

Legal responses to cyber bullying and sexting in South Africa

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Introduction

Children living in the early 21st-century are exposed to new-age technologies, various social networking sites, unlimited access to the internet and chat rooms, and a choice of mobile phone communications. This has significantly changed the way in which children communicate with each other, and about each other. It has also drastically altered the type and content of the information they share with each other concerning both themselves and their peers, as well as the way in which they express themselves in their communication.

The advances in technology, the different mediums of communication and the general changes in communication patterns have resulted in unacceptable and undesirable communication behaviour (or misbehaviour) among children through the use of these technologies.

The perceived distance and accompanying feelings of anonymity created by the various electronic communication methods have contributed to the development and occurrence of some of this misbehaviour.

Cyber bullying and sexting are two relatively new phenomena that have emerged along with children's often unlimited and unmonitored access and use of electronic communication technology. The technology used and the type of misbehaviour are unfamiliar to adults, which has made it difficult for parents to prevent and deal with the phenomena. Even the legislature and law enforcement officials appear to be

unprepared and not fully equipped to deal with these new developments in a balanced and effective manner.

A child is defined in the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) as a person under the age of 18 years.¹ As soon as a person reaches the age of 18 years he or she is regarded as an adult and is treated as such in the criminal justice system. Legislation does not make special provision for young persons (18–25-year-olds).

This paper explores cyber bullying and sexting in South Africa. It focuses on the responses to the new trends in undesirable communication behaviour within the context of the existing legislative frameworks and legal remedies available in South Africa. It also identifies some of the gaps and risks in the legal responses to children involved in these activities, and offers some recommendations in an attempt to minimise the gaps and accompanying risks to children.

What are cyber bullying and sexting?

The internet, and to some extent mobile phones, create a 'virtual' world. Children grow up spending a lot of time in this virtual world, where there is no personal contact with others – only messages and images. This virtual world makes it easier for them (and adults) to lose their inhibitions and to act in ways and say things they would not ordinarily do or say in personal, face-to-face interactions.



CENTRE
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CJCP Issue Paper
No. 10

August 2011



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The virtual world creates a sense of anonymity and distance. This can result in feelings of disconnect, which contribute to the occurrence of cyber bullying and sexting among adults and children. Cyber bullying is rampant in this virtual world, where perpetrators may lose sight of the fact that they are causing harm to a 'real' person, or where their intentions for engaging in this misbehaviour may be different from the actual harm caused to their victims.

Cyber bullying

There are various definitions of cyber bullying, most of which include acts involving bullying and harassment through the use of electronic devices or technology.² There are also various ways in which cyber bullying is carried out. Burton and Mutongwizo³ highlight the following methods:

- Text messages
- Picture/video clips (via mobile phone cameras)
- Mobile phone calls
- E-mail
- Chat rooms
- Instant messages
- Websites and blogs
- Social networking sites (such as Facebook, Twitter)
- Internet gaming.

Burton and Mutongwizo⁴ have identified various types of cyber bullying, including the following:

- *Harassment.* Harassment involves frequently sending a cruel or threatening message to a person's e-mail account or mobile phone. It is usually persistent and repeated and is directed to a specific person. It may cause alarm, annoyance or substantial emotional stress to the receiver. The South African Law Reform Commission distinguishes between direct and indirect online harassment. Direct harassment includes threats, bullying or intimidating electronic messages sent directly to the victim. Indirect harassment includes spreading rumours about the victim on internet discussion forums, subscribing the victim to unwanted online services and posting

information about the victim on online dating or sex services.⁵

- *Denigration.* Denigration involves sending or posting malicious gossip or rumours about a person to damage his or her reputation or friendships. It also includes posting or sending digitally altered photographs of someone to others, particularly pictures that portray the victim in a sexualised or harmful way.
- *Impersonation or identity theft.* This occurs when someone breaks into someone else's e-mail or social networking account and poses as that person, sending messages or other information or pictures online in a bid to damage the victim's reputation and friendships, or to get the victim into trouble or danger.
- *Outing.* Outing involves sharing someone's secrets or embarrassing information or images online with people whom the information was never intended to be shared. In some instances deception is used to trick someone into revealing their secrets or embarrassing information, and these are then shared online with others.
- *Cyber stalking.* Like traditional stalking, cyber stalking involves threats of harm or intimidation through repeated online harassment and threats.
- *Happy slapping.* Happy slapping involves incidents where people walk up to someone and slap them, while another captures the violence using a mobile phone camera.

Sexting

Sexting – 'texting' and 'sex' – involves the sending of nude or semi-nude photos or videos and/or sexually suggestive messages via mobile phone texting or instant messaging.⁶

Another definition of sexting focuses on the involvement of children in sexting. It emphasises that the sexually explicit texts or nude or partially nude images of minors are sent to other minors, and that these images



may in some instances be classified as child pornography.⁷

There are three main scenarios in which sexting occurs:⁸

- Exchanges of images solely between two romantic partners.
- Exchanges between romantic partners that are then shared with others outside the relationship.
- Exchanges where at least one person would like to start a romantic relationship.

It may be argued that people (including children) have the right to privacy and to express themselves freely, and that they therefore have the right to take and send nude or semi-nude photos or videos and/or sexually suggestive messages to others via mobile phone texting or instant messaging. Furthermore, taking and keeping nude or semi-nude photos or videos of oneself for personal use is not illegal per se.

But the problem with sending these types of photos or messages is that the sender loses control over what happens to the photos or messages once the 'send' button has been pressed. Chances are that these photos or messages will end up online, and will exist forever in cyber space. Once the photo or message is in cyber space, the sender is not able to retrieve or delete it. Another concern is that compromising photos or videos of a child may fall into the hands of a paedophile and may be used for illegal purposes, such as images to groom other children.

Another unintended consequence of sexting between children, which is specifically applicable to children, is that some of these photos, videos or messages of children may be regarded as child pornography. Sending or sharing them may therefore constitute a contravention of legislation prohibiting the possession, distribution, creation or production of child pornography. This may result in children being prosecuted on very serious charges, with serious consequences, for something they do not necessarily regard as wrong or illegal.

The relationship between sexting and cyber bullying

There is a definite relationship between sexting and cyber bullying. The connection becomes clear in instances where, for example, images sent voluntarily to romantic partners are used to avenge a broken relationship. In Florida, United States (US), an 18-year-old high school student who had recently broken up with his 16-year-old girlfriend e-mailed her nude images, which she had originally sent to him only, to everyone on her e-mail contact list.⁹

The impact of cyber bullying

The psychological impact of cyber bullying is often more traumatising than physical bullying because of the extreme public nature of the bullying. Online exposure means that the whole world can witness the victim's humiliation. Since children spend a lot of time on their mobile phones and in cyber space, cyber bullying can happen 24 hours a day, and the victim may feel that there is no way to escape it.

Cyber bullying may result in victims suffering from anxiety and depression and, in extreme cases, may cause suicide. But victims of cyber bullying may be reluctant to report the bullying for fear that their mobile phones may be taken away or their internet access suspended.

Below are some examples of the impact of cyber bullying:

- In 2003, Ghyslain Raza from Quebec, Canada, made a home video of himself wielding a golf ball retriever as a light saber as he pretended to be the *Star Wars* character Darth Maul. Classmates found the tape and posted it online. The video became one of the most downloaded clips ever. The video clip was not flattering and showed Ghyslain's lack of athletic skill and his portly figure. Ghyslain was humiliated to such an extent that he dropped out of school and had to be admitted to psychiatric care.
- In Macclesfield, United Kingdom (UK), 15-year-old Megan Gillian took a fatal dose of painkillers in January 2009 after being harassed and teased online.

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The UNCRC recognises the occurrence and seriousness of cyber bullying and sexting; but it also requires that the response to such incidents be proportionate to the circumstances and nature of the acts, and that the individual circumstances of the child perpetrator be taken into account.

- In Missouri, US, 13-year-old Megan Meier committed suicide in October 2006 allegedly as a result of being tormented by a fake MySpace persona created by Lori Drew, the mother of Megan's rival.

Recognition of cyber bullying in international instruments

United Nations Convention on the Rights of the Child, 1989¹⁰

The United Nations Convention on the Rights of the Child (UNCRC), 1989 was ratified by South Africa on 16 June 1995. One of the aims of the UNCRC is to encourage state parties to take the necessary measures to ensure that the rights of children are protected according to internationally accepted standards. These protective measures are applicable to all children, especially those in conflict with the law.

Article 19.1 of the UNCRC states that:

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

The United Nations Committee on the Rights of the Child in 2011 elaborated on Article 19 to include psychological bullying and hazing¹¹ by adults and other children, as well as acts committed via information and communication technologies (ICT), such as mobile phones and the internet (referred to as 'cyber bullying').¹²

The committee also stated that although children are the actors in bullying, the role of the adults responsible for these children is crucial in all attempts to react appropriately and to prevent such violence. In addition, the measures taken against the perpetrator should not exacerbate violence by taking a punitive approach and using violence against violence.

The committee recognised that children as users of ICTs may become involved in violence through ICTs. This violence may involve bullying others, and creating and uploading inappropriate sexual material. It recommended that state parties should ensure that relevant legislation provides adequate protection of children in relation to ICTs. The committee further recommended the provisioning of accurate, accessible and age-appropriate information and empowerment on life skills, self-protection and specific risks – including those relating to ICTs and how to develop positive peer relationships and combat bullying – through the school curriculum and in other ways.

It is clear that the UNCRC recognises the occurrence and seriousness of cyber bullying and sexting; but it also requires that the response to such incidents be proportionate to the circumstances and nature of the acts, and that the individual circumstances of the child perpetrator be taken into account. A purely punitive approach should be avoided in these cases.

International cases of cyber bullying and sexting

Cyber bullying

Numerous incidents of cyber bullying around the world have been reported on in the international media:¹³

- In August 2009, also in the UK, Keeley Houghton (18) was sentenced to three months' imprisonment after pleading guilty to harassment. She cyber bullied another 18-year-old girl for four years and threatened to kill her. Keeley was the first person in Britain to be sent to prison for cyber bullying.
- In May 2009 two adolescent girls in Australia were forced to leave one of Sydney's elite private schools when they published material on MySpace, which contained personal and defamatory information about their classmates.
- In September 2010 two teenage boys in Canada were charged with sexual assault, and possession and distribution



of child pornography after they posted photographs on Facebook of the gang rape of a 16-year-old girl at a private party.¹⁴

- In May 2011 a 17-year-old high school student in Illinois, US, was arrested for allegedly making a Facebook sex list, which contained the names of approximately 50 fellow students. The list detailed the victims' sexual behaviours, sexual characteristics and physical appearance in explicit and derogatory language. The perpetrator was expelled from school and was arrested on charges of disorderly conduct.¹⁵

Sexting

Some states in the US are using criminal investigations and prosecutions under state child pornography laws in an attempt to control sexting.¹⁶

Some cases of sexting reported in the media highlight the legal responses to this phenomenon:

- A 14-year-old girl in New Jersey faced child pornography charges and potential sex offender registration after posting 30 nude pictures of herself on MySpace.¹⁷
- A 13-year-old boy in Ohio was charged after school officials found a sexually explicit image of an eighth-grade girl on his mobile phone.
- In Florida, two teenagers were convicted of producing, directing or promoting a photograph featuring the sexual conduct of a child after they photographed themselves naked and engaged in sexual behaviour, and e-mailed the photograph to each another.
- In an interesting case in May 2010, a Pennsylvania school district was sued by a 17-year-old teenager who claimed that her school principal confiscated her mobile phone after he found nude images she had taken of herself on it, and turned the evidence over to prosecutors. The Wyoming County district attorney threatened to file felony child pornography charges against the girl

unless she took a class on sexual violence. The Federal Appeals Court ruled that prosecutors could not criminally charge a teenage girl who appeared in photos similar to those involved in the case.¹⁸ This judgment highlights the fact that it is not illegal for people (even children) to keep nude or semi-nude images of themselves on their mobile phones, and that law enforcement should refrain from unnecessarily criminalising children for doing so.

Cyber bullying in South Africa

There is limited research on cyber bullying and sexting in South Africa. As such, it is unclear how many children are involved in these practices. The number of children subjected to cyber bullying is also unknown.¹⁹

Some limited studies, however, have been conducted. The Centre for Justice and Crime Prevention (CJCP) conducted a pilot study in 2009 among 1 726 young people between the ages of 12 and 24 years. The study found that almost half of the respondents (46.8%) had experienced some form of cyber bullying.²⁰ Another interesting study finding was that there appears to be a relationship between young people who commit cyber bullying and those who are the victims of cyber bullying: 69.7% of the study respondents who had bullied others via text messaging had themselves been bullied.

A study conducted in Nelson Mandela Bay, Port Elizabeth, among 1 594 primary and secondary school learners indicated that 36% of the respondents had experienced some form of cyber bullying.²¹

A more recent study on online victimisation of children conducted by the Youth Research Unit of the Bureau of Market Research at the University of South Africa revealed that:²²

- 21.46% of high school pupils surveyed said they had been approached with 'unwanted talk about sex';
- 17.79% said they had received e-mails

There appears to be a relationship between young people who commit cyber bullying and those who are the victims of cyber bullying: 69.7% of the study respondents who had bullied others via text messaging had themselves been bullied.



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- or instant messages with advertisements or links to 'X-rated' websites;
- 16.95% had opened messages or links with pictures of naked people or people having sex;
- 16.60% had been asked for sexual information about themselves;
- 14.27% were worried or felt threatened by online harassment; and
- 9.90% said they had been asked to 'do something sexual'.

The study also found that male adolescents were more likely than their female counterparts to engage in unsafe online activities that put them at greater risk of becoming victims of online victimisation.

This behaviour includes opening messages showing pictures of naked people or people having sex (50.3%), accessing websites showing sexually explicit material (50.9%), or receiving e-mails or instant messages with advertisements for or links to age-restricted websites (51.3%).

Cyber bullying and sexting: South African examples

Although the terms 'cyber bullying' or 'sexting' may be unfamiliar to some, it is clear from the definitions of each that such cases have been reported on in the local media recently, emanating from victims seeking relief in South African courts. Some of these cases include the following:

- In April 2008 a businessman obtained an interdict against a Durban woman after she became obsessed with his 17-year-old daughter, whom she met in a MXit chat room. The North Gauteng High Court in Pretoria prohibited the woman from contacting the businessman, his daughter, his son or any of his family members telephonically or electronically.²³
- In Springs, Gauteng, the mother of a 16-year-old girl obtained a peace order in terms of section 384 of the Criminal Procedure Act, 1955 against another 16-

year-old girl at her daughter's school. This happened after the other girl apparently regularly humiliated the woman's daughter on MXit. The daughter's name also appeared on a MXit 'slut list', which contained the names of girls from various schools in Springs, including their addresses, telephone numbers and schools.²⁴

- Two boys, aged 14- and 16-years-old, were arrested on 8 November 2010 for the alleged rape of a 15-year-old school girl. The alleged rape took place at the Jules High School in Jeppes town, and the boys had allegedly filmed the incident on their mobile phones.

According to media reports covering their first court appearance, the boys admitted their part in the consensual sex but the victim maintained that she had been raped. After studying the evidence contained in the case docket, the prosecutor concluded that there was insufficient evidence to prosecute the two boys on a rape charge and requested further investigations be conducted while considering other possible charges.²⁵

On 11 November 2010, the senior public prosecutor and the acting director of public prosecutions had a lengthy consultation with the girl and possible witnesses, after which they decided to charge all three children (the two boys and the girl) with contravention of section 15(1) of the Sexual Offences and Related Matters Act, 2007 (Act 32 of 2007). In terms of this section, a person who commits an act of sexual penetration of a child, despite the child's consent, is guilty of having committed an offence.

In cases where both the 'perpetrator' and 'victim' are children, the institution of a prosecution must be authorised in writing by the National Director of Public Prosecutions, and both parties must be prosecuted for contravention of the said section.

There were also reports that all three accused were charged with contraven-



tion of the Films and Publications Act, 1996 because the recording and distribution of the sexually explicit video clip is regarded as the 'creation, production, distribution or possession of child pornography'.²⁶

All three accused appeared at a preliminary inquiry on 17 November 2010 and they were released into the custody of their parents. The charges were provisionally withdrawn on 1 December 2010 and the court ordered that all three accused must attend a three-month diversion programme.²⁷

- In February/March 2006, three high school boys aged 15- to 17-years-old were charged with *crimen iniuria* after publishing an alleged defamatory image of the deputy principal of their school. One of the boys created the defamatory image electronically by attaching the heads and faces of the principal and deputy principal on to a picture of two naked men sitting next to each other in a sexually suggestive and intimate manner. The boy took the school badge from the school website and used it to obscure the men's genitals. He then sent the image to a friend's mobile phone, who forwarded it to other learners at the school. One of the accused printed the image and placed it on the school's notice board.²⁸

The school authorities disciplined the three boys: they were prohibited from assuming leadership positions at the school or from wearing honorary colours for the rest of the year. They also had to attend three hours' detention at school for five consecutive Fridays.

The boys were also criminally charged, but the case was diverted from the criminal justice system after the boys acknowledged responsibility for their actions. In terms of the diversion order, the boys had to clean cages at the local zoo for 56 hours as community service. The school principal accepted the apologies of two of the accused, but the deputy principal was legally advised not to entertain discussion of an apology.

The deputy principal sued for defamation and issued summons against the three school boys to claim for damages for injury to his dignity, good name and reputation. The North Gauteng High Court found in favour of the deputy principal and awarded R45 000 in damages. The boys appealed to the Supreme Court of Appeal, but their appeal was dismissed.

During the case in the Constitutional Court, the Restorative Justice Centre entered the arena as one of two *amici curiae*. The centre asked the court to change the law so that in defamation cases concerning children the parties should be required to engage meaningfully with each other in reconciliatory proceedings before any court action is brought.²⁹ The Constitutional Court upheld the appeal but reduced the amount of the damages awarded to R25 000. The court also developed the common law to recognise the value of apology and to discourage the bringing of such matters to court without an attempt to resolve them through restorative justice methods.³⁰

Existing legal responses to cyber bullying and sexting in South Africa

Introduction

Responses in South Africa to both cyber bullying and sexting are fragmented and rely on various pieces of legislation, common law definitions of criminal offences and civil law remedies in cases. Generally, the undesirable acts contravene the relevant provisions of existing criminal law legislation, fit common law or statutory crime definitions, or meet the requirements for civil law remedies.

Cyber bullying

South Africa does not have specific legislation dealing with cyber bullying, which would usually fall under the definition of harassment. The victims of cyber bullying therefore have to rely on remedies offered by the criminal law and/or civil law. The legal consequences and remedies discussed below are applicable to

Perpetrators of acts of cyber bullying which violate the dignity of another person and meet the other requirements of this criminal offence may therefore be charged with *crimen iniuria*.



Defamatory remarks in chat rooms, on social networking sites, e-mails, text messages or instant messages to third parties are some of the methods of committing cyber bullying that will fall within the ambit of this criminal offence.

all perpetrators of cyber bullying, and are available to all victims of cyber bullying, irrespective of the ages of the perpetrator or the victim.

Criminal law responses

Depending on the nature of the acts of cyber bullying, the perpetrator may be criminally charged with the following criminal offences:

■ ***Crimen iniuria***

Crimen iniuria consists of the unlawful, intentional and serious violation of the dignity or privacy of another person.³¹ In this instance, both a subjective and objective test is applied to determine whether or not a person's dignity has been violated. It must be clear that the victim is aware of the perpetrator's offending behaviour, and the victim must feel degraded or humiliated by it. It is not required that the perpetrator's words or conduct should have come to the attention of people other than the victim: the victim's dignity may be infringed upon even if a third party was unaware of it. Perpetrators of acts of cyber bullying which violate the dignity of another person and meet the other requirements of this criminal offence may therefore be charged with *crimen iniuria*. This crime can also be committed by communicating to somebody else a message containing, expressly or implicitly, an invitation to or a suggestion of sexual immorality or impropriety, or by sending indecent photos.³²

■ **Assault**

Assault is defined as any unlawful and intentional act or omission:

- a) which results in another person's bodily integrity being directly or indirectly impaired, or
- b) which inspires a belief or fear in another person that such impairment of his or her bodily integrity is immediately to take place.³³

Cyber bullying, whereby the perpetrator threatens the victim with personal violence and this conduct inspires fear or a belief in

the victim that such personal violence is to take place, may therefore fall within the ambit of the definition of assault. The test is subjective: Did the victim believe that the perpetrator intended to, and was able to, carry out the threat?

■ **Criminal defamation**

Criminal defamation is defined as the unlawful and intentional publication of a matter concerning another, which tends to seriously injure his or her reputation.³⁴ Criminal defamation includes both verbal and written defamation. It is a requirement that the defamatory conduct or words must have come to the notice of someone other than the victim. If not, the perpetrator can only be charged with *crimen iniuria*. Defamatory remarks in chat rooms, on social networking sites, e-mails, text messages or instant messages to third parties are some of the methods of committing cyber bullying that will fall within the ambit of this criminal offence.

■ **Extortion**

Extortion is committed when a person unlawfully and intentionally obtains some advantage, which may be of either a patrimonial or non-patrimonial nature, from another by subjecting the latter to pressure, which induces him or her to hand over the advantage.³⁵

With reference to cyber bullying, extortion may be committed where a person intentionally and unlawfully threatens to electronically distribute information or compromising images about another person unless the victim hand the perpetrator some advantage.

Civil law responses

■ **Order to keep the peace**

In terms of section 384 of the Criminal Procedure Act, 1955 (Act 56 of 1955)³⁶ a person who has been a victim of violent conduct by another person, or who has been threatened with injury to himself or herself or to his or her property by another person, or where the other person has used language or behaved in a manner towards the victim that



is likely to provoke the breach of peace or assault, that person may approach a magistrate for an order to keep the peace. Upon receipt of such an application, the magistrate may order the perpetrator to appear before him or her, and may order the arrest of the perpetrator to ensure that the latter appears before the magistrate.

After an enquiry, the magistrate may order the perpetrator to give recognisances with or without sureties to the amount of R2 000 for a period not exceeding six months to keep the peace towards the complainant (victim) and refrain from doing or threatening injury to his or her person or property. This order may be accompanied by an order of costs. In the event that the recognisances are not observed, it may be declared forfeited, and any such declaration of forfeiture will have the effect of a judgment in a civil action in the magistrate's court of the district.³⁷

■ An interdict and a defamation claim

An application for an interdict may be brought in the High Court for an order restraining a person from committing or continuing a wrongful act. This remedy is also available where someone has been threatened with a wrongful act. The applicant in this instance may also sue for defamation and claim for damages, where he or she has suffered an injury to his or her dignity, and/or an injury to his or her good name and reputation as a result of the wrongful act or threat.³⁸

Sexting

Children have the constitutional right to privacy, which includes the privacy of their communication. They also have the right to freedom of expression, which includes freedom of the press and other media, and the freedom to receive or impart information and ideas. Any response to sexting among children must take these constitutional rights into consideration.

South Africa does not have any legislation dealing specifically with the sending or sharing of nude or semi-nude photos or videos and/or sexually suggestive messages of children via mobile phone texting or

instant messaging between children. Any legal response to this phenomenon will fall, if applicable, within the ambit of child pornography, which is prohibited in terms of the Films and Publications Act, 1996 (Act 65 of 1996), the Films and Publications Amendment Act, 2009 (Act 3 of 2009) and the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007).

The discussion below focuses on the unintended possible legal consequences to children who send and receive nude or semi-nude photos or videos and/or sexually suggestive messages of children via mobile phone texting or instant messaging to and from other children.

Sexting between consenting adults who send such photos, videos or messages of adults to other adults is not illegal. Those who voluntarily engage in such practices are not at risk of facing the possible legal consequences discussed next. However, adults sending nude or semi-nude photos or videos and/or sexually suggestive messages of children via mobile phone texting or instant messaging do run the risk of being prosecuted under the said legislation as this constitutes child pornography.

The Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007

Child pornography is defined in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 as:

any image, however created, or any description or presentation of a person, real or simulated, who is, or who is depicted or described or presented as being, under the age of 18 years, of an explicit or sexual nature, whether such image or description or presentation is intended to stimulate erotic or aesthetic feelings or not, including any such image or description of such person –

- (a) engaged in an act that constitutes a sexual offence;
- (b) engaged in an act of sexual penetration;
- (c) engaged in an act of sexual violation;

South Africa does not have any legislation dealing specifically with the sending or sharing of nude or semi-nude photos or videos and/or sexually suggestive messages of children via mobile phone texting or instant messaging between children.



It is clear that some acts of cyber bullying and sexting may fall within the ambit of either or both of the civil or criminal law responses available in South African law.

- (d) engaged in an act of self-masturbation;
- (e) displaying the genital organs of such person in a state of arousal or stimulation;
- (f) unduly displaying the genital organs or anus of such person;
- (g) displaying any form of stimulation of a sexual nature of such person's breasts;
- (h) engaged in sexually suggestive or lewd acts;
- (i) engaged in or as the subject of sadistic or masochistic acts of a sexual nature;
- (j) engaged in any conduct or activity characteristically associated with sexual intercourse;
- (k) showing or describing such person –
 - (i) participating in, or assisting or facilitating another person to participate in;
 - or
 - (ii) being in the presence of another person who commits or in any other manner being involved in, any act contemplated in paragraphs (a) to (j);
- or
- (l) showing or describing the body, or parts of the body, of such person in a manner or in circumstances which, within the context, violate or offend the sexual integrity or dignity of that person or any category of persons under 18 or is capable of being used for the purposes of violating or offending the sexual integrity or dignity of that person, any person or group or categories of persons.

Section 19 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 provides that any person exposing or displaying, or causing exposure or display, of child pornography to a child is guilty of the offence of exposing or displaying, or causing the exposure or display, of child pornography or pornography to a child. A conviction in terms of this Act will also result in the child's name being registered as a sex offender in the national register for sex offenders.

Sending and sharing nude or semi-nude

photos or videos and/or sexually suggestive messages via mobile phone texting or instant messaging (sexting) between children may therefore fall within the definition of child pornography and the unlawful exposure of a child (who receives it) to child pornography.

Sexting between children may also fall within the ambit of section 22 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, which prohibits exposing or displaying genital organs, anus or female breasts to children. Causing such exposure or display is also prohibited in terms of this section. Exposing or displaying genital organs, anus or female breasts to a child is a sexual offence.

Therefore, if a child sends a photo of genital organs, anus or female breasts to another child, he or she runs the risk of being charged and convicted of contravening this section. Also, if a child aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another child to take and send such a photo of the latter to the first child or any other person, he or she will be liable in terms of section 55 of the Act.

The Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 furthermore creates a difficult situation for the friends of children involved in sexting, which amounts to contravention of the said laws.

In terms of section 54 of this Act, a person who has knowledge that a sexual offence has been committed against a child (exposure to or displaying of genital organs, anus or female breasts to a child, or exposure or display of child pornography to a child) must report such knowledge immediately to a police official. Failure to report such information is an offence, and if convicted the person can be sentenced to a fine or imprisonment for a period not exceeding five years, or to both a fine and such imprisonment.

The friends of a child involved in sexting, in cases where such act contravenes the above provisions of the Act, who have knowledge of such acts, are therefore obliged in terms of the Act to report such knowledge.



Films and Publications Act, 1996 (Act 65 of 1996), the Films and Publications Amendment Act, 2009 (Act 3 of 2009)

Section 24B of the Films and Publications Amendment Act, 2009 (Act 3 of 2009) provides *inter alia* that:

any person who unlawfully possesses or creates, produces or in any way contributes to, or assists in the creation or production of any film, game or publication which contains depictions, descriptions or scenes of child pornography or which advocates, advertises, encourages or promotes child pornography or the sexual exploitation of children, shall be guilty of an offence.

In this regard publication is defined to include 'a photo and any message or communication, including a visual presentation, placed on any distributed network including, but not confined to, the Internet'.³⁹

A person found guilty of contravention of this section may be sentenced to a fine, imprisonment or both.

Sending and sharing nude or semi-nude photos or videos and/or sexually suggestive messages via mobile phone texting or instant messaging (sexting) between children may therefore, depending on the content, also fall within the ambit of the prohibition of possessing or creating, producing and distributing child pornography.

Conclusion

It is clear that some acts of cyber bullying and sexting may fall within the ambit of either or both of the civil or criminal law responses available in South African law. However, the current law does not cover all the different types of cyber bullying that occur.

Two of the civil law remedies (interdict and claim for damages) require an application in the High Court, and this would usually mean that the victim would have to appoint a legal representative, which may be very costly. These remedies may therefore not be viable solutions to all victims of cyber bullying.

Another problem with resorting to the available remedies is that they may, in certain instances, be regarded as very harsh responses to acts committed by children who are not fully mature and psychologically developed and who may, as a result, not fully understand and appreciate the seriousness and consequences of their actions.

The intention of the legislature (with reference to the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, the Films and Publications Act, 1996 and the Films and Publications Amendment Act, 2009) was clearly aimed at prosecuting adults and not children, who, by implication, are criminalised for offences relating to child pornography. The intention was to protect children from adults who possess, create, produce and distribute child pornography. However, the way the legislation is drafted allows for child perpetrators to be charged. If convicted, their names are automatically placed on the register for sex offenders.

Role players in the criminal justice system should therefore be careful not to criminalise unnecessarily all children who engage in cyber bullying and sexting. Ultimately, the law may need to be reviewed to adjust its impact on child offenders.

The inclusion of an affirmative defence for children engaging in sexting in the relevant legislation may provide some kind of solution. Although the child may still be subjected to arrest, investigation and appearances in court, such a defence may reduce efforts to prosecute children in terms of the said legislation in the first place.

The Child Justice Act, 2008 (Act 75 of 2008)

The Child Justice Act, 2008 (Act 75 of 2008) (hereinafter referred to as 'the Act') came into effect on 1 April 2010. The Act creates a separate criminal justice system for children, and any child who commits a criminal offence will be dealt with in terms of the Act, including those who commit acts of cyber bullying which fall within the ambit

Role players in the criminal justice system should therefore be careful not to criminalise unnecessarily all children who engage in cyber bullying and sexting.



The Act aims to establish a child justice system that entrenches the principles of restorative justice. ... It recognises the need for proactive crime prevention, and places emphasis on the effective rehabilitation and reintegration of children in order to minimise the potential for re-offending.

of the definition of a specific crime, and those engaged in sexting which is classified as child pornography.

The Act aims to establish a child justice system that entrenches the principles of restorative justice. It ensures children's accountability for crimes committed, without necessarily criminalising them. It recognises the need for proactive crime prevention, and places emphasis on the effective rehabilitation and reintegration of children in order to minimise the potential for re-offending. The Act balances the interests of children and those of society, with due regard to the rights of victims.

One of the central features of the Act is that it creates the possibility of diverting criminal cases involving child offenders out of the criminal justice system. There is no exclusion from the possibility of diversion based solely on the nature of the offence, and any child accused of committing any crime can therefore be diverted from the criminal justice system, if desirable in the circumstances. Diversion may be considered throughout the child justice process up until before closure of the case for the prosecution.

Diversion of a matter, in appropriate circumstances, may be considered if the child:

- acknowledges responsibility for the offence;
- has not been unduly influenced to acknowledge responsibility;
- there is a *prima facie* case against the child;
- the child and, if available, his or her parent, an appropriate adult or a guardian consent to diversion; and
- the prosecutor indicates that the matter may be diverted.

The objectives of diversion are to, among others:⁴⁰

- deal with a child in conflict with the law, outside the formal criminal justice system in appropriate cases;

- encourage the child to be accountable for the harm caused by him or her;
- meet the particular needs of the individual child;
- promote the reintegration of the child into his or her family and community;
- provide an opportunity to those affected by the harm to express their views on its impact on them;
- prevent stigmatising the child and avoid the adverse consequences flowing from being subject to the criminal justice system;
- reduce the potential for re-offending;
- prevent the child from having a criminal record; and
- promote the dignity and well-being of the child, and the development of his or her sense of self-worth and ability to contribute to society.

If a child offender successfully complies with a diversion order, the matter is regarded as finalised. The child will not have a criminal record and he or she can never be prosecuted again for that particular offence.

In instances where the child fails to comply with the diversion order, and depending on the reasons for such failure, he or she may be subjected to a more onerous diversion order, or the prosecutor may decide to proceed with the prosecution of the child. If the prosecution proceeds, the court may record the acknowledgement of responsibility made by the child as an admission, and the state will therefore not have to prove it again.

The Act creates less harsh responses and provides alternatives to children being charged with criminal offences, including those committed during acts of cyber bullying or sexting. It may therefore be argued that there is no need to seek changes and alternatives in the way that children who commit cyber bullying and sexting are being dealt with when charged



with such criminal offences because the Act makes it possible for them to be diverted.

Challenges in applying the Act in cases of cyber bullying and sexting

This may, however, be false comfort when dealing with cyber bullying or sexting. For instance, when a child sends nude or semi-nude photos or videos and/or sexually suggestive messages via mobile phone texting or instant messaging to another child, and these photos, in the opinion of the police officer, are regarded as child pornography, the police officer may charge the sender with contravention of section 19 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.

According to the Act, such a charge will then fall under the Schedule 3 offences (serious offences) listed in the Act. The Act provides for the arrest of children accused of committing Schedule 3 offences. The police officer may therefore, depending on the charges he or she decides to file at that moment, arrest the child who sent the photos, if the police officer believes that the photos fall within the ambit of a Schedule 3 offence. If not released on bail on his or her own recognisance or in the care of a parent/guardian/appropriate adult, the child may be detained in a police cell or lock-up before his or her appearance at a preliminary inquiry.

Following the arrest, the child may also be subjected to questioning by the police, and if the alleged act relates to sexting and a charge of possessing, creating, producing and distributing child pornography is being investigated, the child may be questioned about his or her sexual history.

Although the Act provides for the possibility of diversion of all criminal matters involving children, irrespective of the nature of the offence, Schedule 3 offences are the most difficult to divert because of the seriousness of these offences and the fact that the victims' views have to be taken into account. Before the matter may be diverted, the child must also take responsibility for the offence. This may pose a problem when the child does not really regard his or her actions as wrong and

criminal. If the case is not diverted, the matter will go on trial in a child justice court. If the child is convicted on a charge of possessing, creating, producing and distributing child pornography, he or she may be sentenced to imprisonment, where applicable. The child's name will also be entered into the sexual offender register upon conviction.

If the acts committed during cyber bullying fit the definition of *crimen iniuria* or defamation or any other less serious offence (Schedule 1 offences), the police may issue a summons or hand the child a written warning to appear at a preliminary inquiry. Schedule 1 offences are more likely to be diverted because these crimes are less serious and diversion can take place before the child's appearance at the preliminary inquiry.

The decision to divert or not lies with the prosecutor, and each case is evaluated on its own merits and circumstances. There is, however, no guarantee that a matter will be diverted, and even if it is diverted, the child may still be prosecuted if he or she fails to comply with the diversion order. In cases where the matter has not been diverted or where the child fails to comply with the diversion order and the prosecutor decides to proceed with the criminal trial, the matter will go on trial in a child justice court. If convicted, the child will be sentenced and will have a criminal record.

Conclusion

The Act only applies to children and creates a separate child justice system catering specifically for the special needs of children. The processes in the Act aim to protect children, and only relate to the way children are treated and dealt with in the criminal justice system and not to the nature of the charges that may be brought against children. If a child and an adult commit the same criminal offence, the charges will be the same. The Act only dictates the additional considerations to be taken into account when dealing with a child, and provides for extra protective measures applicable to children.

Although the Act provides for the protection of children in the criminal justice

The Act only applies to children and creates a separate child justice system catering specifically for the special needs of children.



It is therefore clear that a pure criminal justice response to cyber bullying and sexting, in applicable cases, does not provide a sustainable solution to the problem.

system and creates the possibility of children being diverted out of the criminal justice system in appropriate cases, it does not mean that all children committing acts of cyber bullying (fitting the definition of a crime) or sexting (that is regarded as child pornography) will be diverted. Each case is decided on its own merits, and even if the matter is diverted the child who fails to comply with the diversion order may still be prosecuted.

Depending on the seriousness of the offence, according to the police officer dealing with the matter, the child may be arrested and detained. If the prosecution of the child proceeds and the child is convicted, he or she will have a criminal record. In the case of a conviction on a sexual offence, he or she will be registered as a sexual offender in the national sexual offender register.

Also, a conviction on a criminal charge does not prevent the victim from claiming damages from the child in a civil court, and the child may therefore also be liable for such damages if the claim is successful.

It is therefore clear that a pure criminal justice response to cyber bullying and sexting, in applicable cases, does not provide a sustainable solution to the problem. Although such responses may be necessary and essential in serious cases, other interventions that do not unnecessarily criminalise children will be more desirable in the majority of cases.

Proposed legislation dealing with cyber bullying in South Africa

In 2003 the then Minister of Justice and Constitutional Development approved an investigation into stalking by the South African Law Reform Commission. Issue Paper 22 was published in 2003 and a Discussion Paper was published in 2004 with a draft bill on stalking.

Following this investigation, the Protection from Harassment Bill, 2010 (Bill 1 of 2010) was tabled before Parliament in 2010. The Bill is currently being deliberated on in Parliament and is expected to be implemented towards the end of the year.⁴¹

Despite media reports to the contrary, the Bill does not provide a separate definition of cyber bullying. The definition of harassment, as stated in the Bill means:

directly or indirectly engaging in conduct that causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably –

- (a) following, watching, pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or related person resides, works, carries on business, studies or happens to be;
- (b) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or
- (c) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving it where it will be found by or given to, or brought to the attention of, the complainant or a related person.

The definition is wide enough to include acts of cyber bullying. Harm, as defined in the Bill, means any mental, psychological, physical or economic harm.

With regard to protection against harassment – and by implication cyber bullying – the Bill makes provision for the complainant to apply for a protection order against harassment in any magistrate's court. Upon receipt of the application for a protection order, the court must, if satisfied that there is *prima facie* evidence that:

- the respondent is engaging or has engaged in harassment;
- harm is being or may be suffered by the complainant or a related person as a result of that conduct if a protection order is not issued immediately; and
- the protection to be accorded by the interim order is likely not to be achieved



if prior notice of the application is given to the respondent,

issue an interim protection order against the respondent.

The interim protection order must be served on the respondent, and it must call on the respondent to show cause why the protection order must not be made final. After hearing all the evidence, the court must issue a protection order if it finds on a balance of probabilities that the respondent has engaged in or is engaging in harassment. When the court issues a protection order (including an interim protection order), it must make an order authorising a warrant for the arrest of the respondent and suspend the execution of that warrant subject to compliance with the protection order.

When the respondent fails to comply with the protection order, the complainant may hand the warrant of arrest to any member of the South African Police Service, together with an affidavit wherein it is stated that the respondent contravened the protection order. The said member must immediately arrest the respondent if there are reasonable grounds to suspect that the complainant or related person is suffering or may suffer imminent harm as a result of the alleged breach of the protection order.

Any person who fails to comply with a protection order or who wilfully makes a false statement in a material aspect is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding five years.

An application for a protection order does not mean that the complainant cannot lay criminal charges against the perpetrator. The complainant can therefore still lay criminal charges for assault or *crimen iniuria* or any another criminal charge, depending on the nature and circumstances of the case. Therefore, if a child commits cyber bullying, a protection order may be issued against him or her, he or she may be charged criminally if the act falls within the ambit of the definition of a criminal offence, and he or she may be liable to pay damages following a civil action.

The fact that the Bill provides for the protection order to be issued by magistrates' courts will make this remedy more accessible to victims because the application can be made even if the victim is not legally represented. It will therefore be much cheaper than an application for an interdict in the High Court.

Although acts of cyber bullying do fall within the ambit of the Bill and the Bill does provide some protection to the victims of cyber bullying, such protection will only be available if the victims know who the perpetrators are and where to find them. The Bill is in nature a civil law response, and the victim will still have to use the criminal justice system if he or she wants the perpetrator to be criminally charged for his or her actions. The victim will therefore still have to follow two processes.

The Bill also covers instances where images or messages sent as part of sexting are used for cyber bullying or harassment purposes after, for example, the end of a relationship because such acts will fall within the ambit of the definition of harassment provided for in the Bill.

Conclusion

Cyber bullying may be described as a new way of committing an old crime. Bullying has undoubtedly always existed among children, and the reasons why some children bully others are complex and diverse.

Sexting, however, is a relatively new phenomenon. Not all forms of sexting are illegal. Sexting between adults is not illegal as long as the images or videos do not include children. Sexting between children, on the other hand, is more complex. Children may not really understand and appreciate the risks and possible consequences of sending nude or semi-nude photos or videos and/or sexually suggestive messages via mobile phone texting or instant messaging to other children, and this makes it more difficult to prevent.

There is a definite link between sexting, cyber bullying and harassment that is often overlooked.

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The unintended legal consequences, where children face possible prosecution on child pornography-related charges, are a concern.

Cyber bullying and sexting do occur in South Africa, but the extent of the phenomena is not clear.

There are various civil and criminal remedies available in South African law, and further attempts by the legislature to increase the protection of victims of harassment, which includes cyber bullying, are in progress. The possible legal consequences of acts of cyber bullying are the same for children and adults. The Child Justice Act, 2008 creates a separate child justice system for children, which allows for children to be diverted out of the criminal justice system and provides for additional considerations and protective measures applicable to children in conflict with the law.

Although these criminal law and/or civil law responses may be essential to protect the rights and well-being of victims in some instances of cyber bullying and sexting, the prevention of cyber bullying and sexting does not lie solely within the justice system. These responses may be inappropriate and, in some instances, too severe in relation to the acts committed by the children. The unintended legal consequences, where children face possible prosecution on child pornography-related charges, are a concern.

The prevention of cyber bullying and sexting, and ways to effectively address these phenomena, require multidisciplinary approaches and interventions.

Recommendations

This paper has focused on the legal responses to cyber bullying and sexting. The recommendations will therefore focus mainly on the way in which role players in the criminal justice system can contribute to dealing with these behaviours:

- There is a need to review the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, the Films and Publications Act, 1996 and the Films and Publications Amendment Act, 2009 to adjust the impact that these laws have on child offenders in cases of sexting between children.

- Police officers, prosecutors, presiding officers, probation officers and legal representatives should be educated and sensitised about occurrences of cyber bullying and sexting, as well as on the causes of this behaviour.
- Arresting and charging children who engage in cyber bullying and sexting should be used only as a measure of last resort, and alternative methods to deal with these children should be investigated and prioritised.
- In cases where criminal charges are unavoidable due to the seriousness and nature of the acts, prosecutors should, where appropriate, divert matters out of the criminal justice system.
- Diversion programmes addressing the causes and effects of cyber bullying and sexting should be available and accessible to these children.
- Restorative justice approaches should be encouraged to ensure participation of victims in the process. These approaches should, where possible, be the first point of intervention and, if successful, the end of the matter.

Other role players also need to participate in efforts to prevent cyber bullying and sexting. Recommendations in this regard include the following:

- The media should be encouraged to participate in prevention efforts. The media can play an important role in raising awareness about cyber bullying and sexting, and the consequences of such actions. It can also educate children and parents on how to prevent cyber bullying and sexting.
- Cyber safety, education and awareness-raising about cyber bullying and sexting should form part of the school curriculum. The Department of Basic Education should ensure that schools have clear policies on how to deal with such incidents.
- The companies that generate and host social networking sites should have more



responsibility. They should use their technologies to discourage cyber bullying and sexting, and should perhaps fund prevention and diversion programmes.

- Teachers should be trained to recognise the occurrences of cyber bullying and sexting in the class room and schools, and to respond to such cases in an appropriate manner.
- Parents and caregivers should be educated on the prevalence of cyber bullying and sexting. They should be

empowered to understand the technologies used to engage in these activities, and they should be made aware of any signs which may indicate that their children are either engaging in cyber bullying or are on the receiving end of it.

- Children should be educated and made aware of cyber bullying and sexting, the consequences of these practices, and how to prevent it. They should also be encouraged to report incidents of cyber bullying and sexting.

The prevention of cyber bullying and sexting, and ways to effectively address these phenomena, require multi-disciplinary approaches and interventions.



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The Centre for Justice and Crime Prevention (CJCP) is dedicated to developing, informing and promoting innovative evidence-based crime prevention focused on the groups identified as being vulnerable to victimisation or offending. The CJCP does this by:

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- disseminating the results of its research and lessons learned to relevant audiences.

About this paper

Very little is known about the true extent of cyber bullying and sexting in South Africa – two relatively new phenomena.

The occurrence of cyber bullying and sexting has increased along with increased access to and usage of electronic communication technology. Both adults and children are therefore at risk of participating in or being exposed to these practices.

It is important to examine the legal responses to cyber bullying and sexting in the South African context since some of

these acts may result in the commission of criminal offences or lead to civil actions.

This paper explores cyber bullying and sexting in South Africa and focuses on the responses within the context of existing legislative frameworks and legal remedies available in South Africa.

It also identifies some of the gaps and risks in the legal responses applicable to children who engage in cyber bullying and sexting, and offers some recommendations in an attempt to minimise the gaps and accompanying risks to children.



ISSN 1819-2661



© 2011, Centre for Justice and Crime Prevention
ISSN: 1819-2661

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Published by the Centre for Justice and Crime Prevention
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