeed, cyberbullying may be more common off social media than on it. Self-reported instances of cyberbullying emphasise bullying by text message and prank calls. As a consequence, technology firms have developed tools to deal with such conduct. In 2013 Apple's iOS7 software for iPhone and iPad introduced a function where nominated phone numbers could be blocked from calling or messaging a user. Most phones running the Android operating system also offer a blocking function, and third party software is also available.

While these technological and institutional mechanisms are often dismissed in popular discussions about bullying, they are significant. Blocking, by itself, tackles much of the harm imposed by cyberbullying, and certainly more efficiently and effectively than a government imposed scheme. The empowerment of users to take control of their own experience – with the support of parents, guardians and, where appropriate, schools – is a necessary way to tackle unwanted interactions.

Furthermore, each of Facebook, Twitter, and Google Plus offer extensive resources on bullying. Parents need to work with children to understand the services available to them.

A number of major social network organisations, including Facebook, Google, Microsoft and Yahoo!7 have signed up to the Commonwealth Government's Cooperative Arrangement for Complaints Handling on Social Networking Sites, which aims to improve avenues for complaint handling and the reporting of abusive content.

There are many further tools available for parents and schools to supervise childrens' internet access. These tools can limit available websites, monitor activity, prevent certain content from being seen, and flag warning signs of aggressive behaviour. One of the most popular is Net Nanny, which can be highly tailored to monitor or block internet content depending on the preferences of the adult. It records internet activity such as website visits, social media chat logs and messages, and can be tailored to block (if desired) pornography and even profane language.[37] Other popular services include WebWatcher[38], PC Pandora[39], Family Protector[40], and CYBERsitter.[41]

Blocking tackles much of the harm imposed by cyberbullying, and certainly more efficiently and effectively than a government imposed scheme.

To be effective at tackling bullying, these tools require the active involvement of adults. As such, these tools can only be supplements to the primary goal of any anti-bullying policy; which is to have children disclose their victimisation, to have adults detect signs of victimisation in children, and then to ensure that those adults engage positively.

It is important to note that technological and institutional solutions to cyberbullying are being further developed over time. The government needs to ensure that technology firms and social media sites are free to experiment and develop new services and protections. Locking in a regulatory regime could stifle the development of such services. This is a serious concern considering the fluid and porous nature of online communication. New services are always developing and young people tend to be early adopters. Technological innovation and fashion move too quickly for legislators or regulators to effectively keep up.

Public policy and cyberbullying

The growth in awareness of bullying and cyberbullying has brought about an unsurprising desire among the media, activists, and policymakers for legislative change.

There is a natural 'do something' response in reaction to tragedy. While this response is understandable, it rarely produces effective and efficient legislation, has the unfortunate consequence of legislative duplication, and –

[37] http://www.netnanny.com/
[38] http://www.webwatcher.com/
[39] http://www.pcpandora.com/
[40] http://www.intego.com/mac-parental-control-software
[41] https://www.cybersitter.com/

as it is often formed in a highly politically charged atmosphere – can create some unfortunate unintended consequences. The former chair of the Productivity Commission, Gary Banks, has outlined how rushed regulation in response to media storms too often creates long term consequences down the track.[42]

There is a natural 'do something' response in reaction to tragedy.

A further element to new cyberbullying proposals is the propensity for 'moral panic' – an intense fear of disruption to the social order. Moral panics are commonly associated with technological change and place youths as both the agent and the victim of that disruption. As danah boyd writes,

> As moral panics about child safety take hold, politicians feel that they should take action—or at least capitalize on the appearance of doing so. They regularly campaign over safety issues and implement or expand laws targeted at curtailing the freedoms of minors. In the 1980s and 1990s, this included curfew laws, anti-loitering laws, and truancy laws …
>
> The same fears that shaped children's engagement with parks and other gathering places in the latter half of the twentieth century are now configuring networked publics created through social media. Adults worry that youth may be coerced into unseemly practices or connect with adults who will do them harm. For decades, adults have worked to limit teen access to and mobility within public spaces. Simultaneously, teens have worked to circumvent adult authority in order to have freedom and mobility. The internet limits adult control precisely because it makes it harder for parents to isolate youth from material that they deem unacceptable and from people whose values may differ from theirs or who are unfamiliar in other ways.[43]

Cyberbullying is a classic moral panic. Describing it as such does not detract from the significant consequences of bullying. But when cyberbullying as treated as a unique behavioural phenomenon, rather than a form of traditional bullying, it closely maps the characteristics of a moral panic.

Freedom of speech and children

Children have a right to be free from bullying. They have a right to safety and protection just as any other citizen, and they also have a right to the security of parental figures. Anti-bullying programs and laws are designed to protect those rights.

However, policies to tackle bullying can often come in conflict with other rights, for example, the right to free expression. Freedom of speech is a fundamental, if not *the* fundamental, individual right. It is central to the functioning of democracy, and vital to human moral autonomy.[44]

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[42] G Banks, 'Tackling the Underlying Causes of Over-regulation: An Update', paper presented to Australian Regulatory Reform Evolution Conference, Canberra, 24-25 October 2006.

[43] boyd, *It's complicated : the social lives of networked teens*.

[44] C Berg, *In Defence of Freedom of Speech: From Ancient Greece to Andrew Bolt*, Monographs on Western Civilisation, Institute of Public Affairs; Mannkal Economic Education Foundation, 2012.

Children have the right to freedom of speech as much as any other individual. The popular press uniformly portray children as the targets, or victims, of speech, rather than their instigators. Hence, they argue that, we need to protect children from speech. But technology has had a major liberating effect on personal expression for those who may not have had a voice in the traditional media.

Children have the right to freedom of speech as much as any other individual.

Young people are now capable of engaging with (for instance) politicians, celebrities, authors, journalists, and musicians directly on social media. Less dramatically but no less significantly, young people have been able to use social networks to deepen and extend their interpersonal networks, build and create relationships, and form communities that previous generations could not have imagined.

From a sociological standpoint, the major feature of social networks is not that they encourage technological skill development but that they encourage social development. Social networks are a powerful medium for self-expression and identity development. Identity development is a very important part of adolescence.

On social media, children create profiles that they use to create and reflect their identity. Social media users can customise their profiles with images, addons, photographs, biographies and descriptions. Their friendship circles – and how those circles are arranged – reflect their preferred identities. The way they participate in digital conversations, let alone what they say in those conversations, is a form of identity development.[45]

Social media brings about risks, but this is the case for any new environment in which individuals are free to communicate and socialise. The benefits of digital media for personal and social expression are dramatic. The significance of new technology for child socialisation, identity development, and relationship construction is likely to be unclear for many decades but almost certainly beneficial, as children are able to self-actualise in an environment which is freer – and safer – than previous generations were able to do so.

Freedom of speech is ultimately a human right because of its role in the forming and testing of individual conscience; it is the expression of an individuals' moral autonomy. Children do not have the ability to publicly express their opinions in the mainstream media, and neither are they likely to be able to publish alternatives. Social media provides a platform for identity development and expression for a group of citizens who are excluded from the 'usual' outlets through which democratic issues are debated.

What does this mean for anti-bullying policy? Public policy responses to bullying need to ensure that they do not interfere with the free expression of children. Social media is a powerful outlet for freedom of speech, and policies

[45] d boyd, 'Why Youth (Heart) Social Network Sites: The Role of Networked Publics in Teenage Social Life ', in David Buckingham (ed.), *MacArthur Foundation Series on Digital Learning – Youth, Identity, and Digital Media Volume* MIT Press, Cambridge, MA, 2007.

which unduly constrain that speech would be trampling on fundamental rights. In the next section we detail some of the many existing laws which provide remedy for behaviour which could be described as 'bullying'. But any existing laws and any new proposals must be seen through this light – the fundamental importance of free expression for children.

Existing legal remedies

The internet is not a lawless wilderness. Activity which occurs online is subject to, and constrained by, territorial law.

The internet is not a lawless wilderness. Activity which occurs online is subject to, and constrained by, territorial law. Expression online is subject to the very same limitations as offline speech. In recent years Australian courts have applied defamation and racial vilification laws on social media and blog posts, to name just two of the most prominent cases.[46]

To the extent that the internet poses challenges for existing law, those challenges concern determining in which jurisdiction a given act occurred, not whether it occurred in a jurisdiction at all.[47] Cross-jurisdictional issues are unlikely to be a significant factor in bullying prevention, as bullying occurs within school- and peer-group.

As a consequence, and with the above argument in mind, we should not be looking for remedies for bullying that are specific to the internet. If the existing remedies for bullying are insufficient, then they are insufficient both on and offline.

The popular definition of bullying captures a very large range of individual behaviour. As we have shown, some of what is described popularly as 'bullying' is better described by participants as 'drama', 'pranks', or 'teasing'. A broad and unclear definition of bullying incorporated in Australian law risks criminalising or penalising conduct which is a natural part of the social and emotional development of young people. Interpersonal conflict is part of growing up. Such nuances are often missed in the debate by parents and popular media alike. Young people draw meaning and significance from social interactions differently to adults who observe from the outside. What may look like harassment on Facebook to an adult observer may be seen by young participants as something else entirely. Trying to develop bureaucratic and legal mechanisms that impose order on this complex social world could be counterproductive and have unpredictable developmental consequences.

[46] See *Eatock v Bolt* [2011] FCA 1103 and http://au.news.yahoo.com/nsw/a/21816220/student-ordered-to-pay-over-defamation/.

[47] For an extended exploration of these issues, see AD Thierer & CW Crews, *Who rules the net? : Internet governance and jurisdiction*, Cato Institute, Washington, D.C., 2003.

At the other extreme, much of what is described as bullying in the popular press constitutes serious criminal conduct. For example, stalking with intent to intimidate or cause fear of physical or mental harm, physical or sexual assault, threats to kill or harm, criminal defamation, blackmail, and victimisation, are often collapsed into the word 'bullying'. In these cases, there are substantial civil and criminal remedies at the state or Commonwealth level available to victims. In some circumstances the law provides for significant jail terms. The fact that some criminal conduct occurs on the internet makes no difference to the criminality of that conduct.

Victoria provides a good example. Brodie's Law, as it is popularly known, is a set of provisions which established criminal liability for certain acts of bullying. The provisions were inserted into Victoria's *Crimes Act* in 2011, as an extension of existing stalking laws. Directing "threats",[48] "abusive or offensive" words and acts[49] or "offensive material"[50] to the victim with the intention of causing physical or mental harm is now explicitly outlawed under these provisions.

Even prior to the introduction of this legislation, stalking laws in Victoria and other states covered acts of bullying. Contact, with the intention of causing harm, via email, social media, internet chat rooms or other forms of electronic communication has been illegal since 2003.[51] Publishing information about, or posing as, the victim on the internet, causing unauthorised computer functions or tracing internet use also falls under stalking provisions in Victoria.[52] Stalking is treated very seriously and carries a prison sentence of up to ten years.

In Victoria, contact with the intention of causing harm via email, social media, internet chat rooms or other forms of electronic communication has been illegal since 2003.

While policymakers need to be careful that any new legislation does not duplicate existing law, there is a greater risk: that they do not unintentionally trivialise serious criminal conduct by describing such conduct as the lesser wrongdoing of bullying. It is for this reason that many social media sites' anti-bullying recommendations emphasise the need for victims to contact police when necessary: an online death threat is not an example of bullying, but an unlawful threat to kill under state and federal law.

Online speech does differ from offline speech in one important way: there is already significant legislation prohibiting offensive or harassing expression over the internet with no equivalently broad legislation governing speech offline. Section 474.17 of the Commonwealth *Criminal Code Act 1995* states it is an offence to use a carriage service to menace, harass or cause offence:

[48] S 21A(2)(da), *Crimes Act 1958* (Vic).
[49] S 21A(2)(db), (dc) and (dd), *Crimes Act 1958* (Vic).
[50] S 21A(2)(e), *Crimes Act 1958* (Vic).
[51] S 21A(2)(b), *Crimes Act 1958* (Vic).
[52] S 21A(2)(ba), (bb) and (bc), *Crimes Act 1958* (Vic).

> 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.

There are a number of civil and criminal remedies that cover conduct which can be described as cyberbullying

Most, if not all, cases of cyberbullying are more accurately described as 'drama' and policymakers ought not to intervene. For more serious and far more rare cases there is s 474.17.

Institute of Public Affairs researchers have previously criticised s 474.17 and similar provisions for being excessively expansive.[53] But the significance of this provision for new anti-bullying proposals is that legislation already exists, is recognised by the discussion paper to exist, is recognised to have been used successfully by prosecutors against bullying-type conduct, and is broad and powerful enough to cover a large amount of conduct. The criticisms of s 474.17 in the context of the cyberbullying debate are insubstantial and weak.

The *Criminal Code* also covers misuse of data and 'hacking'. One common method of cyberbullying is for a bullying perpetrator to hack into the victim's social media accounts and post messages as the victim. Arguably this falls under section 478.1 of the Commonwealth *Criminal Code Act 1995*, which creates an offence of access or modification to password protected data. The offence carries up to a two year term of imprisonment. Similar provisions exist in New South Wales, Victoria, Queensland, Western Australia, South Australia, Tasmania and the Australian Capital Territory.

There are a number of civil and criminal remedies that cover conduct which can be described as cyberbullying and fall within the purview of conduct the government wants to target. Butler, Kift and Campbell provide a comprehensive overview of existing Australian law that covers cyberbullying activity. Their key point is that "[i]t is not difficult to reconceptualise cyber bullying in terms of criminal, tortious or vilifying behaviour."[54] A few are worth noting. In some circumstances bullying may constitute criminal defamation. In many more circumstances, civil defamation would capture a very large amount of cyberbullying. As they write,

> Where the cyber bullying consists of uploading words or images onto internet web sites, chat rooms, bulletin boards, blogs or wikis which

[53] James Paterson, *FreedomWatch*, 2012, http://freedomwatch.ipa.org.au/jail-for-being-immature-and-dumb/; Chris Berg, *FreedomWatch*., 2013, http://freedomwatch.ipa.org.au/freedom-of-speech-and-the-man-monis-case/.
[54] DA Butler, SM Kift, & MA Campbell, 'Cyber bullying in schools and the law : is there an effective means of addressing the power imbalance?', *eLaw Journal*, vol. 16, no. 1, 2010.

humiliate, embarrass or otherwise cause distress to the target, the target may have an action for defamation.

Defamation is perhaps the clearest example of an existing legal remedy that covers bullying both online and offline.[55] Sharing material online that is false, and which may damage a person's reputation, is defamatory. The tort of defamation provides the victim with the basis for a legal claim. The vast majority of bullying falls foul of defamation law. Insults and other bullying acts are often entirely false and in many cases where bullying becomes a problem it is because there has been, or there is likely to be, reputational damage. Remedies available to victims of defamation include damages and, where the court deems it necessary, injunctive relief may also be available.[56]

The vast existing body of law captures almost all cyberbullying. Other actions may be available as intentional infliction of mental harm, invasion of privacy, and perpetrator liability.

Australian law has developed over centuries in order to tackle a massive range of conduct, and is easily adaptable to the online sphere by the judiciary. In addition, there has been substantial development in the prevention of crimes like stalking in the past decade. There is no need for parliament to create new offenses that are covered by existing law.

Australian law has developed over centuries in order to tackle a massive range of conduct, and is easily adaptable to the online sphere.

There is a common misconception held by law enforcement and many in the public when it comes to the enforcement of existing law on digital communication: that the jurisdictional complexities of the medium obscure simple enforcement challenges. Regardless of whether a website is hosted in Australia or another country with starkly different laws to Australia, individuals who commit criminal acts in Australia are liable to Australian law. The Commonwealth *Criminal Code Act 1995*applies to Australian internet users regardless of where the website they use is being hosted. There appears to be a widespread misconception however, even among law enforcement, that this is not the case, and that the international nature of communications networks mean that our domestic law is powerless.[57] Education would seem to be necessary to inform all involved of the conceptual significance of the digital sphere, and the applicability of terrestrial law to the internet.

It is to be expected that legal action is only taken in the most extreme cases. Bullying, as we have seen, is extremely common among young people. The last

[55] See the discussion at Desmond A. Butler, "Civil liability for cyber bullying in schools: A new challenge for psychologists, schools and lawyers," in K. Moore, Eds. *Proceedings Psychology making an impact: the Australian Psychological Society 42nd Annual Conference* (2007), pages 52-56.
[56] *Fitzroy Legal Service, The Law Handbook* (2014) http://www.lawhandbook.org.au/handbook/ch24s02s04.php
[57] For an illustration of this misconception, see G Guy, *Submission to the Joint Select Committee on Cyber-Safety Inquiry,* Parliament of Australia, House of Representatives, 2011.

thing society wants is to be charging large numbers of students with criminal conduct.

However, the sheer comprehensiveness of existing legal remedies for bullying and cyberbullying ought to be part of any education program as a disincentive to such conduct. Furthermore, its existence provides a tool by which parents, schools, and ultimately law enforcement, can convince bullies from ceasing their conduct. Even in the most extreme cases, a police caution will be sufficient to prevent future bullying conduct.

Finally, the political system and the media needs to understand that these remedies exist. What does it tell children who are being victimised by bullies – or the bullies themselves – when parliament repeatedly claims that there are no remedies for cyberbullying?

The Abbott government's proposed 'rapid removal' power is an explicit censorship power.

The Abbott government's proposal to tackle cyberbullying

The Coalition took to the 2013 election a promise to:

> [w]ork together with social media operators, schools, parents and children to tackle cyber bullying and other harmful material and behaviour targeted at individual children online, by measures such as ensuring large social media operators rapidly remove harmful online material directed at a child.[58]

This was not the only policy proposed by the Coalition during the 2013 election covering internet safety: a short-lived release of the Coalition's cyber-safety policy also suggested the government should require "mobile phone operators installing adult content filters on phones which will be switched on as the default unless the customers proves he or she is at least 18 years of age", but this was dropped after internal backlash within the Coalition.[59]

In late January 2014 the Department of Communications released a discussion paper outlining a range of policy options the government could pursue.

The keystone of the policy was the establishment of a Children's e-Safety Commissioner, with two primary functions: to educate about and coordinate existing government and private initiatives which would tackle cyberbullying, and to implement and administer a proposed scheme for "the rapid removal of material that is harmful to a child from large social media sites."[60]

This scheme would apply to 'large social media sites' such as Facebook, Twitter, and Google Plus. It would allow complainants – that is, children or their guardians – to report 'material targeted at and likely to cause harm to an Australian child' to the e-Safety Commissioner, which the commissioner would then require the eligible sites to remove from the internet. If the sites refused

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[58] *Our Plan: Real Solutions for all Australians: The direction, values and policy priorities of the next Coalition Government*, Liberal Party of Australia, 2013.
[59] J Swan & L Battersby, 'How Malcolm Turnbull was ambushed by the Coalition's own internet policy', review, *The Sydney Morning Herald,* 6 September 2013.
[60] *Enhancing Online Safety for Children: Public consultation on key election commitments*, Australian Government, Canberra, 2014.

to do so, the commissioner would be empowered with some enforcement powers, including warnings, infringement notices, adverse publicity, and ultimately civil penalties. The government emphasises that its priority in forming such an institutional arrangement is the speed in which material will be removed. In totality, this 'rapid removal' is an explicit censorship power.

One further proposal in the January 2014 discussion paper was the possibility of a Commonwealth criminal or civil penalty for cyberbullying. This would almost entirely replicate the existing provision 474.17 of the Commonwealth Criminal Code. In April 2014, the parliamentary secretary for communications, Paul Fletcher, confirmed that the government would not be going ahead with a new offence.[61]

The Abbott government's proposal presents a serious threat to freedom of speech online.

In a submission to the inquiry the Institute of Public Affairs outlined some major problems with the content removal proposal:[62]

- The proposal presents a serious threat to freedom of speech online. Any limitation on freedom of speech needs to be tightly confined, in response to an urgent and pressing problem, and needs to target action, not expression. On these grounds the Children's e-Safety Commissioner fails. It is overly broad, will not address the bullying problem, and restrains expression rather than the underlying conduct.

  Instead, the government proposes to censor expression according to the discretion of the Commissioner. Rather than focusing on the elimination of the harmful conduct – that is, sustained harassment – the proposal simply censors individual acts of expression. The proposal is at the same time a blunt instrument – censorship is an extreme power for the government to wield – and unlikely to make a material difference to bullying. Faced against a genuine act of bullying sustained over time a specific take-down power such as the one outlined in the discussion paper would be entirely ineffective.

  The distinction of what constitutes harmful material is highly ambiguous, not just from the perspective of policy analysts studying the government's proposals, but from the perspective of the young people themselves. The Commissioner will be instructed to take certain factors into account, but the young people participating in online activity will be unable to predict what speech might fall foul of these decisions. The power to censor always involves highly subjective and therefore arbitrary decisions. What is viewed as bullying by adults is not necessarily seen that way by young people. The opacity of young peoples' social interactions adds to these ambiguities.

[61] P Fletcher, 'Speech to the Youth, Technology and Virtual Communities Conference', review, 30 April 2014.
[62] Berg & Breheny, *Submission to the Department of Communications Discussion Paper 'Enhancing Online Safety for Children'*

There is a significant risk that bringing major social media sites under government control will simply drive bullying activity underground.

- The proposal also has significant rule of law issues. For example, the discussion paper seems to imply that the onus of proof will be reversed should an individual seek to appeal the Commissioner's decision: 'In cases of material which is potentially harmful or distressing to a child, the scheme should favour the interests of the child, rather than the person seeking to publish the material'.

- The proposal might push young people onto less controlled and less transparent sites. The government intends to declare certain large social media sites as "participating" with the Children's e-Safety Commissioner. There is a significant risk that bringing these major sites under government control will simply drive bullying activity underground, as young people leave major sites like Facebook and Twitter for sites that they believe are less legally risky.

  However, smaller, non-participating sites also tend to be less well established, are more forgiving of anonymity, and are more opaque from the perspective of parents and guardians.

  Displacing bullying from the most popular - and therefore easiest for parents to monitor - sites like Facebook to sites which are newer, are harder to monitor, have less Australian presence and have less developed inbuilt privacy and e-safety systems will do little to reduce bullying victimisation.

- The proposal to consolidate existing anti-bullying programs could be counterproductive. The Children's e-Safety Commissioner is proposed to consolidate existing anti-bullying programs into "a single organisation which takes the lead in relation to online safety for children, allowing for greater efficiency and addressing duplication and overlap". Duplication and overlap offer advantages. There is no single, universally accepted and universally successful anti-bullying program. Given the fluid and personal nature of the bullying problem, it is unlikely one will ever be developed. Agencies and levels of government need the flexibility to experiment with new and competing education programs. Program consolidation would be counterproductive.

- The proposal is guaranteed to suffer mission creep. It is the historical experience of previous bodies that they exceed or stretch their mandate, are provided with extra powers and responsibilities by future parliaments, and grow in stature and prominence. The Institute of Public Affairs has traced how other bodies have grown from modest beginnings to become bureaucratic behemoths.[63]

[63] C Berg, *The Biggest Vested Interest of All: How Government Lobbies to Restrict Individual Rights and Freedom Occasional Paper*, 2013.

> There is no reason to believe that the Children's e-Safety Commissioner will operate within the boundaries set by any particular parliament, nor any guarantee that its functions will not be extended in the future. Considering the substantial threat to freedom of speech represented by its proposed functions, the Abbott government should be worried that it is not creating a body that will become even more dangerous in the future. The only way to guarantee the Commissioner will not threaten free speech in years to come is to decline to establish it in this parliament.

More fundamentally, the basic problem with the government's proposal is the conceptual confusion about the cyberbullying problem. By treating bullying and cyberbullying as separate categories, and targeting discrete policy at the latter, it ignores the large amount of research that suggests the key, essential step to tackling bullying behaviour is to involve parents, teachers and guardians.

By the time any bullying victim begins the inevitably bureaucratic process of reporting social media communications to a Commonwealth bureaucracy, the involvement of an adult will have already been established. And if that adult involvement has not been established, the child victim will be no closer to tackling the underlying bullying problem. It is worth recalling the definition of bullying, which stipulates that bullying is an act repeated over time.

Even if a child manages to pursue, without any parental or adult involvement, a complaint through the Children's e-Safety Commissioner, the only possible response would be the removal of one, specific piece of harmful material from the internet. Bullying is a sustained behaviour at school and online, not a specific digital insult. Indeed, the best thing the Children's e-Safety Commissioner in such circumstances could do for the child is not to pursue individual pieces of content through social media networks, but to immediately notify parents and teachers of the bullying.

What is the appropriate role for public policy in cyberbullying?

Bullying, to appropriate a phrase common in technology policy, is *platform neutral*. The research outlined in this paper demonstrates conclusively that there is no clear distinction between traditional bullying and bullying online. Rather, cyberbullying is better seen as a subset of bullying, rather than a different behavioural form. Children who are cyberbullying are almost always bullied in the schoolyard as well; yet children who are bullied in the schoolyard are not always cyberbullied.

Tackling specific instances of cyberbullying –as the Abbott government's Children's e-safety Commissioner proposal would do – without tackling the underlying bullying behaviour will be ineffective and may have counterproductive consequences.

Yet policymakers nevertheless should confront the question of whether there is an appropriate role for public policy regarding cyberbullying. The features which distinguish cyberbullying from traditional bullying do not necessitate

Policymakers should confront the question of whether there is an appropriate role for public policy regarding cyberbullying.

unique policy. As we have explored above, the fact that cyberbullying 'follows children home' turns out to be less consequential than it sounds, as it implies that cyberbullying is a continuation of traditional bullying rather than constituting a separate behaviour.

Two other features of cyberbullying shall be considered here: anonymity and 'viral' content. Each are less prevalent problems than is commonly depicted, but it must be recognised that they are existent problems. Yet in each case the potential role of public policy is limited by the nature of the internet itself.

Anonymity

Anonymity is a necessary and vital part of online discourse, and any policy that seeks to constrain anonymous speech would be a drastic restriction on freedom of speech.

First is the question of digital anonymity. It has been claimed that bullying online can be more virulent or harmful because bullies can hide behind anonymity to attack their victims. This belief appears to be widespread among children themselves. For example, a number of young people have suggested in focus groups that it is the anonymity of online bullying, rather than the bullying content itself, which is most disturbing.[64] Children were not sure whether it was their friends who were doing the bullying. This suggests that anonymous cyberbullying is in large part akin to relational bullying, that is, bullying in which social hierarchies are deployed.

However, the significance of anonymity appears to be overstated. As one study found,

> Although most participants expressed the view that anonymity is integral to cyber bullying a prominent theme that emerged was the participants' uncertainty about whether the Internet and other communication technologies provide actual or perceived anonymity for the aggressor. The data contradicted the students' statements, as it emerged that much of the cyber bullying they described was not anonymous. Rather, the cyber bullying often occurred in the context of their social groups and relationships, for example boyfriend/girlfriend, 'best' friend, and other friends and classmates. Analysis of the participants' comments revealed that the students often discover the identity of the individual who bullies them online, for instance from others who know about or who witness the bullying, albeit at various lengths of times after the incident.[65]

Cyberbullying remains, like bullying, a social activity, where bullying is performed in groups or in front of audiences, and concerns relationships. Another study found that only a quarter of students who reported being cyberbullied did not know their bully.[66] This proportion must of course be seen in the context of the lower rates of cyberbullying to traditional bullying.

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[64] JJ Dooley, J Pyzalski, & D Cross, 'Cyberbullying Versus Face-to-Face Bullying: A Theoretical and Conceptual Review', *Journal of Psychology*, vol. 217, no. 4, 2009; F Mishna, M Saini, & S Solomon, 'Ongoing and online: Children and youth's perceptions of cyber bullying', *Children and Youth Services Review*, vol. 31, no. 12, 2009.
[65] Mishna, Saini, & Solomon, 'Ongoing and online: Children and youth's perceptions of cyber bullying'.
[66] Ibid.

An associated claim often made by children in focus groups – and, indeed, throughout the popular press – is that anonymity affects the bully themselves, encouraging them to be more aggressive because they are protected by their privacy. This too is not borne out by the evidence. Research has determined that, contrary to widespread belief, anonymity does not correlate with more hostile expression online.[67]

How should public policy respond to anonymity? For the most part, attempts to reduce anonymity online would be futile. Anonymous accounts can be recreated, pseudonymous accounts can be undetected, and aggressors can shift to less 'regulated' parts of the internet.

Finally, policymakers need to recognise the important social function that anonymity has. Anonymity is a necessary and vital part of online discourse, and any policy that seeks to constrain anonymous speech would be a drastic restriction on freedom of speech.

In some highly publicised distressing but rare cases, it is not obvious how any policy response could be able to intervene.

Viral content

One further claim made that cyberbullying can be uniquely damaging is that the audience can grow exponentially, multiplying the potential harm. This is made in one of the papers relied on by the Department of Communications' Discussion Paper into the Children's e-Safety Commission.[68] Viral bullying is the flip-side of the attention economy brought about by social networking. The same mechanisms that allow, for instance, a young Justin Bieber to reach millions of potential fans also allows victims to be shamed in front of millions of people.

The most famous example of viral content being associated with bullying is a video called the *Star Wars Kid*. This is also the most extreme case on the record, and is often used to illustrate the harm of cyberbullying. It is for that reason worth being clear about the policy significance of the *Star Wars Kid* video, yet it is also important to recall that it is notable for its extreme nature – the *Star Wars Kid* video is an incredibly atypical instance of cyberbullying.

In 2002, Ghyslain Raza, a 15 year old Quebecan made a private video in which he re-enacted a light-saber fight from Star Wars using golfing equipment. The video was found by Raza's schoolmates, and uploaded to the internet in 2003.

It has been estimated that the *Star Wars Kid* video has been watched 900 million times.[69] It was first distributed not through modern video-sharing websites (YouTube was only launched in 2005) but through peer-to-peer networking. A decade later Raza recounted the substantial bullying he received: "No matter how hard I tried to ignore people telling me to commit suicide, I couldn't help but feel worthless, like my life wasn't worth living." He

[67] K Short, *Hiding Behind the Small Screen: Investigating Levels of Anonymity When Managing Online Hostile Commentary,* American University, School of Communication, 2012.
[68] Srivastava, Gamble, & Boey, 'Cyberbullying in Australia: Clarifying the Problem, Considering the Solutions'.
[69] 'Star Wars Kid is top viral video', review, *BBC News,* 27 November 2006.

left his school and was privately tutored. Ultimately, his family sued those who had stolen and uploaded the video for emotional distress, and the cases were settled out of court.

The *Star Wars Kid* is a powerful, if extreme, illustration of the potential danger of digital networks. Such mass shaming is rare, but should not be dismissed. However, it also illustrates the limits of public policy. It was shared through peer-to-peer networking rather than the social media sites which are the target of much cyberbullying specific policy. More significantly, at no point in Raza's experience does there appear to be a moment when policy could intervene to prevent the harm. Raza's family justifiably used existing Canadian law to seek compensation, but this is a post hoc solution. Viral content is characterised by its replicability. It is copied and copied again, so that it is not merely seen by large audiences but hosted by them. In such distressing cases, it is not obvious how any policy response could be able to intervene. What would have mattered for Raza was personal support from family members and other adults in his life as he was thrust into the spotlight.

Policymakers need to treat cyberbullying according to the larger body of knowledge drawn from research into school bullying.

The internet challenge

One of the major challenges policymakers face with digital technology is limitations on power. It is obviously desirable that extreme experiences like that of Ghyslain Raza be avoided. But there is no clear institutional mechanism that could be deployed to do so. Despite the application of terrestrial law, censorship is highly ineffective on the internet; as one famous quote suggests 'The Net interprets censorship as damage and routes around it.' Both anonymity and viral content operate at a different time scale to legislation and bureaucracy. Even the most 'rapid' removal power vested in a Children's e-Safety Commissioner would be incomparably slow against, for instance, a retweeting on Twitter or sharing on Facebook.

Thus, the internet brings risks alongside its substantial benefits. We ought not to overstate those risks – cases such as the *Star Wars Kid* are few, and as we have seen, the problem of cyberbullying is too often overblown compared to traditional bullying. Nevertheless, policymakers need to recognise that there are some social behaviours which legislation or regulation cannot effectively prohibit, and some harms which legislation or regulation cannot prevent.

Conclusion

Bullying is a serious problem. It should not be dismissed or treated lightly. Cyberbullying, too, is a problem and can cause harm. Children who are bullied can suffer depression, lower educational outcomes, and at the most tragic end, can self-harm or suicide.

But cyberbullying needs to be understood as a form of bullying, not a discrete behaviour in and of itself. Bullying is a constant feature of human social interaction, and has always been prevalent among children and at schools.

As such, policymakers need to treat cyberbullying according to the larger body of knowledge drawn from research into school bullying. Children who have been bullied need to be given the tools to deal with bullying behaviours, and the confidence to approach teachers, parents and other adults who can provide appropriate support, advice and advocacy on their behalf. The role that parents play in this process is vital, and any answer to the problem of cyberbullying cannot involve a transfer of responsibility from parents to government.

There are substantial existent legal remedies, which cover a very broad range of conduct that falls within the definition of bullying. Many instances of sustained and aggressive conduct are dealt with by both civil and criminal law. A vast number of Commonwealth and state laws deal with harassment, intimidation, threats, defamation, breaches of privacy and other conduct.

Any new legislation is likely to duplicate existing legal remedies. Policymakers must take care not to further complicate a legal system which is already difficult to navigate. Increasing the number of laws designed to cover similar conduct creates confusion for victims and makes legal redress more expensive.

Powers of censorship also present a very real and serious threat to freedom of speech. Human rights such as free expression are just as important for children as they are for adults. A policy based on censorship undermines the development of young children, and suppresses their growth in areas such as problem solving, self-regulation and risk management – vital skills for children to learn.

The responsibility for tackling cyberbullying ultimately rests with parents. Many tools are available to assist parents. Strategies around internet browsing practices and the location of computers and other devices in the home, as well as the use of appropriate software, will provide some answers to parents seeking to deal with these issues.

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Uncovering threats to freedom of speech and personal liberty: a program of the Institute of Public Affairs

Submission to the Department of Communications Discussion Paper 'Enhancing Online Safety for Children'

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March 2014

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Free people, free society

Executive summary

The government's proposed Children's e-Safety Commissioner represents a serious threat to freedom of speech and digital liberty. The proposed regime would create extraordinary new powers, which would be conferred on a government-appointed digital censor. The power to order certain material to be pulled down from large social media sites also gives discretionary power to a government bureaucrat.

The proposal misdiagnoses the problem of bullying on and offline. Bullying can be a significant and very harmful social problem – whether on or offline. Cyberbullying is not a special case demanding of specific laws. It should be dealt with using the same legal framework as bullying that takes place offline.

The existence of a Children's e-Safety Commissioner will not prevent or protect young people against cyberbullying. There are many forms of harmful online activity that will not be caught by the government's proposed regime. The regime may also drive cyberbullying to sites that are less easily monitored by parents and guardians. Smaller social media sites are less likely to have rigorously enforced community standards yet the government's proposal is aimed only at large social media sites.

The proposal also ignores existing remedies. There are a variety of current laws that exist to catch the same conduct that the government seeks to proscribe. Legal remedies for stalking, harassment, intimidation and a range of other unacceptable behaviours are already available to victims of bullying.

The Children's e-Safety Commissioner may provide a false sense of security among parents that cyberbullying has been dealt with. Some parents may not feel that their own efforts are still necessary when faced with the existence of the government's cyberbullying program. Parents may fail to employ monitoring and security software believing it to be redundant. However, there will be cases of cyberbullying that are not caught by the government's scheme but that would have been caught by parental vigilance.

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Introduction

The Institute of Public Affairs is opposed to the government's proposed Children's e-Safety Commissioner and the introduction of a new cyberbullying offense.

In September 2013, the Coalition in opposition released the 'Coalition's Policy to Enhance Online Safety for Children'. In January 2014, the Department of Communications released a discussion paper outlining in detail what it proposed to do, and called for submissions in response. This submission addresses itself to that discussion paper.

The discussion paper consists of three proposals.

- A Children's e-Safety Commissioner, with responsibility to oversee the government's anti-cyberbullying policies.
- A statutory requirement for large and participating social media networking sites to remove harmful material from their sites, upon the request of users or as directed by the Commissioner.
- Reform of Commonwealth legislation to create a new cyberbullying offence or strengthen existing provisions of the Commonwealth Criminal Code which prohibit the use of a carriage service to harass or be menacing or offensive.

The strongest option for a new cyberbullying offense would give the Commissioner the power to issue infringement notices to take down material, cease conduct, or any other action the Commissioner thinks necessary.

Bullying is a serious problem, but it is a serious social problem. It is not a technological or legal problem. Remedies for bullying that target the medium in which bullying occurs or the legal framework will be ineffective. The only effective way to tackle bullying is through parents, guardians and schools.

If these proposals are pursued, parliament should not imagine that it has done anything to protect young people from being the victims of bullying.

In some circumstances – by encouraging bullying conduct onto sites harder to monitor, or discouraging young people from informing parents about their victimisation – it will be ineffective.

New legal remedies for cyberbullying offenses are excessive, in part duplicate existing law, and represent an unacceptable threat to freedom of speech.

About this submission

This submission seeks to contextualise the cyberbullying problem as an educational and social challenge, rather than a technological or legal one.

First, the submission strives to get conceptual clarity on cyberbullying. The discussion paper expends little energy trying to understand the problem it wants to solve. This submission argues that cyberbullying is not a unique and discrete form of conduct but merely traditional bullying with a

different medium. A proper understanding of cyberbullying as a form of traditional bullying affects what policy should be used to tackle this problem.

There is a great deal of research into bullying – the forms it takes, the harms it causes, and the most effective remedies. The discussion paper confuses the issues, misdiagnoses the problems, and as a consequence offers a policy proposal which would be ineffective at tackling the harm of cyberbullying.

Second, the submission surveys the substantial existing law available to remedy serious instances of cyberbullying. It is necessary to be clear about what sort of conduct the government is seeking to prohibit. The discussion paper cites, but seems to dismiss, the existence of Section 474.17 of the Commonwealth Criminal Code which provides exactly the restitution and protection against online harassment that the government is seeking. Furthermore, the submission argues that there are a large number of existing civil and criminal remedies which cover all forms of conduct that the discussion paper describes as cyberbullying.

Third, the submission argues that the power to take down content from social media sites is an excessive and unnecessary limitation on freedom of speech. A take-down power along the lines proposed would be disproportionate, would limit speech rather than confronting the underlying act of bullying, and would be unpredictable and unnecessarily coercive. This is particularly important given the importance of social networking for young people as a means for individual and social development.

Fourth, the submission briefly explores some of the existing institutional and technological tools by which young people can both empower themselves to prevent or mitigate bullying, and the existing programs offered by social networks to take-down serious abuse. An attempt to regulate large social networks could push social interactions towards smaller sites that neither have elaborate policies to deal with bullying, or are less easily monitored by parents and guardians.

Finally, this submission deals with some further objections to the government's proposal. A consolidation of anti-cyberbullying functions would reduce necessary experimentation in education programs. The Children's e-Safety Commissioner is bound to suffer mission creep as it is seen by governments and the public as a one-stop-shop for social media censorship. Finally, many of the Commissioner's proposed functions are already being provided by the private and university sector.

This submission addresses itself directly to the issue of cyberbullying among students and children. Unfortunately, popular discussion of cyberbullying often conflates a large number of different issues that require different analytical frames and require different policy responses. For instance, racial vilification on social media sites is a different issue to cyberbullying, which is addressed not towards groups but specific individuals. Likewise the Twitter 'trolls' debate, which saw a number of celebrities call for action on anonymous trolls who were criticising them, is also a starkly different issue, despite superficial similarities.

When the government considers the cyberbullying proposals, it needs to remain clear about what exactly it is trying to do, and what conduct it is trying to prevent.

The government's proposal confuses and misdiagnoses the 'cyberbullying' problem

From a social or policy standpoint, cyberbullying does not differ in any meaningful way from 'traditional' bullying. Cyberbullying is a neologism that confuses more than it clarifies. Parliament needs to understand that there is, in fact, no such thing as 'cyberbullying'. It does not describe a discrete and specific form of conduct. There is just bullying, on and offline.

A policy that tries to tackle cyberbullying as a discrete activity will both misdiagnose the essential problem with bullying and be consequently ineffective.

What do we mean by bullying? The Norwegian bullying prevention expert Dan Olweus provides a standard three part definition: it is a) intentionally aggressive behaviour, b) involves an imbalance of power between bully and victim, and c) is usually repeated over time.[1] Clearly such activity can occur in the online and offline space.

The discussion paper defines 'cyberbullying' as "any communication, with the intent to coerce, intimidate, harass or cause substantial emotional distress to a person, using electronic means to support severe, repeated and hostile behaviour". However, an understanding of the standard three part definition of bullying should show that the discussion paper's emphasis on the medium by which bullying occurs is misplaced.

Cyberbullying is bullying using information communications technologies. This includes the use of large social media sites like Facebook and Twitter, blogs and message boards, but also includes any other electronic communication, like text messages and emails. Bullying can also be done over landlines or mobile phones, as the Australian Mobile Telecommunications Association has pointed out.[2] Given the ubiquity of mobile phones, bullying by text or multimedia message is likely to be more significant a problem than bullying by social media.[3] Only the government's most extreme proposal (to create a civil enforcement regime for cyberbullying) would tackle non-social media cyberbullying, and this proposal has many concerning and dangerous features that lead us to reject that extreme option.

It has been well documented that students who experience bullying online also experience bullying offline. Raskauskas and Stoltz find a close correlation between victims of cyberbullying and traditional bullying. As they write, "The overlap between traditional and electronic bullying is important because it means that some students are facing bullying both at school and outside

[1] See http://www.violencepreventionworks.org/public/bullying.page.
[2] https://www.police.nsw.gov.au/__data/assets/pdf_file/0018/107028/bullying_with_mobile_phones.pdf.
[3] Aashish Srivastava, Roger Gamble, and Janice Boey, "Cyberbullying in Australia: Clarifying the Problem, Considering the Solutions," *International Journal of Children's Rights* 21(2013).

school."[4] Another study found that "hardly any students are exclusively cybervictims … most of the cybervictims [are] at the same time traditional victims."[5]

Determining the prevalence of bullying and cyberbullying is problematic for two reasons. The first is that researchers have not determined a consistent definition of what such activity would constitute. The second is the fluid nature of social cues prevalent among youth. Teenagers distinguish between (for instance) 'bullying', 'teasing', 'drama', and 'pranks'. The distinctions between these activities – which reflect young peoples' sense of the seriousness of the harm they are causing or being subject to – are not obvious to outsiders, and can vary according to age and social group.[6]

The paper relied upon by the Department of Communications cites a number of studies which find the experience of being cyberbullied is between 4.9% and 30% in a given Australian student population.[7] This is a substantial difference. Apart from definitional problems, further complexities are introduced by the fact that the bullying surveys are self-reported.

Despite the difficulties of measurement, there is evidence to suggest that cyberbullying is less prevalent than traditional bullying. A 2008 paper in the *Journal of Child Psychology and Psychiatry* found that "cyberbullying is substantially less frequent" than traditional bullying.[8]

Any harm caused by bullying is serious. Bullying can cause severe distress and emotional harm. Reducing bullying and the harm caused by bullying is an important and worthy goal.

However, there does not seem to be any clear evidence that harm from bullying has significantly increased as a result of the growth of social media. Death by suicide is the discussion paper's primary illustration of the extreme harm that can be caused by cyberbullying. The risk of triggering suicide is proposed to be one of the factors by which the e-Safety Commissioner would test harmful material.

Suicide is a real and tragic consequence of bullying.[9] The discussion paper cites several highly publicised incidents of suicide which (it suggests) were related to cyberbullying. However, these cited examples illustrate the co-occurrence of cyberbullying and traditional bullying, suggesting that a strategy to tackle only cyberbullying would not affect the underlying problem. The question before the government is not whether bullying can have tragic consequences, it is a) does the rise of digital communication change the significance of bullying in a policy-relevant way and b) can the government prevent the harm caused by cyberbullying?

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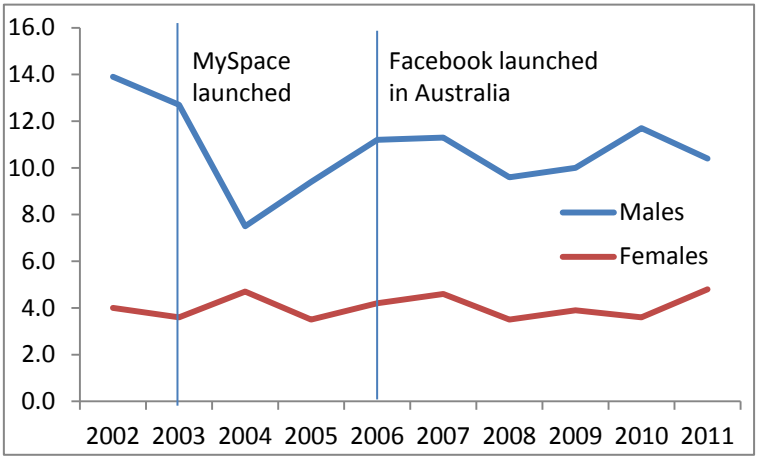
[4] Juliana Raskauskas and Ann D. Stoltz, "Involvement in Traditional and Electronic Bullying among Adolescents," *Developmental Psychology* 43, no. 3 (2007).
[5] Petra Gradinger, Dagmar Strohmeier, and Christiane Spiel, "Traditional Bullying and Cyberbullying: Identification of Risk Groups for Adjustment Problems," *Zeitschrift fur Psychologie / Journal of Psychology* 217, no. 4 (2009). See also Peter K. Smith et al., "Cyberbullying: Its Nature and Impact in Secondary School Pupils," *Journal of Child Psychology and Psychiatry* 49, no. 4 (2008); danah boyd, *It's Complicated : The Social Lives of Networked Teens*, text.
[6] *It's Complicated : The Social Lives of Networked Teens*.
[7] Srivastava, Gamble, and Boey, "Cyberbullying in Australia: Clarifying the Problem, Considering the Solutions".
[8] Smith et al., "Cyberbullying: Its Nature and Impact in Secondary School Pupils".
[9] Young Shin Kim and Bennett Leventhal, "Bullying and Suicide. A Review," *International Journal of Adolescent Medicine and Health* 20, no. 2 (2008).

We shall address the latter question further in the submission. As to the former, if cyberbullying does 'super-charge' traditional bullying – that is, make it more pervasive and harmful – then we would expect to see an increase in death by suicide among young people since the advent of social media. MySpace was launched in 2003, and Facebook was opened to public access in Australia in 2006. The graph on death rates below does not show any clear increase in death by suicide that we could attribute to the launch of these social networks.

Have social networks increased the harm from bullying?
Age-specific death rate (per 100,000) by suicide in Australia, ages 15-19



Source: ABS 3303.0 Causes of Death, Australia, 2011, IPA

The harm caused by bullying is real, and parliament's desire to reduce bullying and the harm it causes is irreproachable.

But the research evidence shows that the single most significant barrier to tackling bullying is the fact that most young people being bullied remain silent – that is, they do not tell teachers or parents. A large Western Australian study found that 38 per cent of children bullied did not speak to anybody else about their victimisation.[10] This is of great concern because adult intervention is the most effective mechanism for reducing both bullying and the harm from bullying. The government's proposed cyberbullying policies intervene only after the most important and necessary step has been made: telling adults about victimisation.

It is true that there is reason to believe that students are less likely to tell adults if they are being cyber-bullied than if they were being traditionally bullied.[11] However when considering this, it is important to recall the co-occurrence of both forms of bullying. Furthermore, one major reason that students do not notify adults is that they fear having their electronic equipment confiscated by parents, or being forced to remove themselves from social media. Once again, this suggests that educating parents and students about the harm and unacceptability of bullying is essential.

One final factor which could make cyberbullying worse than traditional bullying is the potential for online bullying to be a combination of public and anonymous. However, the government's proposal

[10] Joint Select Committee on Cyber-Safety, "High-Wire Act Cyber-Safety and the Young, Interim Report," (Parliament of Australia, 2011).
[11] Smith et al., "Cyberbullying: Its Nature and Impact in Secondary School Pupils."

will do little to mitigate the anonymity problem. Two of the major social network sites - Facebook and Google Plus – have a 'real name' policy, placing a limit on anonymous accounts. For those sites that do not have real name policies – like Twitter – even the strongest take-down power available to the e-Safety Commissioner would not be able to prevent the creation of new, anonymous accounts.

Anonymity is a necessary and vital part of online discourse, and any constraint on anonymity would be a drastic restriction on freedom of speech. Furthermore, the dangers of anonymity can be overstated. Anonymity does not correlate with more hostile expression online.[12] While it is important to recognise that anonymity affects perceptions of the harm of cyberbullying among young people, any policy to reduce anonymity would be deeply misguided, and damage the benefits individuals – including young people – get from online interaction.

[12] Kimberly Short, " Hiding Behind the Small Screen: Investigating Levels of Anonymity When Managing Online Hostile Commentary," (School of Communication: American University, 2012).

Australian law already provides many remedies for conduct described as cyberbullying

The internet is not a lawless wilderness. Activity which occurs online is subject to, and constrained by, territorial law. Expression online is subject to the very same limitations as offline speech. In recent years Australian courts have applied defamation and racial vilification laws on social media and blog posts, to name just two of the most prominent cases.[13]

To the extent that the internet poses challenges for existing law, those challenges concern determining in which jurisdiction a given act occurred, not whether it occurred in a jurisdiction at all.[14] Cross-jurisdictional issues are unlikely to be a significant factor in bullying prevention, as bullying occurs within school- and peer-group.

As a consequence, and with the argument presented above in mind, we should not be looking for remedies for bullying that are specific to the internet. If the existing remedies for bullying are insufficient then they are insufficient on and offline.

The popular definition of bullying captures a very large range of individual behaviour. As we have seen above, some of what is described popularly as 'bullying' is better described by participants as 'drama', 'pranks', or 'teasing'. A broad and unclear definition of bullying incorporated in Australian law risks criminalising or penalising conduct which is a natural part of the social and emotional development of young people. Interpersonal conflict is part of growing up. Such nuances are often missed in the debate by parents and popular media alike. Young people draw meaning and significance from social interactions differently to adults who observe from the outside. What may look like harassment on Facebook to an adult observer may be seen by young participants as something else entirely.[15] Trying to develop bureaucratic and legal mechanisms that impose order on this complex social world could be counterproductive and have unpredictable developmental consequences.

At the other extreme, much of what is described as bullying in the popular press constitutes serious criminal conduct. For example, stalking with intent to intimidate or cause fear of physical or mental harm, physical or sexual assault, threats to kill or harm, criminal defamation, blackmail, and victimisation, are often collapsed into the word 'bullying'. In these cases, there are substantial civil and criminal remedies at the state or Commonwealth level available to victims. In some circumstances the law provides for significant jail terms. The fact that some criminal conduct occurs on the internet makes no difference to the criminality of that conduct.

So while the government needs to be careful that it does not duplicate existing law, there is a greater risk: that it may unintentionally trivialise serious criminal conduct by describing such conduct as the lesser wrongdoing of bullying. It is for this reason that many social media sites' anti-bullying

[13] See *Eatock v Bolt* [2011] FCA 1103 and http://au.news.yahoo.com/nsw/a/21816220/student-ordered-to-pay-over-defamation/.
[14] For an extended exploration of these issues, see Adam D. Thierer and Clyde Wayne Crews, *Who Rules the Net? : Internet Governance and Jurisdiction* (Washington, D.C.: Cato Institute, 2003).
[15] This argument is made powerfully in boyd, *It's Complicated : The Social Lives of Networked Teens*.

recommendations emphasise the need for victims to contact police when necessary: an online death threat is not an example of bullying, but an unlawful threat to kill under state and federal law.

Online speech does differ from offline speech in one important way: there is already significant legislation prohibiting offensive or harassing expression over the internet with no equivalently broad legislation governing speech offline. Section 474.17 of the Commonwealth Criminal Code states it is an offence to use a carriage service to menace, harass or cause offence:

> 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.

Most, if not all, cases of cyberbullying are either more accurately described as 'drama', or are already criminal activity as described above, and therefore captured by s 474.17.

The discussion paper appears to implicitly accept the strength of s 474.17. However, it suggests that "the language of these provisions is difficult to understand … most people would not know what 'using a carriage service' means." Later the discussion paper suggests the "most people" who would not understand the language are specifically minors.

This is a shaky foundation to rest significant legislative change on. That legislation is written for the benefit of the legal community is not unique to cyberbullying. It is highly unlikely that any minors will be digging around in the Commonwealth Criminal Code for solutions to bullying. But we could say the same thing about the legislation that governs criminal activity that minors may be victims of: the strength of our laws against theft or assault is not measured by the accessibility of the legal language.

Simply put, if the essential policy problem is that not enough people understand legislation as written, then the obvious policy solution is to educate people about that existing legislation, not add new offences to the statute books.

The discussion paper raises a few further objections to the use of s 474.17, but these are even more dubious. It suggests that the existing provision is too broad, and that the maximum penalty is too large. This is hard to understand – the broad provision captures any conduct likely to be described as cyberbullying, and the courts are under no obligation to impose the maximum penalty.

The existence of s 474.17 ought to be the final word on the government's cyberbullying proposals. It is true that Institute of Public Affairs researchers have previously criticised s 474.17 and similar

provisions for being excessively expansive.[16] But the significance of this provision for the government's proposed changes is that legislation already exists, is recognised by the discussion paper to exist, is recognised to have been used successfully by prosecutors against bullying-type conduct, and is broad and powerful enough to cover a large amount of conduct. The criticisms of s 474.17 in the context of the cyberbullying debate are insubstantial and weak.

There are a number of civil and criminal remedies that cover conduct which can be described as cyberbullying and fall within the purview of conduct the government wants to target. Butler, Kift and Campbell provide a comprehensive overview of existing Australian law that covers cyberbullying activity. Their key point is that "[i]t is not difficult to reconceptualise cyber bullying in terms of criminal, tortious or vilifying behaviour."[17] A few are worth noting. In some circumstances bullying may constitute criminal defamation. In many more circumstances, civil defamation would capture a very large amount of cyberbullying. As they write,

> Where the cyber bullying consists of uploading words or images onto internet web sites, chat rooms, bulletin boards, blogs or wikis which humiliate, embarrass or otherwise cause distress to the target, the target may have an action for defamation.

Such activity would capture almost all cyberbullying. Other actions may be available as intentional infliction of mental harm, invasion of privacy, and perpetrator liability.

Australian law has developed over centuries in order to tackle a massive range of conduct, and is easily adaptable to the online sphere by the judiciary. In addition, there has been substantial development in the prevention of crimes like stalking in the past decade. There is no need for parliament to create new offenses that are covered by existing law.

There is a common misconception held by law enforcement and many in the public when it comes to the enforcement of existing law on digital communication: that the jurisdictional complexities of the medium obscure simple enforcement challenges. Regardless of whether a website is hosted in Australia or another country with starkly different laws to Australia, individuals who commit criminal acts in Australia are liable to Australian law. Section 474.17 of the Commonwealth Criminal Code applies to Australian internet users regardless of where the website they use is being hosted. There appears to be a widespread misconception however, even among law enforcement, that this is not the case, and that the international nature of communications networks mean that our domestic law is powerless.[18] Education would seem to be necessary to inform all involved of the conceptual significance of the digital sphere, and the applicability of terrestrial law to the internet.

It is to be expected that legal action is only taken in the most extreme cases. Bullying, as we have seen, is extremely common among young people. The last thing society wants is to be charging large numbers of students with criminal conduct.

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[16] James Paterson to *FreedomWatch*, 2012, http://freedomwatch.ipa.org.au/jail-for-being-immature-and-dumb/; Chris Berg to ibid., 2013, http://freedomwatch.ipa.org.au/freedom-of-speech-and-the-man-monis-case/.

[17] Desmond A. Butler, Sally M. Kift, and Marilyn A. Campbell, "Cyber Bullying in Schools and the Law : Is There an Effective Means of Addressing the Power Imbalance?," *eLaw Journal* 16, no. 1 (2010).

[18] For an illustration of this misconception, see Geordie Guy, "Submission to the Joint Select Committee on Cyber-Safety Inquiry," (House of Representatives: Parliament of Australia, 2011).

However, the sheer comprehensiveness of existing legal remedies for bullying and cyberbullying ought to be part of any education program as a disincentive to such conduct. Furthermore, its existence provides a tool by which parents, schools, and ultimately law enforcement, can convince bullies from ceasing their conduct. Even in the most extreme cases, a police caution will be sufficient to prevent future bullying conduct.

Finally, the political system and media needs to understand that these remedies exist. What does it tell children who are being victimised by bullies – or the bullies themselves – when parliament repeatedly claims that there are no remedies for cyberbullying?

The proposal is a serious threat to freedom of speech online

Freedom of speech is a fundamental liberty. It is the manifestation of our individual moral autonomy and underpins our democratic system of government.[19] Any limitation on freedom of speech needs to be tightly confined, in response to an urgent and pressing problem, and needs to target action, not expression. On these grounds the Children's e-Safety Commissioner fails. It is overly broad, will not address the bullying problem, and restrains expression rather than the underlying conduct.

The freedom of speech problems involved in the government's proposal are particularly disappointing because in opposition, the Coalition promised to pursue a freedom agenda to elevate 'traditional rights' such as freedom of speech and association to the top of the government's human rights goals.[20] The establishment of a Children's e-Safety Commissioner would be directly opposed to that agenda – the development of a new censorship power that can be applied to the most dynamic and popular forms of online communication.

The government proposes to make the test of what constitutes a cyberbullying incident to be "material targeted at and likely to cause harm to an Australian child." The Commissioner would take into account context and content, the age and characteristics of the child in question, and "the risk of triggering suicide of life-threatening mental health issues for the child." If the material passes these tests, the Commissioner will order that the material be taken down, and, if the extreme proposal to introduce a civil penalty regime is introduced, may issue an infringement notice to forbid such conduct occurring again.

As discussed above, bullying is harmful not because it constitutes individual offensive expressions but because it constitutes a sustained behaviour over time between to individuals with unequal real or perceived power with the intention to cause emotional harm. Many of the civil and criminal remedies available described above target such conduct.

Instead, the government proposes to censor expression according to the discretion of the Commissioner.

Rather than focusing on the elimination of the harmful conduct – that is, sustained harassment – the proposal simply censors individual acts of expression. The proposal is at the same time a blunt instrument – censorship is an extreme power for the government to wield – and unlikely to make a material difference to bullying. Faced against a genuine act of bullying sustained over time a specific take-down power such as the one outlined in the discussion paper would be entirely ineffective.

In the next section the submission outlines the existing policies and protocols whereby social media sites allow users to block other users, or report abuse for take-down or banning. These policies have been developed independently of government, in response to user demand, and are increasingly effective. What happens when the Commissioner decides some content constitutes cyberbullying

[19] For an extended argument on the right to freedom of speech, see Chris Berg, *In Defence of Freedom of Speech: From Ancient Greece to Andrew Bolt*, Monographs on Western Civilisation (Institute of Public Affairs; Mannkal Economic Education Foundation, 2012).
[20] Chris Merritt, "George Brandis to Reclaim Rights Agenda," *The Australian*, 30 August 2013.

but social media networks disagree? It is easy to see how a cooperative scheme can easily become coercive.

The distinction of what constitutes harmful material is highly ambiguous, not just from the perspective of policy analysts studying the government's proposals, but from the perspective of the young people themselves. The Commissioner will be instructed to take certain factors into account, but the young people participating in online activity will be unable to predict what speech might fall foul of these decisions. The power to censor always involves highly subjective and therefore arbitrary decisions. What is viewed as bullying by adults is not necessarily seen that way by young people. The opacity of young peoples' social interactions adds to these ambiguities.

The proposal also has significant rule of law issues. For example, the discussion paper seems to imply that the onus of proof will be reversed should an individual seek to appeal the Commissioner's decision:

> In cases of material which is potentially harmful or distressing to a child, the scheme should favour the interests of the child, rather than the person seeking to publish the material.

Freedom of speech on social media is particularly important for young people

The rise of social media networking sites in the last few decades has brought risks, but this is the case for any new environment in which individuals are free to communicate and socialise. The benefits of digital media for personal and social expression are dramatic. Technology has had a major liberating effect on personal expression for those who may not have had a voice in the traditional media.

This is as true – if not more true – for young people, who are now capable of engaging with (for instance) politicians, celebrities, authors, journalists, and musicians directly on social media. Less dramatically but no less significantly, young people have been able to use social networks to deepen and extend their interpersonal networks, build and create relationships, and form communities that previous generations could not have imagined. From an education standpoint, the major feature of social networks is not that they encourage technological skill development but that they encourage social development. Social networks are a powerful medium for self-expression and identity development.[21]

A recognition of these obvious yet underappreciated benefits of digital engagement should emphasise the very real risks of imposing statutory limits, controls, or censorship powers on the spaces young people use for personal development.

Punishing young people for cyberbullying offenses could have significant developmental consequences as well. Social interactions in young people are highly fluid and opaque. A bully in one social context can be a victim in another, and vice-versa. A very large number of students are bully-

[21] danah boyd, "Why Youth (Heart) Social Network Sites: The Role of Networked Publics in Teenage Social Life " in *Macarthur Foundation Series on Digital Learning – Youth, Identity, and Digital Media Volume* ed. David Buckingham (Cambridge, MA: MIT Press, 2007).

victims.[22] There are a large number of psychological and social factors for why that is the case. But for our purposes, institutionalising penalties – and encouraging their greater use – brings the risk of creating further harm.

[22] Melissa K. Holt, David Finkelhor, and Glenda Kaufman Kantor, "Hidden Forms of Victimization in Elementary Students Involved in Bullying," *School Psychology Review* 36, no. 3 (2007).

There are already many technological and institutional tools to mitigate cyberbullying

All major social media sites offer mechanisms and tools to deal with online harassment and bullying.

Facebook's 'Family Safety Centre' includes information on bullying and a graduated series of responses that include removing users from abusive tags, unfriending and blocking other Facebook users, and for abusive content, which specifically includes bullying, reporting it to Facebook, after which Facebook will take it down. The Facebook Community Standards include a prohibition on bullying and harassment that reads:

> Facebook does not tolerate bullying or harassment. We allow users to speak freely on matters and people of public interest, but take action on all reports of abusive behavior directed at private individuals. Repeatedly targeting other users with unwanted friend requests or messages is a form of harassment.

Twitter has a graduated system to deal with harassment. Users can unfollow accounts, block them to prevent them from sending tweets or reading a user's tweets. Private account settings also prevent unapproved users from reading tweets. Finally, Twitter has a service to report users who engage in targeted abuse or harassment. Users who have violated the Twitter terms of service – which includes a prohibition on targeted abuse – have their accounts deactivated.

Google Plus also has a safety centre with anti-bullying information for parents and teenagers. Users can block other users, remove others from their posts, and report others for violating Google Plus' Community Standards, which include restrictions on hate speech, impersonation and private information.

As we have seen, cyberbullying is not restricted to social media sites; indeed, cyberbullying may be more common off social media than on it. Self-reported instances of cyberbullying emphasise bullying by text message and prank calls. As a consequence, technology firms have developed tools to deal with such conduct. In 2013 Apple's iOS7 software for iPhone and iPad introduced a function where nominated phone numbers could be blocked from calling or messaging a user. Most phones running the Android operating system also offer a blocking function, and third party software is also available.

While these technological and institutional mechanisms are often dismissed in popular discussions about bullying, they are significant. Blocking, by itself, tackles much of the harm imposed by cyberbullying, and certainly more efficiently and effectively than a government imposed scheme. The empowerment of users to take control of their own experience – with the support of parents, guardians and, where appropriate, schools – is a necessary way to tackle unwanted interactions.

Furthermore, each of Facebook, Twitter, and Google Plus offer extensive resources on bullying. Parents need to work with children to understand the services available to them.

Finally, a number of major social network organisations, including Facebook, Google, Microsoft and Yahoo!7 have signed up to the Commonwealth Government's Cooperative Arrangement for

Complaints Handling on Social Networking Sites, which aims to improve avenues for complaint handling and the reporting of abusive content.

It is important to note that technological and institutional solutions to cyberbullying are being further developed over time. The government needs to ensure that technology firms and social media sites are free to experiment and develop new services and protections. Locking in a regulatory regime could stifle the development of such services. This is a serious concern considering the fluid and porous nature of online communication. New services are always developing and young people tend to be early adopters. Technological innovation and fashion are too fast paced for legislators or regulators to effectively keep up.

An official government scheme could also have the unintended consequence of providing a false sense of confidence that the cyberbullying problem has been dealt with. This is a form of regulatory complacency which encourages actors to reduce private risk management in response to regulatory expansion. Given the certainty that the government's policies will not be effective at reducing bullying, the regulatory complacency that the establishment of a Children's e-Safety commissioner could spark would be serious.

Pushing young people into less controlled and less transparent sites

The government intends to declare certain large social media sites as "participating" with the Children's e-Safety Commissioner. There is a significant risk that bringing these major sites under government control will simply drive bullying activity underground, as young people leave major sites like Facebook and Twitter for sites that they believe are less legally risky.

However, smaller, non-participating sites also tend to be less well established, are more forgiving of anonymity, and are more opaque from the perspective of parents and guardians.

Displacing bullying from the most popular - and therefore easiest for parents to monitor - sites like Facebook to sites which are newer, are harder to monitor, have less Australian presence and have less developed inbuilt privacy and e-safety systems will do little to reduce bullying victimisation.

Further comments

Anti-bullying program consolidation would be counterproductive

The Children's e-Safety Commissioner is proposed to consolidate existing anti-bullying programs into "a single organisation which takes the lead in relation to online safety for children, allowing for greater efficiency and addressing duplication and overlap" (p.6). Appendix A of the discussion paper details a large number of programs and resources administered by seven separate administrative agencies from the Department of Communications to the Australian Human Rights Commission.

First: it is important when assessing resources dedicated to anti-bullying that private sector initiatives are considered as well. All major social media sites have anti-bullying programs and resources. Furthermore, there are a large number of private sector anti-bullying initiatives available for schools and parents to use.

Second: program consolidation would not necessarily further the government's goals. Duplication and overlap offer advantages. There is no single, universally accepted and universally successful anti-bullying program. Given the fluid and personal nature of the bullying problem, it is unlikely one will ever be developed. Agencies and levels of government need the flexibility to experiment with new and competing education programs. Program consolidation would be counterproductive.

Children's e-Safety Commissioner is guaranteed to mission creep

The discussion paper grants a large number of powers and responsibilities to the proposed Children's e-Safety Commissioner. These are extensive as they are. However, it is the historical experience of previous bodies that they exceed or stretch their mandate, are provided with extra powers and responsibilities by future parliaments, and grow in stature and prominence. The Institute of Public Affairs has traced how other bodies have grown from modest beginnings to become bureaucratic behemoths.[23]

There is no reason to believe that the Children's e-Safety Commissioner will operate within the boundaries set by this parliament, nor any guarantee that its functions will not be extended in the future. Considering the substantial threat to freedom of speech represented by its proposed functions, the government should be worried that it is not creating a body that will become even more dangerous in the future. The only way to guarantee the Commissioner will not threaten free speech in years to come is to decline to establish it in this parliament.

The popular moral panic over 'trolls' illustrates how expansive a program that allows the government to censor social media could potentially become. Will government – this government or the next – be able to resist demands that trolls who are criticising celebrities, or politicians, be silenced? Once the government has taken responsibility for cleaning up social networks from bullies it is hard to see where the limits are.

[23] See Chris Berg, "The Biggest Vested Interest of All: How Government Lobbies to Restrict Individual Rights and Freedom " in *Occasional Paper* (2013).

The private and university sector is providing many functions of the Children's e-Safety Commissioner

It is the stated philosophical position of the Coalition government that "government should do for people what they can't do for themselves – and no more."[24] However, much of what the Commissioner is proposed to do replicates existing private and university activity. There is a large amount of research already being conducted on bullying and cyberbullying – it is not clear how a dedicated research fund will add to this research in a politically significant way. Schools across Australia have already been working on and investing in custom made or private sector anti-bullying programs that can be tailored to their needs. Reliable, research-informed advice on bullying prevention and mitigation is already widely available online. The Children's e-Safety Commissioner would not add materially to what is already available.

[24] Tony Abbott, "This Year's G20: Getting the Fundamentals Right" (World Economic Forum, Davos, Switzerland, 23 January 2014).

Conclusion: what to do about cyberbullying

Bullying is a very serious issue. It can cause real harm. The desire of the government to prevent bullying and mitigate the harm caused by bullying is admirable and worthy. However, the proposed Children's e-Safety Commissioner will do little to prevent bullying, and may in some circumstances extenuate the harm it causes.

So what can we do about cyberbullying? Ultimately cyberbullying is a variant of traditional bullying, and bullying is a social phenomenon. A consistent finding in the literature is that many children do not tell teachers or parents about being bullied. The most important intervention we can make on behalf of bullied children is to encourage them to speak to adults about how they are being victimised. Certainly being open about their experiences helps adults prevent some of the most tragic consequences of bullying – that is, self-harm or suicide. Adults are also capable of intervening to stop the bullying, or helping victims cope and understand that the experience of being bullied is a temporary one.

The education necessary for this is two way: parents, guardians and teachers need to be able to identify the signs of bullying in a child; and children to identify the differences between bullying and playful teasing.

As we have argued, the hardest and most important step in bullying prevention is the first one: encouraging children to talk to somebody about their experiences. Legal remedies are far down the risk-management priority scale.

New technology does present important challenges for parents and schools to educate themselves. Of course, digital literacy is not only – or even primarily – important for the prevention of cyberbullying: indeed, concerns about other cybersafety issues like privacy protection ought to be a key part of a modern education system and part of family discussions. As Berin Szoka & Adam Thierer write,

> Regrettably, we often fail to teach our children how to swim in the "new media" waters. Indeed, to extend the metaphor, it is as if we are generally adopting an approach that is more akin to just throwing kids in the deep end and waiting to see what happens. Educational initiatives are essential to rectifying this situation.[25]

While the Commonwealth and State governments can play some part in educating children about safety online, ultimately the most effective anti-bullying intervention will be from the ground up. The most effective way to protect children from dangers online is to educate them, supervise them, and encourage them to share their experiences and worries with the adults in their life.

[25] Adam D. Thierer and Berin Szoka, "Cyberbullying Legislation: Why Education Is Preferable to Regulation," in *Progress on Point* (The Progress and Freedom Foundation, 2009).

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