REGULATING CYBERBULLYING: A SOUTH AUSTRALIAN PERSPECTIVE

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Evidence based research informs us that cyberbullying is associated with a range of negative consequences. Moreover, findings from recent studies demonstrate that victims of cyberbullying experience even more severe mental health implications than victims of traditional bullying. Cyberbullying can affect adults and children alike and is manifest in various forms encompassing a broad range of behaviours. At present, there is no specific law outlawing the phenomenon of cyberbullying in Australia. Cyberbullying *per se* is not legally defined by law, nor prosecuted as such. Given the limited literature on the regulation of cyberbullying, this paper provides a South Australian perspective on the criminal laws capable of regulating instances of this potentially devastating form of online conduct. An analysis of how each of the identified existing criminal provisions may regulate the specific manifestations of cyberbullying demonstrates that the most serious forms are governed comprehensively, albeit in a piecemeal manner. Crucial to South Australia's arsenal of laws capable of regulating cyberbullying was the introduction of recent South Australian filming offences legislation. This legislation has closed a previously existing gap in the criminal law framework in relation to the regulation of 'happy slapping'.

I INTRODUCTION

Research into the nature, scope and negative consequences of cyberbullying indicates that this phenomenon is difficult to define and measure. The literature informs us that there are multiple manifestations (forms) of the conduct, that it can be experienced by children and adults alike, and that it can have a potentially devastating impact on those who are exposed to it. The criminal law

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has an important function in regulating serious instances of cyberbullying. To date, there is no specific cyberbullying law in Australia. Cyberbullying per se is not legally defined by, nor prosecuted, under Australian law. There are, however, a host of existing state and federal offences capable of encapsulating instances of cyberbullying, albeit in a piecemeal manner. Given that cyberbullying is an emergent phenomenon, the available literature on the regulation of this conduct in Australia is scant. This paper gives insight into the phenomenon and provides a survey of criminal laws applicable in South Australia, identifying their potential in regulating specific manifestations (forms) of cyberbullying. This overview includes a detailed analysis of the role of recently enacted South Australia 'filming offences' legislation (enacted March 2013) in relation to cyberbullying.

II CYBERBULLYING – A SNAPSHOT OF THE PHENOMENON

Cyberbullying has proven difficult to define. To date, a universal definition has not been agreed upon. However, the general consensus among scholars is that cyberbullying can be defined as intentional and aggressive online conduct intended to harm another who cannot easily defend him or herself.[1] The elements of aggression, intention, power imbalance and repetition are widely accepted as being crucial criteria of a cyberbullying definition.[2] The presence of these criteria delineates cyberbullying from various other forms of online conduct.[3] In a cyberbullying context, harm includes emotional harm which involves a broad range of negative emotions including annoyance, humiliation, short-term grief, fear, and anxiety, as well as

[1] Colette Langos, 'Cyberbullying: the challenge to define' (2012) 15(6) *Cyberpsychology, Behavior and Social Networking* 285; Peter K Smith et al, 'Cyberbullying: its nature and impact on secondary school pupils' (2008) 49(4) *Journal of Child Psychology and Psychiatry* 376.

[2] Ibid.

[3] For example, 'cyberjoking' and 'cyberteasing', may cause offence, annoyance or hurt a person's feelings, but do not require the mental state of intention.

more severe forms of harm in the form of protracted psychological injury and serious long-term psychological harm.[4]

Cyberbullying can be *direct* or *indirect*.[5] Direct cyberbullying occurs where the cyberbully directs the electronic communications to the victim only (as opposed to communications which are posted to publically accessible areas of cyberspace).[6] It occurs in the private online domain. Indirect cyberbullying occurs in instances where the electronic communication is not sent directly to the victim.[7] Instead, the cyberbully posts the communication to a publically accessible area of cyberspace. Public forums such as social media sites, publically accessible blogs and websites, and video sharing websites are obvious examples of platforms which fall within the public online domain. The concept of the public online domain extends to situations where there are multiple recipients of an electronic communication, given the lack of control over the material once it is sent to multiple parties.[8] The communication has the potential to spread exponentially given that any of the recipients could forward, save and repost the material at a later stage. The reach of the material is in this manner uncontained and lies outside the parameters of the private online domain.

There are an immensely broad range of behaviours the phenomenon encompasses. The various manifestations can be categorised into eight main forms:

> *Harassment* which involves repeatedly sending offensive messages to a target.[9]

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4 Colette Langos, *Cyberbullying, associated harm and the criminal law* (PhD Thesis, University of South Australia, 2013).

5 Langos, above n 1; Susan W Brenner and Megan Rehberg, "Kiddie Crime?' The Utility of Criminal Law in Controlling Cyberbullying' (2009) 8(1) *First Amendment Law Review* 1.

6 Ibid.

7 Ibid.

8 Langos, above n 1.

9 Nancy E Willard, *Cyberbullying and cyberthreats: responding to the challenge of online social aggression, threats and distress* (Research Press, 2007), 6.

Cyberstalking which involves intense harassment and denigration that includes threats or creates significant fear in the victim. Harassment becomes cyberstalking when a victim fears for their personal safety.[10]

Denigration may involve making a derogatory comment about the target. There are several manifestations of this conduct. It can occur using words or can involve the dissemination of a derogatory, sexual or non-sexual image.[11]

Happy slapping involves the filming of a physical assault on a victim and the subsequent distribution of the film to humiliate the victim publically.[12]

Exclusion involves a victim not being allowed to enter online 'areas' such as particular chat room discussion group by being purposely excluded by members of those online domains.[13]

Outing and trickery are tactics applied together. It involves a situation where a perpetrator manipulates the victim into disclosing information that the perpetrator then publicises in order to humiliate the victim.[14]

Impersonation or Masquerading involves the perpetrator pretending to be the victim and sending an offensive message that appears to come from the victim.[15]

Indirect threat is a form of cyberbullying which relates to cyberstalking in that it refers to an online communication of impending physical harm. Unlike cyberstalking, this form relates to a single threat of physical harm made indirectly in the public online domain.[16]

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10 Ibid 10.
11 Langos, above n 4, 55-60.
12 Stephanie Chan et al, 'Understanding 'happy slapping" (2012) 14(1) *International Journal of Police Science and Management* 42.
13 Willard, above n 9, 9-10.
14 Ibid 9.
15 Ibid 8.
16 Langos, above n 4, 64-66.

Cyberbullying can occur in multiple contexts and occurs amongst children and adults alike.[17] Lack of a uniform cyberbullying definition and standardised measurement techniques makes it difficult to determine accurately the rate at which cyberbullying is occurring. A 2009 study conducted by the Australian Communications and Media Authority reported an average of 11 percent of young people aged between 8 and 17 years had experienced cyberbullying at some point in time.[18] The study also revealed that cyberbullying increased with age. By the age of 16 to 17 years, nearly one in five youths (19 percent) reported having experienced cyberbullying.[19] Although most cyberbullying research conducted to date has examined cyberbullying between youths, recent studies examining cyberbullying between adults indicate that it transcends the 'youth only' context.[20]

Research examining the consequences of cyberbullying is only in its infancy. However, early findings demonstrate that cyberbullying is associated with a range of negative implications such as high levels of anxiety,[21] suicidal ideation,[22] depression,[23] and psychosomatic problems,[24] as well as behavioural problems, such as

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17 Langos, above n 4.

18 Australian Communications and Media Authority, *Click and connect: Young Australians' use of online social media 02: Quantitative research report* (Australian Communications and Media Authority, 2009).

19 Ibid.

20 See, eg, Carmel Privitera and Marilyn Anne Campbell, 'Cyberbullying: the new face of workplace bullying?' (2009) 12(4) *CyberPsychology and Behavior* 564; Andy Phippen, *Online Abuse of Professionals-Research Report from UK Safer Internet Centre* (UK Safer Internet Centre, 2011).

21 Jaana Juvonen and Elisheva F Gross, 'Extending the School Grounds? – Bullying Experiences in Cyberspace' (2008) 78(9) *Journal of School Health* 496.

22 Sameer Hinduja and Justin W Patchin, 'Bullying, cyberbullying and suicide' (2010) 14(3) *Archives of Suicide Research* 206.

23 Jing Wang, Tonja R Nansel and Ronald J Iannotti, 'Cyber and traditional bullying: differential association with depression' (2011) 48(4) *Journal of Adolescent Health* 415.

24 Andre Sourander et al, 'Psychosocial Risk Factors Associated with Cyberbullying Among Adolescents: A Population-Based Study' (2010) 67(7) *Archives of General Psychiatry* 720.

aggressive behaviours and excessive consumption of alcohol.[25] These consequences are similar to those reflected in traditional bullying research.[26] Recent studies have shown that victims of cyberbullying experience more severe mental health implications than victims of traditional bullying.[27] It has been hypothesised that factors including anonymity; the seemingly limitless technological reach in cyberspace; potential global audience; and potential permanency of online material (all factors unique to cyberbullying) intensify the harm experienced by victims.[28]

The wave of cyberbullying related suicides in Australia[29] continues to intensify community concern in regard to this potentially devastating form of online behaviour.[30] Effective management of the phenomenon requires a co-ordinated, multi-faceted response from both government and private industry. Non-criminal policy responses may include implementing those school-

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25 Ibid.

26 Ken Rigby, 'Consequences of bullying in schools' (2003) 48(9) *Canadian Journal of Psychiatry* 564.

27 Sonja Perren et al, 'Bullying in schools and cyberspace: Associations with depressive symptoms in Swiss and Australian adolescents' (2010) 4 *Child and Adolescent Psychiatry and Mental Health* 28; Marilyn A Campbell et al, 'Victims' perceptions of traditional and cyberbullying, and the psychological correlates of their victimisation' (2012) 17(3-4) *Emotional and Behavioural Difficulties* 389.

28 Langos, above n 4, 128-32.

29 See, eg, Emma Hope, 'Tragic family's crusade against bullying', *Mercury* (online), 19 September 2013, <http://www.themercury.com.au/news/tasmania/tragic-familys-crusade-against-bullying/story-fnj4f7k1-1226722411138>; Shannon Deery and Carly Crawford, 'Schoolgirl Sheniz Erkan takes own life after Facebook torment', *news.com.au* (online), 12 January 2012, <http://www.news.com.au/national/torment-too-much-for-teen/story-e6frfkvr-1226242267322>; Lauren Wilson and Stephen Lunn', 'Cyberbullying ends in tragedy', *The Australian* (online), 22 July 2009, <http://www.theaustralian.com.au/news/cyber-bullying-ends-in-tragedy/story-e6frg6n6-1225752976566>.

30 See, eg, Chloe's Law movement, part of which is an online community of 289,000 Australians advocating for heavier penalties for bullying and cyberbullying; federal Chloe's Law petition to the Australian senate (sponsored by Senator Eric Abetz 2013-2014); Tasmanian Chloe's Law petition to the Tasmanian House of Assembly (sponsored by Jacquie Pertrusma MP and Shadow Attorney-General Vanessa Goodwin MP 2013).

based intervention strategies which research identifies as being the most effective; ensuring restorative justice practices are implemented as part of school and workplace conflict resolution mechanisms for managing instances of cyberbullying and other relationship problems; and educating adults and children as to how to identify the conduct and respond when victimised. The criminal law also has a role in the management of cyberbullying. At present, there is no specific cyberbullying law in Australia. Cyberbullying is thus not legally defined by, nor prosecuted, under Australian law. A host of state and federal legislation is, however, capable of regulating instances of cyberbullying in a piecemeal manner where the conduct falls within the scope of existing offences.[31]

Given the limited literature on the regulation of cyberbullying, the following section provides policy makers with a South Australian perspective. The discussion below provides a survey of criminal laws applicable in South Australia and identifies their potential in regulating specific manifestations (forms) of cyberbullying.

III EXISTING CRIMINAL LAWS GOVERNING CYBERBULLYING IN SOUTH AUSTRALIA

A *Unlawful Threats*
Criminal Law Consolidation Act 1935 (SA) s 19

To obtain a conviction under this provision, the prosecution must prove beyond reasonable doubt that the accused issued a threat to kill

[31] Sally M Kift, Marilyn A Campbell and Desmond A Butler, 'Cyberbullying in social networking sites and blogs: legal issues for young people and schools' (2010) 20(2) *Journal of Law, Information and Science* 60. The Commonwealth has jurisdiction over 'postal, telephonic and other like services' as stipulated in Section 51(v) of the *Australian Constitution*. The *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act 2005* (Cth) introduced a range of new telecommunications offences which are contained in a Schedule to the *Criminal Code Act 1995* (Cth) – the *Criminal Code*.

or endanger the life of another;[32] or intentionally threatened to cause 'harm' to another. 'Harm' is defined in the *Criminal Law Consolidation Act 1935* (SA) ('*CLCA*') as 'physical or mental harm'.[33] Mental harm relates to 'psychological harm and does not include emotional reactions such as distress, grief, fear or anger unless they result in psychological harm'.[34] In practice, it is unlikely that a perpetrator intends to make a threat of psychological harm: for example, 'I am going to make you have a mental breakdown'. It is more likely that a threat to harm will be limited to instances where a perpetrator intends to threaten physical harm: for example, 'I'm going to beat you to pulp'. The two forms of cyberbullying which may typically involve a threat to kill or a threat to cause physical harm include 'cyberstalking' and 'indirect threat'.

The *CLCA* does not provide a definition of a 'threat'.[35] Olsson J in *Carter v R*[36] referred to the New Zealand Court of Appeal decision of *R v Meek*[37] where the making of a threat was held to 'involve a communication to a person himself or to other persons of an intention to do ill towards him; the declaration of a hostile intent or a menace'.[38] In *Carter v R*, Olsson J held that the notion of a threat includes a situation of obtaining a positive advantage by overcoming the will of a person by intimidation[39] and also includes a 'mere declaration of hostile intent, which is made and intended to be taken seriously and thus influences the mind of the recipient, by arousing in that person an apprehension that the threat is at least likely to be carried out'.[40]

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32 *Criminal Law Consolidation Act 1935* (SA) s 19(1).
33 Ibid s 21.
34 Ibid.
35 Ibid s 19(2).
36 (1994) 176 LSJS 112.
37 (1981) 1 NZLR 499.
38 (1981) 1 NZLR 499, 502-3.
39 (1994) 176 LSJS 112, 22.
40 Ibid.

The threat may be direct or indirect.[41] The threat does not need to be directed to the victim personally (directly).[42] It must be communicated by words, either written or spoken, or a combination of both words and conduct. The perpetrator must intend to kill or 'harm' a person. Lack of an immediate apprehension of harm is irrelevant where the threat was made for the purpose of intimidating or overcoming the will or influencing the conduct of the person to whom the threat was communicated.[43]

The fault elements of section 19 are intention or recklessness.[44] 'Recklessness' requires proof of conscious risk-taking[45] and is formulated as 'reckless indifference'. There is some uncertainty in the common law as to whether the anticipated result must have been 'likely' or 'probable' or merely 'possible'.[46] Although considered in relation to criminal damage, the South Australia Supreme Court in *Tziavrangos v Hayes*[47] considered that 'reckless indifference' required proof of a *possibility*.[48] 'Recklessness' with respect to consequences is determined subjectively;[49] it involves an 'assessment of the offender's conduct by reference to his own

41 *Criminal Law Consolidation Act 1935* (SA) s 19(3).
42 *Carter v R* (1994) 176 LSJS 112, 16.
43 *R v O* [1997] SASC 6213, (Bleby J).
44 *Criminal Law Consolidation Act 1935* (SA) ss 19(1)(b), (2)(b).
45 Lord Irving of Lairg, 'Intention, Recklessness and Moral Blameworthiness: Reflections on the English and Australian Law of Criminal Responsibility' (2001) 23(1) *Sydney Law Review* 5, 6.
46 *R v Boughey* (1986) 161 CLR 10; Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook, 3rd ed, 2005), 206-7; Ian Leader-Elliott, *The Commonwealth Criminal Code: A Guide for Practitioners* (Commonwealth Attorney-General's Department in association with the Australian Institute of Judicial Administration, 2002) 75; Model Criminal Code Officers Committee, 'Model Criminal Code Chapter 5 Fatal Offences Against the Person' (Discussion Paper, Model Criminal Code Officers Committee, 1998).
47 [1991] SASC 2819.
48 [1991] SASC 2819. This case considered the *Criminal Law Consolidation Act* 1953 (SA) s 85(3) in relation to 'damaging property of another'.
49 *Vallance v R* (1961) 108 CLR 56; *Pemble v R* (1971) 124 CLR 107; *R v Boughey* (1986) 161 CLR 10. The South Australian Supreme Court was clear in *Tziavrangos v Hayes* (1991) 55 SASR 416 that 'reckless indifference' required proof of the accused's knowledge of the risk (subjective concept).

capabilities'.[50] In accordance with *Tziavrangos*, words or conduct communicated in a moment of spontaneous frustration, or anger, or communicated as a mere joke (where the accused did not mean to arouse a fear that the threat will be carried out), may be encapsulated under section 19 where a possible risk, as to whether the words or conduct would arouse such a fear, exists or will exist.[51]

It is not necessary that a fear actually be aroused, although if it is, that may assist in determining whether a threat was issued, and may have some bearing on the proof of the intention of the accused.[52] In establishing either of the fault elements, the court must be convinced that the accused was not merely 'sounding off' or 'unburdening himself' or 'venting his spleen' but that the words/conduct were intended to be taken seriously.[53] Factors such as the context in which the conduct or words were written or spoken,[54] the form of words used,[55] evidence heard by the court (accused, victim, witnesses) and the accused's subsequent behaviour[56] are critical in drawing such an inference. The threat must be issued without lawful excuse.[57]

1 *Section 19 in the Cyberbullying Context*

Section 19(3) expressly states that a threat can be made either 'directly or indirectly', communicated by 'words or conduct', allowing the provision to operate in the cyber context alongside the physical context envisaged upon its initial drafting. In relation to cyberbullying, it is possible that a threat is issued in either the private online domain (where the threat is communicated to the victim directly), or the public online domain (where the threat is

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50 Lord Irving of Lairg, above n 45, 16.

51 [1991] SASC 2819. The Model Criminal Code is clear on the meaning of 'recklessness' as per s 5.4(1) of the Code. The Code stipulates that 'recklessness' requires proof of a 'substantial' risk in contradistinction to a 'probable', 'likely' or 'possible' risk. This definition of 'recklessness' provides for a much greater appreciation of risk.

52 *R v O* [1997] SASC 6213, (Bleby J).

53 *Carter v R (1994)* 176 LSJS 112, [25]; *R v Thompson* [2007] SADC 109, [63].

54 *Carter v R (1994)* 176 LSJS 112, [24]; *R v Thompson* [2007] SADC 109, [63].

55 *Carter v R (1994)* 176 LSJS 112, [24]; *R v Thompson* [2007] SADC 109, [63].

56 *R v Thompson* [2007] SADC 109, [63].

57 *Criminal Law Consolidation Act 1935* (SA) ss 19(1)(a), (2)(a).

communicated indirectly). Written words, imagery and sound are primary methods of communication when using information and communication technologies ('ICTs'). A broad interpretation of 'conduct' is likely to include sound and images communicated by such means. It is likely that the elements of intention, aggression, and power imbalance (elements of cyberbullying) will be established in instances relating to threats of impending harm, given the nature of a threat.

In light of the requirements of the offence and the characteristics of each of the various manifestations of cyberbullying, section 19 may apply to some instances of 'cyberstalking' which occur in either the direct (when the electronic communications sent by the perpetrator are directed at the victim only), or indirect context (the electronic communications occur in publically accessible areas of cyberspace, for example, on blogs, websites etc.). Section 19 could also potentially regulate an instance of an 'indirect threat' where a threat to cause another physical harm is made via, for example, a publically accessible website or social media webpage. The prosecution must prove that the perpetrator intended to arouse a fear that the threat will be or is likely to be carried out; or prove the perpetrator's reckless indifference as to whether such a fear is aroused.

Whilst capable of regulating some cases of 'cyberstalking' and 'indirect threat', a large portion of cyberbullying falls outside the scope of this provision. The forms of cyberbullying not governed by section 19 are likely to include, 'happy slapping', 'denigration' (by any means), 'harassment', 'exclusion', 'masquerading' or 'impersonation', and 'outing' and 'trickery'. These forms of cyberbullying do not typically involve the making of a threat to kill or cause 'harm' as defined in section 21 of the *CLCA*.

B *Assault*
Criminal Law Consolidation Act 1935 (SA) s 20

At common law, an assault is any act committed intentionally or recklessly which puts another person in fear of immediate and unlawful violence (formerly referred to under the common law as 'common assault'), encompassing situations where a person causes force to be applied to the body or clothing of another (formerly referred to under the common law as 'battery').[58] The common law offences of 'common assault' and 'battery', respectively, were codified into statute in South Australia in 2006.[59] Section 20 of the *CLCA* encompasses instances involving both the threat of force and the use of force. In the cyber context, section 20(1)(c) is the subsection most applicable to instances of cyberbullying, given the nature of the online environment.

1 *Section 20(1)(c) in the Cyberbullying Context*

Section 20(1)(c) requires the prosecution to prove beyond reasonable doubt that the accused made a threat by words or conduct to apply force to the victim. Written words, imagery and sound are primary methods of communication in the cyber context. A broad interpretation as to what constitutes 'conduct' for the purposes of section 20 is likely to include sounds and images communicated via *ICTs*. A threat to apply force can be made either directly or indirectly. Thus, the threat to apply force can be expressed to a person other than the victim. In a cyberbullying context, it is possible that a threat to apply force is made either in the private online domain, where threats to apply force are communicated to the victim directly ('cyberstalking'), or a single threat may be issued in the public online domain, where the threat is communicated indirectly ('indirect threat').

Section 20(1)(c) does not require the prosecution to prove an intention to harm. The prosecution need only demonstrate that there

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[58] *R v Lynsey* [1995] 3 All ER 654; Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook, 3rd ed, 2010), 563.

[59] *Criminal Law Consolidation Act 1935* (SA) s 20.

were reasonable grounds for the victim to believe that the person making the threat was in a position to carry out the threat;[60] or that it was reasonable for the victim to believe that there was a real possibility that the person would carry out the threat.[61] The test of 'reasonableness' places a limit on the scope of subjectivity inherent in an inquiry into a victim's state of mind at the time the threat was issued. The context, content and form of the communication may assist in making a determination as to whether or not reasonable grounds existed. At common law, generally, a threat of future violence will not constitute assault.[62] This was held to be the case in *Knight v R*[63] where the New South Wales Court of Appeal held that threats made over the telephone from an appreciable distance away meant that the recipients of the call were in no immediate danger of violence.[64] In that instance, the threat to apply force did not constitute assault.[65] Section 20(1)(c)(ii) abolishes the common law requirement that there must have been apprehension of immediate bodily harm. Therefore, the fact that a threat to apply force is issued from 'behind a screen' is no impediment to a successful prosecution for assault in the cyber context.

'Cyberstalking' is the form of direct cyberbullying and 'indirect threat' is the form of indirect cyberbullying which may be regulated under this provision where it is reasonable for the victim to believe that the threat to apply force will be, or is very likely to be, carried out. The forms of cyberbullying that lie outside the scope of the provision are likely to include, 'happy slapping', 'denigration' (by any means), 'harassment', 'exclusion', 'masquerading' or 'impersonation', and 'outing and 'trickery'. These forms of cyberbullying do not typically involve the making of a threat to apply force.

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60 Ibid s 20(c)(i).
61 Ibid s 20(c)(ii).
62 (1988) 35 ACrim R 314.
63 Ibid.
64 Ibid 317, (Lee J).
65 *Knight v R* (1988) 35 ACrim R 314, 317 (Lee J).

C *Unlawful Stalking*
Criminal Law Consolidation Act 1935 (SA) s 19AA

Stalking has been described by the Model Criminal Code Officers Committee of the (former) Standing Committee of Attorneys-General as 'intentionally harassing, threatening, and/or intimidating a person by following them about, sending them articles, telephoning them, waiting outside their house and the like'.[66] Anti-stalking legislation was enacted in South Australia in 1994[67] and requires two separate occasions of stalking; plus either an intention to cause serious physical or mental harm or an intention to cause a serious apprehension or fear.

Original anti-stalking legislation did not make specific reference to the use of electronic forms of communication to engage in stalking. With technological developments expanding the 'playing field' of a stalker dramatically (giving a stalker the opportunity to stalk from a distance, or conceal their identity), the majority of Australian states and territories have now included acts occurring via electronic communications in their stalking definitions.[68] In South Australia, existing legislation was amended in 2001 to ensure that 'stalking online is equivalent to stalking offline and [is] treated as such'.[69] In section 19AA(1)(a), sub-sections (iva) and (ivb) were inserted by the *Statutes Amendment (Stalking) Act* in 2001 to accommodate instances of stalking facilitated via *ICTs* often referred to as 'cyberstalking'. The meaning of 'cyberstalking' in this context is largely synonymous with 'cyberstalking' as understood in the cyberbullying paradigm set out above ('cyberstalking' being a form

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66 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, 'Model Criminal Code Chapter 5 Fatal Offences Against the Person (Report, Model Criminal Code Officers Committee, 1998), 51. The Standing Committee of Attorneys-General is now known as the Standing Council on Law and Justice.

67 *Criminal Law Consolidation (Stalking) Amendment Act 1994* (SA).

68 *Crimes Act 1900* (ACT) s 35(2); *Criminal Code 1899* (QLD) s 359B; *Criminal Code Act* (NT) s 189(1); *Criminal Law Consolidation Act 1935* (SA) s 19AA(1); *Criminal Code Act 1924* (Tas) s 192(1*); Crimes Act 1958* (Vic) s 21A(2).

69 South Australia, *Parliamentary Debates*, House of Assembly, 25 October 2001, (Michael Atkinson).

of cyberbullying). Conduct termed 'cyberstalking' is potentially seriously harmful, maleficent online conduct.

1 *Intention to Harm or an Intention to Cause Fear*

Cyberbullying requires a perpetrator to intend to harm a victim. 'Harm', in this context, includes emotional harm (such as distress, grief, fear or anger). The offence of 'stalking' requires a perpetrator to intend to cause a victim serious physical or mental harm; *or* intend to cause the victim serious apprehension or fear. Although not defined for the purposes of this offence, 'serious mental harm' is unlikely to include emotional harm – reactions such as distress, grief, fear or anger unless they result in more serious psychological harm. In relation to the statutory offence of 'stalking', the meaning of 'harm' is likely to be significantly more narrow than the meaning of 'harm' in the cyberbullying context, given the requirement that the harm must be 'serious'. The context and content of words and images used will assist in making a determination as to whether a perpetrator intended to cause a victim 'serious physical or mental harm'. The only forms of cyberbullying likely to meet the required level of intended harm ('serious harm') are 'cyberstalking' or 'indirect threat' (where the conduct occurs on more than one occasion).

Section 19AA(1)(b)(ii) of the Act encompasses instances of stalking where the perpetrator intends to cause serious apprehension or fear. The fact that the legislation makes express reference to 'serious apprehension' or 'fear' may lead to an interpretation that 'fear' is to mean something more than 'apprehension'. This point was commented on by the Model Criminal Code Officers Committee.[70] The Model Criminal Code thus provides guidance on the matter in that 'fear' is defined to include 'apprehension'.[71]

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[70] Model Criminal Code Officers Committee, above n 66, 37.

[71] *Model Criminal Code 2009* (Cth) s 5.1.8.

Importantly, 'fear' has been construed broadly by the South Australian Supreme Court in the case of *Police v Gabrielsen.*[72] This case was heard on appeal from the South Australian Magistrates Court. The victim had been the target of several offensive emails and SMS text messages sent by the accused. Emails and SMS text messages were sent directly from the perpetrator to the victim. From the facts it is clear that the perpetrator intended to cause the victim fear for his reputation and fear of public embarrassment, anxiety and distress. David J commented that 'there are a number of ways in which an accused might intend to arouse serious apprehension or fear'.[73] He emphasised that 'fear' may also be construed as fear for one's reputation and fear of being publicly embarrassed.[74] Accordingly, the Supreme Court held that an intention to cause serious apprehension or fear of embarrassment is sufficient to constitute stalking under section 19AA.[75]

This decision is highly significant in relation to cyberbullying. Extending the meaning of 'fear' to include fear of public embarrassment and fear for one's reputation, potentially captures a wide range of cyberbullying forms. Fear for one's personal safety and wellbeing, fear of public embarrassment and fear for one's reputation are fears a victim of cyberbullying may realistically experience, given the public nature of the online material, wide audience and permanency of the material.

'Harassment', 'cyberstalking', 'denigration' and 'indirect threat' (where the threats occur on more than one occasion) could potentially be governed by this offence. In *Police v Gabrielsen*, the form of cyberbullying that the perpetrator engaged in constitutes 'harassment'. The conduct occurred more than once and an intention to cause the victim a serious apprehension or fear of public embarrassment was established.

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72 [2011] SASC 39.
73 *Police v Gabrielsen* [2011] SASC 39, [14].
74 Ibid.
75 Ibid [16]: The matter was remitted to the Magistrates Court for retrial.

Importantly, the offence specifies that the conduct must occur on more than one occasion. Thus, a perpetrator must direct an electronic communication at a victim more than once to fall within the scope of the offence. Single instances of indirect cyberbullying will not be captured. For example, one act of 'denigration' by words intending to cause the victim fear for his or her professional reputation will not be captured under section 19AA, two or more such posts, may constitute the offence of 'stalking' as defined in the *CLCA*.

The extension of the meaning of 'fear' (to include fear for one's reputation; fear of being publicly embarrassed as well as fear for one's personal safety) in South Australia for the purposes of 'stalking' does not govern instances of cyberbullying in a comprehensive manner. However, this broad interpretation increases the scope of cyberbullying which could potentially be governed by section 19AA.

D *Criminal Defamation*
Criminal Law Consolidation Act 1935 (SA) s 257

Criminal defamation is available at common law in all Australian states and territories. In South Australia, it is an indictable criminal offence to engage in criminal defamation.[76] The physical elements of the offence include: publishing false (or being recklessly indifferent as to whether the matter is false) defamatory matter concerning another living person who can be identified.[77] The first issue to determine is whether the matter is capable of bearing a defamatory meaning.[78] The second relates to whether the matter does bare a defamatory meaning.[79] These questions are answered by applying the common law.

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[76] *Criminal Law Consolidation Act 1935* (SA) s 257.
[77] Ibid s 257(1)(a).
[78] Ibid s 257(3)(a).
[79] Ibid s 257(3)(b).

The fault element of the offence is a key distinction between civil and criminal defamation actions. The fault element in relation to section 257 is intention or recklessness: intending to cause serious harm; or being recklessly indifferent as to whether the publication of the defamatory matter will cause serious harm.[80] 'Serious harm' is not limited to serious physical or mental harm. It is not defined for the purposes of the provision and may include intention to cause serious harm to, for example, a business reputation, a moral reputation, or a professional reputation. This widens the range of conduct which could potentially be captured under the offence. 'Recklessness' is formulated as 'reckless indifference', which requires proof of conscious risk-taking. An accused is recklessly indifferent as to whether the publication of the defamatory matter will cause serious harm where (subjectively determined) a possible risk that the publication will cause serious harm exists.[81] In establishing the fault element, a court will contextualise the conduct.

The publication of the matter must be made without lawful excuse.[82] An accused may rely on the defences listed in the *Defamation Act 2005* (SA).[83] Prior to commencing a criminal defamation prosecution, the prosecution must have the consent of the Director of Public Prosecutions[84] to ensure that no-one is harassed by a frivolous prosecution, and so that the prosecution is sanctioned by a responsible person.[85]

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80 Ibid s 257(1)(b).

81 'Reckless indifference' or 'recklessness' are not defined in the *Criminal Law Consolidation Act 1935* (SA). There are no reported South Australian cases which assist in construing the standard of risk associated with 'reckless indifference'. 'Reckless indifference' considered in relation to criminal damage relates to a possible risk. The Model Criminal Code equates 'recklessness' with a 'substantial risk' as per s 5.4(1) of the Code.

82 *Criminal Law Consolidation Act 1935* (SA) s 257(1).

83 *Defamation Act 2005* (SA) ss 22-31.

84 *Criminal Law Consolidation Act 1935* (SA) s 257(4).

85 *R v Ratcliff, Stanfield & Utting* [2007] SASC 297, [44].

1 *Criminal Defamation in Relation to Cyberbullying*

'Publishing' is easily proven in the cyber context in relation to indirect cyberbullying. 'Matter' includes a vast array of content communicated through a multitude of media including via electronic communications and therefore covers all communications involved in indirect cyberbullying. False defamatory matter may be disseminated to a potentially global audience with the great ease, and without expense, via *ICTs*.

There are several forms of indirect cyberbullying which could potentially be governed by section 257, including 'denigration', 'harassment', and 'masquerading' or 'impersonation', where a perpetrator intends to cause serious harm. The intent behind these forms of cyberbullying is to humiliate or embarrass a victim publicly. The effect may be to cause serious harm to the victim's business reputation, their moral reputation, or their professional reputation.

A court would have regard to the nature (content, form of words used) of the matter published. Little precedent case law exists to assist,[86] although a recent South Australian case heard in the Kadina Magistrates Court in 2009 provides some guidance.[87] The Kadina Magistrates Court decision also involved indirect cyberbullying. The accused, a South Australian teenager, set up a Facebook webpage titled 'Piss off Mark Stuart', which contained photographs identifying the victim, a police officer, and his children. Numerous incorrect, offensive and grossly defamatory statements about the police officer were posted by the accused to the Facebook webpage.[88] Some posts 'encouraged acts of violence and aggression' towards the victim.[89] On the 16th November 2009, the 19 year old pleaded guilty to the charge of criminal defamation, making this the first conviction of its kind in Australia.[90]

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86 *R v Ratcliff, Stanfield & Utting* [2007] SASC 297; *Tropeano v Lauro* [2010] SADC 113.

87 This case is unreported.

88 Nigel Hunt, 'Man banned from home town after online police slurs-Facebook criminal', *Sunday Mail* (Adelaide), 22 November 2009, 72.

89 Ibid 72.

90 The accused was convicted and placed on a two year good behaviour bond.

A portion of cyberbullying is, however, not captured by section 257. Forms of direct cyberbullying are not governed as material is not communicated to a third party – in such instances only the perpetrator and victim are privy to the electronic communication. It is unlikely that 'exclusion' or 'indirect threats' are governed, given that 'exclusion' (of itself) does not involve publishing defamatory matter and an 'indirect threat' involves a threat of impending physical harm. A large portion of cyberbullying that involves humiliation by revealing unpleasant truths lies outside the scope of section 257.

Successful prosecutions for criminal defamation have been rare in Australia.[91] However, the new avenues for publication in cyberspace could potentially facilitate a 'new wave' of criminal defamation cases given the ease with which users of *ICTs* can spread material calculated to harm the reputation of another.

E *Indecent Filming*
Summary Offences Act 1953 (SA) s 26D

Section 26D regulates 'denigration' by way of a sexual or intimate image in a comprehensive manner.[92] The offence prohibits 'indecent filming',[93] defined as the filming of:

> (a) another person in a state of undress in circumstances in which a reasonable person would expect to be afforded privacy; or
>
> (b) another person engaged in a private act in circumstances in which a reasonable person would expect to be afforded privacy; or

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[91] Kift, Campbell and Butler, above n 31; Elizabeth Johnson, 'Criminal defamation: poisonous words and punishment' (2000) *Law Institute Journal* 66, 67.

[92] Section 26D was inserted by way of the *Summary Offences (Filming Amendments) Act 2013* (SA). Previously this offence was provided for in s23AA *Summary Offences Act 1953* (SA). (The content of the offence remains unaltered).

[93] *Summary Offences Act 1953* (SA) s 26D.

> (c) another person's private region in circumstances in which a reasonable person would not expect that the person's private region might be filmed.[94]

The filming component of 'denigration' by way of a sexual image may amount to conduct which would meet the requirements of (b) and (c) of the above statutory definition of 'indecent filming'. Consent to 'indecent filming' is a valid defence,[95] as is filming which occurs by a 'licensed investigating agent'.[96]

Section 26D importantly prohibits the distribution of a moving or still picture obtained by 'indecent filming'.[97] Therefore, the provision also regulates those instances of 'denigration' by sexual image where a film or image depicting the subject engaging in a sexual act or depicting the subject's genital region is taken with consent but is *subsequently distributed* without consent. Consent to distribution of the image is a valid defence,[98] as is not knowing that the indecent filming occurred without the subject's consent[99] and filming which occurs by a licensed investigating agent.[100]

Apparent consent will be ineffective in relation to either 'indecent filming' or distribution of a moving or still image obtained by 'indecent filming', where the subject of the filming is a person under 16 years of age, or is mentally incapacitated;[101] or where filming was obtained by duress or deception.[102] This is a crucial provision which protects the mentally impaired and the very young, given that such individuals may not be able to fully appreciate the implications of giving their consent. Equally, individuals who are deceived into consenting to 'indecent filming', or distribution of such film, ought

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94 Ibid s 26A.
95 Ibid s 26D(2)(a).
96 Ibid s 26D(2)(b).
97 Ibid s 26D(3).
98 Ibid s 26D(4)(a).
99 Ibid s 26D(4)(b).
100 Ibid s 26D(4)(c).
101 Ibid s 26E(1)(a).
102 Ibid s 26E(1)(b).

to be afforded such protection, given that consent is not free or voluntary.

Instances of 'happy slapping' which involve filming a victim in a state of undress in circumstances in which a reasonable person would expect to be afforded privacy, such as using a toilet, engaging in a sexual act, or which depict a victim's 'private region' (defined as 'the person's genital or anal region when covered by underwear or bare)[103] will be captured by the offence of 'indecent filming'. However, there is significant portion of 'happy slapping' which lies outside the scope of the provision as 'happy slapping' does not necessarily involve an 'indecent' aspect. Victims may be physically humiliated or degraded in a multitude of other ways. Humiliating or degrading film depicting the physical assault component of 'happy slapping' is not governed under section 26D.

F *Misuse of Telecommunications Criminal Code (Cth) s 474.17*

The Commonwealth too, has a role to play in governing cyberbullying. Section 51(v) of the *Australian Constitution* stipulates that the Commonwealth may legislate in relation to 'postal, telegraphic, telephonic, and other like services'.[104] The Internet and mobile phone services (the dominant *ICTs* through which cyberbullying is facilitated) thus fall under Commonwealth jurisdiction. A range of telecommunication offences are provided for in Division 474 of the Schedule of the *Criminal Code Act 1995* (Cth) – the *Criminal Code*.

The provision which has the greatest relevance in a cyberbullying context is section 474.17. A perpetrator commits this federal indictable offence if he or she uses a carriage service (this includes 'making a telephone call, sending a message by facsimile, sending an SMS message, or sending a message by email or some other means

[103] Ibid s 26A.
[104] *Australian Constitution* s 51(v).

of using the Internet')[105] to menace, harass or cause offence to a victim (based on an objective standard).

A brief consideration of the terms 'menace', 'harass', and 'offence' is required. These terms are not defined in the legislation. Thus, their meaning should be construed in accordance with their ordinary meanings. The *Macquarie Dictionary*[106] defines 'menace' to mean 'a threat'; 'harass' to mean 'torment'; and 'offence' to mean 'feeling of resentful displeasure'. It is possible to distinguish between all three meanings. Recent decisions of the Supreme Court of Queensland support this.[107] Using a carriage service in a manner which a reasonable person would regard as menacing would require a communication of a threatening nature, as opposed to a communication which seeks to torment (harass), or a communication which causes mere resentful displeasure (offence). Using a carriage service in an offensive manner is given the broadest meaning. This meaning is tempered by the application of an objective standard: what a reasonable person would regard as being offensive.

1 *Section 474.17(a) Criminal Code (Cth)*

'Use of a carriage service' is a physical element of the offence. The physical element is the *conduct* of using a carriage service. 'Use' is not defined in the legislation. Using a carriage service would encapsulate instances where a person (the sender of the electronic communication) communicates with another person via a carriage service, for example, sending a person an email to their email account, sending an SMS text message, or posting a message or image to a person's Facebook page. It also includes instances where

[105] Explanatory Memorandum, *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No 2) 2004* (Cth), s 474.15.

[106] *Macquarie Dictionary*, (Macquarie Dictionary Publishers, 5th ed, 2009).

[107] *Crowther v Sala* [2007] QCA 133: The accused was convicted on the charge of using a carriage service to menace; *R v Ogawa* [2009] QCA 307: The accused was charged and convicted of using a carriage service to harass; *R v Hampson* [2011] QCA 132: The accused was convicted of charges relating to using a carriage service to cause offence.

a person does not communicate with any particular person. No victim is required under this provision.

Conduct can only be a physical element if it is voluntary.[108] Voluntariness is a 'fundamental requirement of criminal responsibility'.[109] Proof of conduct requires proof adduced by the prosecution that an accused acted in a 'voluntary' manner. Conduct is 'voluntary' if it is a product of the will of the person whose conduct it is.[110] Voluntariness will, in the large majority of cases, not be an issue in most conceivable situations (for example, instances of cyberbullying) where conduct is necessarily voluntary.[111]

2 *Section 474.17(b) Criminal Code (Cth)*

The element which relates to how the carriage service was used requires the accused to act in a voluntary manner and may include (but is in no way limited to): the uttering of words (or remaining silent) on a telephone, the posting of messages on the Internet, the sending of messages by email, and the sending of messages (SMS) using a mobile phone. The words uttered or messages posted or sent via a carriage service must be such that a reasonable person would regard them as being, in all the circumstances, menacing, harassing or offensive. The subjective intent of the accused is not relevant.[112] It is also not a requirement of the offence that the victim (recipient) actually be menaced, harassed or offended as a result of the conduct, only that a reasonable person would regard the use of the carriage service, given all the circumstances, as menacing, harassing or offensive. Conduct is measured by an objective standard. As stated in the *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No 2) 2004* (Cth) Explanatory Memorandum, reference to an objective standard 'allows community standards and common sense to be imported into a decision on

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[108] *Criminal Code* (Cth) s 4.2(1).
[109] Leader-Elliott, above n 46, 33.
[110] *Criminal Code* (Cth) s 4.2(2).
[111] See *Crowther v Sala* [2007] QCA 133; *R v Ogawa* [2009] QCA 307; *R v Hampson* [2011] QCA 132.
[112] *Crowther v Sala* [2007] QCA 133, [25].

whether the conduct is in fact menacing, harassing or offensive'.[113] This element of the offence is a physical element. The physical element can be characterised as a circumstance in which the alleged conduct occurs.[114]

The corresponding fault element is not provided in the legislation. Section 5.6 specifies that if the law creating the offence does not specify a fault element for a physical element that consists of a circumstance, recklessness is the fault element for that physical element.[115] Thus, to prove the fault element required in section 474.17(b), the prosecution must prove that the accused was 'aware' of a 'substantial risk'. Before considering what may constitute 'substantial risk', it must be established that there was *a risk*: the legislation requires that the prosecution show that there was a risk that a reasonable person would regard the use of a carriage service, in all the circumstances, to be menacing, harassing or offensive. Particular attention was given to the definition of 'recklessness' in the drafting of the Model Criminal Code. A 'substantial risk' lies in contradistinction to 'probable' or 'possible' risk.[116] It would appear to involve awareness of a higher degree of risk than a risk which is 'probable' or merely 'possible'.[117] However, no further specific criteria are provided in the legislation. Whether or not a risk is 'substantial' must be assessed in relation to the accused's state of mind and the particular circumstances. To establish section 5.4(1)(a), the prosecution must prove that the accused was 'aware' of a substantial risk that the conduct could be sensibly understood as being menacing, harassing or offensive. Awareness relates to foresight, in this case, of a substantial risk. The *Commonwealth Criminal Code: A guide for practitioners* explains, 'it is not enough to establish that the risk was obvious, well known or within the

[113] Explanatory Memorandum, *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No 2) 2004* (Cth), s 474.17 (1).

[114] *Crowther v Sala* [2007] QCA 133, [43].

[115] *Criminal Code* (Cth), s 5.6(2).

[116] Leader-Elliott, above n 46.

[117] Model Criminal Code Officers Committee, above n 66, 55: The committee has chosen the phrase 'substantial risk' so as to avoid speculation about mathematical chances.

defendant's past experience'.[118] The requirement of conscious awareness of risk that the conduct complained of could be viewed as being menacing, harassing or offensive, imports a degree of subjectivity into the provision and would appear to protect individuals of low cognitive functioning who lack the capacity to be aware of the risk, let alone a 'substantial risk', from criminal liability. It should be noted that the 'eccentric' or simply 'unreasonable' perpetrator may also be incapable of forming the required awareness of risk.[119] No criminal liability will be found where the prosecution cannot prove that the accused had a conscious awareness of substantial risk of a particular circumstance. The requirement of awareness of risk thus excludes a range of cyberbullies from criminal liability.

To establish recklessness, section 5.4(1)(b) requires the prosecution to prove the taking of a substantial risk, and furthermore that the taking of the risk was unjustified. Whether taking the risk was unjustified will require the jury to make 'a moral or value judgement concerning the accused's advertent disregard of the risk'.[120] Claims that a risk was justified will be rare.[121] The social utility involved in taking the substantial risk may justify the taking of the risk.[122]

Analysis of the mechanical operation of the provision illuminates its complexities. Particular attention must be given to the application of default fault elements for each part of the provision. The maximum penalty which can be imposed for a breach of this offence is three years imprisonment.

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[118] Leader-Elliott, above n 46, 75; See also *Hann v DPP* (2004) 144 A Crim R 534, [26] (Gray J).

[119] Ian Leader-Elliott, 'The Australian *Criminal Code*: Time for some changes' (2009) 37 *Federal Law Review* 205, 231.

[120] *R v Saengsai-Or* [2004] NSWCCA 108, [70] (Bell J).

[121] Leader-Elliott, above, n 46, 77.

[122] Stephen Odgers, *Principles of Federal Criminal Law* (Lawbook, 2nd ed, 2010), 61.

3 *Section 474.17 in the Cyberbullying Context*

Section 474.17 of the *Criminal Code* does not require conduct to occur more than once and does not require proof of an intention to harm, proof of harm, or require a victim.[123] It is highly applicable to instances of both direct and indirect cyberbullying. All cyberbullying involves 'use of a carriage service' to facilitate the online conduct. Cyberbullying instances may involve 'menacing' conduct. This could occur in instances of 'cyberstalking' or 'indirect threat' where a perpetrator threatens a victim with physical harm. This may also occur in instances where a victim is threatened with harm to a business or personal reputation as may occur in the forms of 'harassment', 'denigration', and 'masquerading' or 'impersonation'. Cyberbullying instances could involve 'harassing' conduct. This could occur in instances of 'harassment', or 'denigration'. Additionally, cyberbullying could also involve 'offensive' conduct. It is conceivable that every form of cyberbullying could be considered 'offensive'. However, only those instances of cyberbullying that a reasonable person would consider to be menacing, harassing, or offensive, fall within the scope of the offence. Thus, it is likely that short-term 'exclusion' and isolated instances of 'denigration' would not be regulated by section 474.17. On the other hand, instances of 'denigration', 'masquerading' or 'impersonation', 'outing' and 'trickery', 'exclusion' or 'happy slapping' could plausibly be governed by this provision.

Even though the reach of the provision is wide and most forms of cyberbullying could be governed by this provision, the Commonwealth will not necessarily prosecute each instance. There are a multitude of factors which Commonwealth prosecutors take into account in making a decision to prosecute.[124] In instances where both state and Commonwealth legislation governs aspects of the alleged conduct, it is often a matter of who 'gets there first' that will

[123] The reach of the provision is thus not limited to regulating instances of cyberbullying (cyberbullying necessarily requires an intention to harm and a victim). Section 474.17 of the *Criminal Code* may regulate a broad range of generally aggressive online conduct.

[124] See, eg, Office of the Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the making of decisions in the prosecution process* (Attorney-General's Department), 5-9.

determine whether the matter is handled by the state or the Commonwealth. State police are, generally speaking, more accessible to the general public. Thus, where a matter can be prosecuted under both state and Commonwealth legislation, more times than not, a matter will be pursued by state police under state legislation. Also of note is the fact that the majority of perpetrators (cyberbullies) are known to the victim (and most do not conceal their identity).[125] It is thus arguably more practical and efficient to investigate instances of cyberbullying and prosecute under state legislation, as the majority of instances are likely to occur between individuals in the same social setting. Where no state legislation governs the alleged conduct, the Commonwealth is most likely to prosecute where a Commonwealth interest is at stake (for example, where the victim is a Commonwealth employee) or in cases where the alleged conduct is of a serious nature.[126]

G *Narrow 'Filming Offences' Legislation*

Legislation creating summary 'filming offences' was enacted in South Australia by way of the *Summary Offences (Filming Offences) Amendment Act 2013* (SA).[127] The Act amends Part 5A of the *Summary Offences Act 1953* (SA).[128] The main objective of the Act is to prohibit the pictorial humiliation of a subject though the misuse of film or images. The Act makes no express reference to particular forms of cyberbullying which are criminalised by means of the legislation. The term 'cyberbullying' is also not referred to in a general manner. The Act is narrower than general misuse of telecommunications legislation, yet not as specific as a statute focused on 'cyberbullying' per se.

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[125] Robert Slonje and Peter K Smith, 'Cyberbullying: Another main type of bullying?' (2008) 49 *Scandinavian Journal of Psychology* 147.

[126] Office of the Director of Public Prosecutions, above n 124.

[127] *Summary Offences (Filming Offences) Amendment Act* 2013 (SA): This received assent on 14 March 2013.

[128] Provisions include: s 26A Interpretation, s 26B Humiliating or degrading filming, s 26C Distribution of invasive images, s 26D Indecent filming, s 26E General provisions. Section 26D: the offence of 'indecent filming' would remain largely the same in terms of content, but would be subject to minor drafting changes. The existing s 23AA would be repealed and the offence would be inserted as s 26D.

Importantly, the new legislation broadens the type of conduct which is prohibited from being filmed and distributed without a victim's consent, capturing wider conduct deemed to be 'humiliating or degrading'. It therefore, more comprehensively criminalises 'happy slapping' by prohibiting a wider range of conduct from being filmed and subsequently posted to the Internet (or otherwise distributed by any other means) to humiliate a victim publically. The following discussion examines the operation of the new legislation.

IV OPERATION OF THE NEW OFFENCES

A *Section 26B – Humiliating or Degrading Filming Section 26B(1)*

Section 26B(1) prohibits humiliating or degrading filming. Where A gives free and voluntary consent to be subjected to a humiliating or degrading act and the filming of the act, B cannot be charged – there is no offence under this provision. Where B films A being subjected to or being compelled to engage in a humiliating or degrading act and A does not consent to filming, B may be charged under section 26B(1). Filming includes moving or still images taken by any means.[129]

However, B has a valid defence where B did not knowingly film the images the subject of the offence.[130] B may submit that the filming took place accidently whilst B was filming something completely different. For example, B may submit that he or she was filming the aquatic wildlife near a river and inadvertently filmed A being subjected to the humiliating and degrading act near the bridge at the river's edge. Inadvertent filming will not constitute an offence. Likewise, B has a defence if B reasonably believes that A consented to the filming.[131] What was reasonable for B to believe at the time of the offence will be up to the court to determine based on the

[129] *Summary Offences Act 1953* (SA) s 26A.
[130] Ibid s 26B(4)(c).
[131] Ibid s 26B(4)(d).

particular facts of the case. Additionally, where the conduct was captured for a legitimate public purpose (in the public interest), filming will not constitute an offence under the provision.[132] Filming that 'aims to expose abuses, a film of police brutality, or film of degrading conditions in a detention centre' are instances where a court is likely to consider the filming to have occurred for a legitimate public purpose.[133] In taking into account whether filming occurred in the public interest, a court may have regard to a range of factors including: whether the conduct occurred for the purpose of educating or informing the public;[134] was connected to law enforcement or public safety;[135] or was for a medical, legal or scientific purpose.[136] The maximum penalty for committing the offence under section 26(1) is one year imprisonment.

It should be noted that there appears to be a 'curious' gap in the legislation. Where A consents to being subjected to a humiliating or degrading act and filming of the act, B cannot be charged under section 26(1) – filming does not constitute 'humiliating or degrading' filming. It follows that it is not an offence under section 26(2) to distribute those images, even if A does not consent to the distribution of those images and that distribution is done with the intention to humiliate A publicly, as the images were not obtained by 'humiliating or degrading' filming. This is a troubling gap in relation to cyberbullying. Suppose a couple (A and B) who are in a romantic relationship enjoy engaging in and filming sexual activity a reasonable person would consider, ordinarily, to be 'humiliating or degrading' (both A and B consent to the activity). Assume that this relationship ends and A posts the images of the sexual acts to the Internet with the intention to humiliate B publicly (revenge is the motive). A and B do not commit an offence against section 26(1) as they consented to acts and the filming. The activity is thus not 'humiliating or degrading' for the purposes of the Act. It follows that distribution of those images taken are not caught under section 26(2),

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[132] Ibid s 26B(4)(e).
[133] South Australia, *Parliamentary Debates*, Legislative Assembly, 17 October 2012, 3251 (John Rau, Attorney-General).
[134] *Summary Offences Act 1953* (SA) s 26B(6)(a).
[135] Ibid s 26B(6)(b).
[136] Ibid s 26B(6)(c).

notwithstanding the fact that A clearly engages in cyberbullying B (the specific form of cyberbullying is 'denigration' by use of sexual or intimate image(s)). A cannot be prosecuted under the legislation for distributing the images without consent. This gap is not apparent in relation to the offence of 'indecent filming'.[137] The distribution of films of indecent sexual acts is prohibited regardless of A's consent to the filming of the acts.[138]

The filming legislation does offer an alternative avenue for prosecuting A's conduct, A could potentially be charged under section 26C – distribution of 'invasive' images (which will be discussed shortly). However, images of a demeaning, but not 'invasive' nature, are not captured under the 'filming offences' code (even though the images have been distributed without consent to humiliate the victim publicly). Law makers ought to consider amending the legislation to eliminate this gap in the 'filming offences' code.

B *Section 26B(2)*

Section 26B(2) prohibits the distribution of a moving or still image (obtained by humiliating or degrading filming) without the subject's consent. B may have a valid defence where B can demonstrate that distribution of the image was inadvertent (B did not intentionally distribute the image).[139] Inadvertent distribution may occur in a similar manner to inadvertent filming, for example where the distributer is not aware that a victim of a humiliating or degrading act is captured in the image. Alternatively, B may have a valid defence where B can prove he or she was not reckless with respect to the risk that the image would be distributed.[140] Recklessness involves conscious risk-taking. Where there was a possible risk that the image would be distributed, B cannot rely on this defence. Distribution of the image is not prohibited where distribution occurs for a legitimate

[137] Ibid s 26D.
[138] Ibid s 23AA(3).
[139] Ibid s 26B(5)(c).
[140] Ibid s 26B(5)(c).

public purpose.[141] The maximum penalty for this offence is one year imprisonment.

C *Section 26B(3)*

The Act also makes it an offence for a bystander to 'take part' in the humiliating or degrading treatment of the victim where the bystander either films the conduct, or distributes images of the conduct as per section 26B(3).[142] 'Taking part' in a humiliating or degrading act captures the conduct of a person who subjects a victim, or compels a victim, to engage in a humiliating or degrading act to which the victim does not consent, as well as capturing the conduct of bystanders who encourage, support or assist another person to engage in the humiliating and degrading act.[143] The legislation does not capture situations such as 'being drunk or stealing from a shop, even if the taking and distribution of the film is very embarrassing';[144] these are situations where the person acts alone, the person is not being subjected to or forced to act in that manner. This provision provides for situations where 'a group of people act in concert';[145] such is usually the nature of 'happy slapping'. A more severe penalty of a maximum of two years imprisonment accompanies this offence.

The legislation makes express provision that a 'humiliating or degrading act' does not include an act that reasonable adult members of the community would consider to cause 'only minor or moderate embarrassment'.[146] As the Second Reading Speech indicates, 'an act is not humiliating or degrading just because the person subjected to it feels humiliated or degraded. … This law does not seek to protect the

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[141] Ibid s 26B(5)(d).
[142] Ibid s 26B(3)(a)(b).
[143] Ibid s 26B(8)(a)(b).
[144] South Australia, *Parliamentary Debates*, Legislative Assembly, 17 October 2012, 3251 (John Rau, Attorney-General).
[145] South Australia, *Parliamentary Debates*, Legislative Assembly, 17 October 2012, 3251 (John Rau, Attorney-General).
[146] *Summary Offences Act 1953* (SA) s 26A.

over-sensitive'.[147] The distinction between what is considered 'moderate embarrassment' and what is considered 'humiliating and degrading' is a standard to be determined on a case by case basis. It is an objective standard by reason of the fact that this line will be drawn upon assessment of the conduct as viewed from the perspective of the reasonable person.

The same defences which operate in relation to section 26B(1) apply where a person has both engaged in the humiliating and degrading treatment of a victim and also filmed the conduct.[148] Defences include: inadvertent filming of the conduct;[149] having reasonable belief the victim consented to the filming;[150] and that the filming took place for a legitimate public purpose.[151] In the same way, the defences which operate in relation to section 26B(2) operate where a person is charged with engaging in humiliating and degrading treatment of a victim and distributing still or moving images obtained by the humiliating and degrading filming.[152] Defences include: the person did not intentionally or recklessly distribute the image;[153] and distribution was for a legitimate public purpose.[154]

This provision extends the type of conduct which is prohibited from being filmed and distributed without a victim's consent. It captures conduct of a non-sexual nature and is not limited to conduct which depicts a subject in a state of undress, using a toilet, or a subject's private areas. It captures wider conduct deemed to be humiliating or degrading. It therefore more comprehensively criminalises 'happy slapping'.

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147 South Australia, *Parliamentary Debates*, Legislative Assembly, 17 October 2012, 3251 (John Rau, Attorney-General).
148 *Summary Offences Act 1953* (SA) s 26B(4)(b).
149 Ibid s 26B(4)(c).
150 Ibid s 26B(4)(d).
151 Ibid s 26B(4)(e).
152 Ibid s 26B(5)(b).
153 Ibid s 26B(5)(c).
154 Ibid s 26B(5)(d).

D *Section 26C – Distribution of Invasive Image*

This provision does not capture any further conduct associated with 'denigration' by way of a sexual (a person engaging in a sexual act) or intimate (depicting a person's genital or anal region, or using a toilet) image. The offence of 'indecent filming' already criminalises this form of cyberbullying.[155]

An image prohibited under section 26C is termed an 'invasive image'. Such an image is defined as a moving or still image of a person engaged in a sexual act, or using a toilet, or an image depicting a person's bare genital or anal region.[156] In a similar manner, 'indecent filming' legislation prohibits the distribution of an image of a person in a state of undress in circumstances in which a reasonable person would expect to be afforded privacy, engaging in a sexual act, or using the toilet, or exposing a person's genital or anal region.[157] Where an image, which fits the description of an 'invasive image'[158] or the definition of an image obtained by 'indecent filming',[159] is distributed without the subject's consent, the subject is a victim of cyberbullying, specifically, 'denigration' by way of a sexual or intimate image. The perpetrator may be charged under either provision. The only significant difference lies in relation to the penalties each respective offence carries. Where a perpetrator is charged under the 'indecent filming' provision, the perpetrator faces harsher penalties where the subject of the image was aged under 18 years, the maximum penalty being $20,000 or imprisonment for four years. Alternatively, where a perpetrator is charged under the 'distribution of invasive image' provision, the maximum penalty is $10,000 or two years imprisonment with no harsher penalty imposed where the subject of the image is aged less than 18 years.[160]

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[155] Ibid s 26D.
[156] Ibid s 26A.
[157] Ibid s 26D: The definition of 'indecent filming' is slightly broader in scope given that the definition captures images of a person in a state of undress in circumstances in which a reasonable person would be expected privacy.
[158] Ibid s 26A.
[159] Ibid s 26D.
[160] Where the subject of the image is under the age of 17, the images could be regarded as child pornography.

As foreshadowed earlier, importantly, this section regulates non-consensual distribution of film or images of an 'invasive' nature which are not captured by section 26B(1) (where A and B consented to acts and filming of acts, it is not 'humiliating or degrading' filming for the purposes of section 26B(1)).

E *Section 26D – the New Provision for 'Indecent Filming'*

The application of the existing 'indecent filming' provision in the cyberbullying context was discussed earlier. The new 'filming offences' provision entails slight drafting changes to the offence of 'indecent filming'. The content of the offence, however, remains unaltered. As stated, it is highly applicable in the cyberbullying context and is capable of regulating 'denigration' by way of a sexual or intimate image in a comprehensive manner, effectively criminalising this form of cyberbullying in South Australia.

F *Section 26E – Apparent Consent*

Importantly, section 26E makes express provision that, for the purposes of Part 5A, apparent consent will not be effective consent when given by a person under 16 years of age, or where the person is mentally incapacitated, or where consent is obtained by duress or deception.[161] This provision protects the very young and the mentally impaired from 'unforeseen' harm (unforeseen on account of their level of maturity or inability to appreciate the consequences of their actions) which may occur subsequent to giving consent. However, the Act does not preclude young people aged over 16 years from giving voluntary consent so as to, for example, 'fit in' with their peers. This leaves a portion of young people vulnerable to potential harm (caused by public humiliation) as a result of the filming and subsequent distribution of film or image – some young people being unable to appreciate the risk of harm (for example, permanency and potential global reach of the material) at the time of giving consent.

[161] *Summary Offences Act 1953* (SA) s 26E(1)(a)(b).

This novel legislative code governing filming offences broadens the type of conduct which is prohibited from being filmed and distributed without a victim's consent, capturing conduct deemed to be 'humiliating or degrading'. It therefore, more comprehensively, criminalises 'happy slapping'.

IV CONCLUSION

Researchers, policy makers and society as a whole face numerous challenges in relation to understanding and managing cyberbullying. This paper provides a South Australian perspective on the criminal laws capable of regulating instances of cyberbullying. An analysis of how each of the identified existing criminal provisions may regulate the specific manifestations of cyberbullying demonstrates that the most serious forms are governed comprehensively, albeit in a piecemeal manner. Crucial to South Australia's arsenal of laws capable of regulating cyberbullying was the introduction of recent South Australian filming offences legislation. This legislation has closed a previously existing gap in the criminal law framework in relation to the regulation of 'happy slapping'. Given the limited literature on the regulation of cyberbullying, this overview provides South Australian law reformers with a useful analysis of the current South Australian situation. Overall, this survey of existing offences indicates that South Australia is well equipped with a host of criminal laws capable of regulating the most serious forms of cyberbullying. Table 1 (see below) summarises the relevant existing criminal offences and the specific manifestations of cyberbullying each provision could encapsulate.

Table 1: Summary of relevant existing criminal offences.

Existing Criminal Laws applicable in SA	**Prohibited Behaviour**	**Forms of cyberbullying which may be encapsulated**
Criminal Law Consolidation Act 1935 (SA) s 19	Unlawful threats	• 'cyberstalking' • 'indirect threat'
Criminal Law Consolidation Act 1935 (SA) s 20.	Assault (by words or conduct)	• 'cyberstalking' • 'indirect threat'
Criminal Law Consolidation Act 1935 (SA) s 19AA	Unlawful stalking Offensive conduct or language	• 'harassment' • 'cyberstalking' • 'denigration' • 'indirect threat'
Criminal Law Consolidation Act 1935 (SA) s 257	Criminal defamation	• 'denigration' • 'harassment' • 'masquerading or impersonation'
Summary Offences Act 1935 (SA) s 23AA	Indecent filming	• 'denigration' (by way of a sexual image) • 'happy slapping'
Criminal Code (Cth) s 474.17	Misuse of telecommunications	• all forms other than 'exclusion'
Summary Offences(Filming Offences) Amendment Act 2013 (SA)	Filming offences	• 'happy slapping'