Cyber-bullying and Harassment of Teenagers: The Legal Response
Alisdair A. Gillespie

Research has demonstrated that Information and Communication Technologies (ICT) can be used to bully and harass children on-line. Cyber-bullying and harassment can be deeply traumatic to the victim and can cause psychological harm. This article assesses possible legal solutions to this problem. The emphasis is on the criminal law, the more normal solution to the infliction of harm and distress to an individual. However, the article also examines whether the civil law provides assistance in this sphere.

Keywords: Bullying; Cyber-Stalking; Child; Cyber-Abuse; Information; Communication; Technology; Harassment; Anti-social Behaviour

Introduction

When one thinks of the ‘threats’ to adolescents that are posed by modern communication technologies, it is easy to concentrate on sexual issues such as grooming (the befriending of children to allow sexual conduct to take place) and the creation and distribution of child pornography. Unfortunately, the abuse of communication technologies is not restricted to this domain. O’Connell et al. note that there are numerous threats to children from communication technologies (2004, pp. 4–9). These threats include ‘cyber-stalking’, which they define, inter alia, as ‘... where an individual [decides] to victimise a person online’. Research has demonstrated that the bullying and harassment of adolescents can be a real problem, with children’s charity NCH reporting that 14% of 11- to 19-year-olds had been threatened or harassed using the short message service (SMS) on mobile telephones (NCH, 2005, p. 2) and O’Connell finding that 20% of children aged 9–16 had been harassed within an on-line chat-room (p. 4). The growth in the use of such technology, especially amongst adolescents, means that it is likely that this abuse will continue. In this article, the dimensions of the problems of the cyber-bullying and
harassment of teenagers are explored. So, too, are the various legal and other options available for tackling such problems. The latter focuses, in particular, on recent legislative and case law developments in this sphere.

**Identifying the Problem**

When examining adolescent behaviour, Bamford argues that it is possible to identify a particular type of behaviour she describes as ‘cyber-bullying’ (2004, p. 1). She provides examples of the range of behaviours that can be defined as ‘cyber-bullying’. These range from ‘flaming’ (the posting of provocative or abusive posts) to ‘outing’ (where personal information is posted) (pp. 2–3). Such findings follow on from other research in this area, where it has been noted that common threats include harassment (see O’Connell *et al.*, 2004, pp. 12–14; Ybarra & Mitchell, 2004, pp. 1311–1312). The NCH also found bullying taking place via mobile telephone. This can be a serious form of bullying; where, for example, the details of a person’s telephone number are mis-used by placing the telephone number on internet websites that advertise sexual services (Bocij *et al.*, 2002, p. 4). Such abuse is more likely to occur because children remain somewhat sanguine about the release of personal information including sex, age and telephone numbers (Livingstone & Boder, 2004, p. 39). In other cases, it can result from cases where someone known to the child mis-uses the telephone number that they have gathered from off-line contact (either from the victim herself or from friends of the victim).

This latter point demonstrates one interesting aspect of cyber-bullying. This is that such bullying has, in effect, two dimensions. The first of these dimensions is where the internet is used as the primary tool of the harassment behaviour. The internet, as a global resource, allows people who are not physically proximate to engage in harassing behaviour through, for example, facilitating the tracking and harassment of children in chat-rooms (O’Connell *et al.*, 2004, p. 12). However, such harassment need not be this remote. The second dimension of such activity is where ICT is used to facilitate harassment. The NCH report that in 76% of cases of SMS bullying the perpetrator was known (and, by inference, close) to the victim (2005, p. 2). Also, Ybarra and Mitchell found that in a significant number (but most certainly not all) cases of such harassment there was a link between victim and perpetrator (2004, p. 1311).

Where there is proximity, it would appear that, apart from traditional bullying techniques (i.e. harassment, threatening emails, victimisation in chat-rooms etc.), harassment through sexualisation is not uncommon. This harassment appears to be an extreme form of ‘outing’. For example, Bamford (2004) identified cases where sexual material about a victim was being posted on the internet. The NCH found that 10% of respondents thought they had been the unwilling subject of a photograph (2005, p. 2), including photographs whilst in states of partial undress. The abuse of images is not restricted to the taking of photographs. Other examples include cases where a person (frequently an adult) will take an innocent picture (often posted by the victim) and use graphic manipulation software to morph it onto a pornographic
picture. This then gives the impression that it is the victim in this pose (something that is theoretically culpable in its own right, under section 1, Protection of Children Act 1978, if it conveys the impression that the image is that of a child under 18 years of age). This sort of abuse can be extremely traumatic to a child and it can also pose serious dangers to a child where the image is posted alongside contact details.

It is not always known who the perpetrators of cyber-bullying and harassment are. However, Bamford concedes that some, although not all, of this behaviour will inevitably involve adolescents themselves (2004, pp. 1, 3). This point appears to have been recognised in other studies, with suggestions that cyber-space provides teenage perpetrators with an opportunity to assert dominance over others in their peer group (Ybarra & Mitchell, 2004, p. 1313). In the off-line world, such dominance may not be possible (Fekkes et al., 2005, pp. 81–82). A power imbalance appears to be a common thread to certain cyber-crimes. Bocij and McFarlane have noted that the anonymity of ICT has meant that some perpetrators argue that they get a feeling of ‘power’ through its use (2004, p. 213). Yet the harassment is real and, although there have been suggestions that the victimisation felt in cyber-space is reduced compared to that experienced in more usual contexts, others argue that the damage caused by cyber-abuse can sometimes last longer than that experienced through off-line abuse (Bocij & McFarlane, 2003, pp. 39–40; O’Connell et al., 2004, p. 14; Ybarra & Mitchell, 2004, p. 1313).

**Legal Solutions**

It has been suggested that people have a ‘right’ to the peaceful use of cyber-space (O’Connell et al., 2004, p. 10). If that is accepted, then the law may need to intervene to assist victims of cyber-bullying. Greenleaf notes that, traditionally, the internet has resisted attempts at regulation, preferring a more liberal approach to its governance (1998, pp. 594–597). However, it is now widely accepted that the law does have a role to play in the regulation of cyber-space.

The first possible use of law in this context would be the invocation of criminal law where three heads of liability (communication offences, harassment and offences against the person) may be relevant.

**Offences Against the Person**

Any apprehension of immediate unlawful bodily contact will be culpable as an assault (R v Ireland [1998] AC 147) and psychiatric illnesses amount to ‘bodily harm’ for the purposes of sections 18, 20 and 47 of the Offences Against the Person Act 1861 (R v Chan-Fook [1994] 1 WLR 689 and R v Ireland; R v Burstow [1998] AC 147). Accordingly, it may seem that these provisions could be useful. However, there may be difficulties. Whilst sections 18 and 20 do not require an assault to take place before the grievous bodily harm is inflicted, it is unlikely that, in the vast majority of situations, the psychiatric harm would be sufficient to amount to being ‘grievous’ (meaning ‘really serious’; DPP v Smith [1961] AC 290). In some cases, it has been
noted that the victim develops an eating disorder but this, by itself, is unlikely to be considered sufficiently serious. Actual bodily harm requires significantly less than this level of harm and has been interpreted to mean any bodily harm, but it is important to note that transient features, such as fear or anxiety, do not count as harm and expert evidence is required to demonstrate the bodily harm (see Smith, 1997, p. 811).

A further potential difficulty in the use of section 47 is that in the majority of situations there may be no apprehension of immediate unlawful violence and therefore no assault to occasion the actual bodily harm (Gardner, 1998, p. 5). Certainly immediacy is an important issue and Smith notes that the doctrine does not require that the victim immediately fears violence but, rather, that the victim fears immediate violence (1997, p. 811). He develops this by noting that, in situations where it is known that there is no likelihood of immediate violence, there can be no assault (2002, p. 414). In the context of cyber-space, it is easy to see how the notion of immediacy could cause difficulty in many cases.

**Communication Offences**

There are two offences that are relevant to this sphere of liability; the first is section 1, Malicious Communications Act 1988 and the second is section 127, Communications Act 2003. The offences are similar in structure, but section 127 is likely to be the more appropriate as it is stream-lined and takes account of all forms of public communications. The offence is triable summarily and punishable by a maximum sentence of six months’ imprisonment (section 127(3)). The offence concerned is to send an obscene, indecent or menacing communication or one that is grossly offensive. No *mens rea* is apparent on the face of section 127, although the inclusion of the verb ‘sends’ must mean that it is highly likely that this will be interpreted to mean that there must be an intention to send the message. However, this need not be extended to knowing that it amounts to a grossly offensive, indecent, obscene or menacing message.

In *DPP v Collins* [2005] EWHC 1308 Sedley LJ considered the definitional terms within section 127, although most of the observations were made *in obiter*. His Lordship decided that indecent and obscene messages were to be judged objectively according to ‘contemporary standards of decency’ (at [10]). This follows the long-held view of the courts, perhaps best formulated by Ashworth J in *R v Stanford* [1972] 2 QB 391 where it was held that ‘indecent’ and ‘obscene’ were on opposite sides of the same scale (p. 398) and were to be considered against the standards of the day. A menacing message is one that is threatening and ‘seeks to create a fear in or through the recipient that something unpleasant is going to happen’. Ormerod notes that the term ‘or through the recipient’ clearly means that the fear does not have to be against the recipient but could be against someone (or, presumably, something) known to the victim (2005, p. 795). What is particularly interesting about this definition is that his Lordship suggests that ‘the intended or likely effect on the recipient must ordinarily be a central factor in deciding [guilt]’ (*Collins* at [10]).
This proposition suggests that there are two potential circumstances where guilt could be contemplated. The first is where the defendant sends a message that he intends the victim to be threatened by. Culpability will exist here, even where the victim is not placed in fear. The second possibility is that, even if the defendant did not intend the communication to place the victim in fear, culpability arises if it was likely to do so. This would appear to suggest that, at least for menacing messages, there is a requirement for mens rea, that being either intention or recklessness (for what else could ‘likely to’ mean?).

Perhaps more surprising was the definition that Sedley LJ gave to ‘grossly offensive’. Parts of the definition are relatively uncontroversial; for example, the suggestion that offensiveness should be considered by the tribunal of fact by ‘the standards of an open and just multiracial society’. However he stated that gross offensiveness required some ‘added value’ to offensiveness (at [5]) but that even that would not be sufficient to convict, and that the justices must look to the context in which the message was sent (at [11]). Sedley LJ believed that it ‘is the message, not its content, which is the basic ingredient of the statutory offence’ (at [9]) meaning that some grossly offensive communications should not be caught by the legislation.

The matter arrived at the House of Lords ([2006] UKHL 40) who disagreed profoundly with Sedley LJ. Their Lordships focused only on ‘grossly offensive’ messages and accordingly the definitions provided by Sedley LJ for the other conduct within s.127 remain of persuasive authority. The House held that the it was not the message as a whole that was the key to s.127 but rather it was the sending of a message that ‘contravened the basic standards of our society’ (at [7]), in other words contrary to what Sedley LJ stated, the content is relevant. The House held that it was irrelevant who sent the message or indeed whether it was delivered at all (at [8]). The House agreed that the intended recipient may be relevant (at [12]) but only because they imputed mens rea into s.127 (that being intentionally sending a grossly offensive message or being reckless as to whether it was grossly offensive (at [10] and [11])) but this was subject to the qualification that it would not assist those messages that ‘went beyond the pale’.

Accordingly s.127 has become an extremely wide offence and indeed it can be suggested that it is now too wide (Gillespie, 2006). That said, for the purposes of cyber-bullying and harassment it is relatively clear now that s.127 can be used where the content is grossly offensive or threatening. However it has been suggested that the principal difficulty with the communications offences is that they do not necessarily capture the behaviour that is occurring (Finch, 2001, p. 257). This is an important point and, whilst it can be seen that harassment in real-time communications (chat-rooms, SMS, emails) will almost certainly be captured by this offence, it is unlikely that the harassment will be a single message but, rather, a pattern of abuse. Even so, it is unlikely that multiple charges would be brought to reflect this and Finch suggests that this might under-play the abuse suffered and call into account the adequacy of the punishments available.

More than this, however, there may be some types of cyber-abuse that might not be covered by this legislation. A good example would be the creation of a website,
since it is unlikely that creating a site would be considered a ‘communication’ (which implies a message sent from one person to another). In some situations, the victim will be sent the web address of the site. Whilst this would certainly be a communication, can it be said that it is grossly offensive, menacing, indecent or obscene? The site may be, but the message itself is innocuous in that it is just a Uniform Resource Locater (URL). The counter-argument to this would be to suggest that the comments of Sedley LJ apply, and that it is the message and not its content that is relevant. It could be argued that, although the URL is the content, the actual message is wider and encompasses the website. However, this construction could lead to a number of difficulties (not least where the sender did not create the site) and may also be stretching the interpretation of section 127 too far.

Harassment

Perhaps the most obvious solution to the problem would be to use the Protection From Harassment Act 1997, which was enacted as a specific response to the problem of stalking and harassment (Finch, 2001, p. 217). The basic essence of the Act was to create a definition of harassment (section 1) that formed the subject of a criminal offence (section 2) and a statutory tort of harassment (section 3). A further, aggravated, criminal offence was also created (section 4) to supplement the basic offence.

Harassment is defined, in part, by section 1, which states, inter alia, that a person must not pursue a course of conduct which amounts to harassment and which he knows or ought to know amounts to harassment. The latter part is clearly demonstrating that mens rea exists for harassment, that being an intention to harass or being reckless as to whether it harasses a person. Section 1(2) of the Act makes clear that it is objective recklessness, with the consideration of ‘ought to know’ to be referenced to a reasonable man in possession of the same information as the offender. Whether someone is harassed is a subjective test, section 7(2) defining this as alarming a person or causing them distress. The syntax of the 1997 Act requires the person to be harassed and thus if a person intends to harass a person but the victim is not in fact alarmed or caused distress then no substantive liability occurs (DPP v Ramsdale [2001] EWHC Admin 106).

The harassment occurs through a ‘course of conduct’ and in section 7(3) this is defined as including conduct that occurs on at least two occasions. However, the courts have interpreted this provision in a way that concentrates more on a ‘course’ of conduct rather than simple mathematics (Finch, 2002: 707). In other words, the fact that there have been two incidents of harassment does not necessarily mean that the offence will be triggered. In DPP v Lau [2000] 1 FLR 799, the High Court stated that the fewer incidents there are the less likely it is that the courts will consider the defendant to have pursued a course of conduct. Ormerod suggests that a nexus must exist between the incidents in order to demonstrate a course of conduct (2000, p. 581) and provides the analogy of a person attending hospital on two occasions. This, by itself, could not amount to a course of treatment if the visits were, in fact, for two separate ailments (p. 582).
At the other end of the spectrum, however, the courts have been prepared to consider a series of events that are closely linked as a single act within a course of conduct. An example of this is *DPP v Ramsdale* [2001] EWHC Admin 106, in which the defendant followed the complainant home, rang the doorbell and tried telephoning her before leaving and returning later the same day and breaking into her house. He then left the house but returned 15 minutes later. The justices hearing the case decided that this was all one act and the High Court did not disagree with this assessment (paras 19 and 21). However, it is important to be clear about what the High Court said—it did not say that this was a single act but, rather, that the justices were not acting irrationally or illegally by finding that it was.

Finch notes that there is uncertainty as to when close acts are considered to be a single act, since some courts have classified behaviour close together as separate acts (2001, p. 222). The lack of certainty could cause problems for cyber-bullying and harassment. If a person is in an internet chat-room or using instant messaging software then it would appear logical that each comment within the chat-room will be taken as part of the whole; in other words, it would amount to a single act. What happens where the person is being tracked through different rooms? For example, D harasses V in chat-room X. V leaves that chat-room and joins chat-room Y. D discovers V’s location and starts to harass V in chat-room Y. It could be argued that this is two separate acts of harassment and, accordingly, a course of conduct. The alternative argument is that it is one continuous act of harassment—D is simply pursuing and harassing V over the internet.

The situation becomes even more complicated in relation to SMS messages or emails. In *Kelly v DPP* [2002] EWHC 1428, the High Court upheld the decision of justices who decided that three telephone calls within five minutes were separate acts and therefore could amount to a course of conduct. Ormerod disapproves of this because of the proximity between the acts (2003, p. 47) and it is certainly difficult to reconcile it with, for example, *Ramsdale*. Burton J, giving the judgment in *Kelly*, compares the telephone calls with email messages and suggests that three telephone calls are no different to three emails (at [23]). This is probably correct, but it does not necessarily solve the conundrum posed because it does not follow that separate emails or SMS messages are necessarily distinct. If D sends V a harassing email and V replies saying ‘stop it’ to which D replies with another email, can this truly be described as two separate acts? If they are a series of replies then would this not imply a single conversation? Burton J does place great emphasis on the fact that the justices found them to be separate (at [22]–[23]) and notes that the victim did not answer the telephone because it was switched off (due to the fact that it was the middle of the night). But what if the telephone had been engaged? Would repeated calls (including leaving harassing messages on an answer-phone) still be considered separate?

A similar conundrum may be raised in respect of creating a website. Some websites have a single page, while others have numerous pages that are hyper-linked together. Is the creation of a website containing harassing or threatening words a single act? It could be argued that, where it is authored over a number of days, this might amount to separate acts, but is this not an example of a continuing act? Also, if D creates the
site but also creates a ‘comments’ section where the comments of posters are automatically published, then is this just a single act because the subsequent posts will be by other individuals and not by D? Section 7(3A) may solve this difficulty, since it provides that conduct that is aided, abetted, counselled or procured by another will be considered a course of conduct for both the principal and the accomplice. Allowing individuals to post abusive messages about a person would arguably come within aiding or abetting, especially where the site was created for the very purpose of harassing another.

A course of conduct is a neutral matter that, in isolation, has no criminal connotations (Finch, 2001, p. 219). It does not really matter whether the individual acts constituting the conduct are illegal, because it is simply one part of a more complicated jigsaw. Indeed, the legislation was specifically drafted to include conduct that would otherwise be lawful (Finch, 2002, p. 707). In the context of off-line stalking, where typical conduct can include apparently innocuous activities, this was clearly necessary. However, it will also be extremely useful in the context of cyber-bullying.

It has been noted that there are two substantive criminal offences contained within the 1997 Act, the basic offence (section 2), which has been discussed already, and the aggravated offence under section 4. The maximum sentence for a section 4 offence is five years imprisonment. It is triable either way and may be more appropriate for serious harassment. Whereas it was seen that section 2 was a broad offence, and one that is relatively easily established, section 4 is significantly more restricted. The victim must be placed in fear of violence on at least two occasions and the fear must be in respect of violence against her, not anyone else, regardless of the relationship that exists between them (Finch, 2001, p. 263). The requirement to be placed in fear twice is onerous, since it requires the victim to suffer in silence during the first period of abuse or, indeed, subsequent periods (since the comment above about mathematics not creating a course of conduct still applies, albeit tempered by the fact that the courts appear more willing to find a nexus).

Lord Steyn, in obiter comments in R v Ireland [1998] AC 147, identified another significant weakness in section 4. The statute requires a person to fear that violence will occur and not just may occur (p. 153). Although it has been argued that the requirement does not, unlike assault, require imminent violence (Simester & Sullivan, 2002, p. 398), the requirement for inevitability creates a high threshold. Finch notes that this does create difficulties for using section 4 in cases of non-contact harassment (2002, pp. 710–711). Others suggest that this may be a fatal flaw; if a person is placed in fear of violence on the first occasion but nothing happens, how can they fear that violence will happen on subsequent occasions when their fears were not realised on the previous occasion? (Addison & Lawson-Cruttenden, 1998, p. 41). This is an interesting argument, but one that is based on too literal a reading of the statute. If it were to be followed, it would lead to section 4 never being used. Just because a person is not assaulted after fearing violence does not mean that they will not fear violence on subsequent occasions (although it is conceded that the more occasions on which violence does not occur the less likely it is that it ever will).
In the context of cyber-bullying, it would appear that the threshold will, in most cases, be too high. This is not least because of geographical proximity. Where the perpetrator and the victim are not known to each other and are talking in an internet chat-room, is it likely that the victim could fear that violence will happen if the perpetrator does not know his or her address? However, where the victim and perpetrator are known to each other and there is geographical proximity (e.g. with regard to mobile telephone abuse), then it is possible that section 4 could be used. That said, even where section 4 can be established, the police and the Crown Prosecution Service (CPS) frequently proceed on the basis of section 2 because it offers a better chance of success (Finch, 2002, p. 711). Finch concludes that the construction of section 4 has created a situation where the remedy to harassment has become focused on physical violence rather than on the recognition of psychological trauma. He further concludes that section 4 mis-understands the concept of harassment, leaving victims vulnerable (pp. 712–713). This conclusion is very difficult to contest.

Restraining Order

Given that section 2 (the more realistic charge) is punishable only by a maximum of six months imprisonment, it could be questioned why, where a communication forms the basis of the conduct, prosecutors may wish to use this offence rather than the strict liability offence under the Communications Act 2003. The answer is, in part, because the communication may not expressly contravene that section but, even where it does, the 1997 Act carries with it an additional sentencing option, the restraining order (section 5).

Section 5 of the 1997 Act permits a court to impose a restraining order on an offender when sentencing him for an offence under either sections 2 or 4. The order is in addition to any sentence that is imposed. It allows a judge to make an order ‘prohibiting [the defendant] from doing anything described in the order’. The duration of the order is for such time as is specified or until a further order is made (section 5(3)), although, given that a restraining order will inevitably interfere with the Article 8 rights of the defendant, one could argue that the consideration of proportionality will require judges to take account of the duration of their orders. In any event, section 5(4) permits, inter alia, the subject of the order to petition the court for its variation or discharge. Breach of a restraining order is a punishable by five years’ imprisonment (section 5(6)). Unlike with section 2, there is no need for a course of conduct in order for a breach of the order to be established; a single breach of any requirement will suffice. The requirements could include otherwise normal behaviour (e.g. sending flowers or, in our context, logging onto internet chat-rooms), but a defendant would be liable to a significant period in custody for such acts. The justification for this is that those subject to an order are likely to use otherwise innocent behaviour in order to harass people and their original conviction demonstrates that there is a need to restrict their activities in order to safeguard the public.
The restraining order under the 1997 Act provided the model for a restraining order under section 5A, Sexual Offenders Act 1997 (now a sexual offences prevention order—SOPO—under section 104, Sexual Offences Act 2003). Their use in the field of cyber-crimes could potentially demonstrate a use in this context. When an offender was convicted of downloading indecent images of children, the courts began to use the restraining order to restrict the use of computer equipment and access to the internet. Whilst this was almost certainly a draconian step, it was justified by the courts as being necessary to safeguard the public from harm (see R v Beaney [2004] EWCA Crim 449; cf. R v Halloren [2004] EWCA Crim 233). An important point raised in this context, however, is that orders must not form an automatic part of the sentencing process and both the imposition of an order and the precise wording of the prohibitions need to be considered in each individual case (R v Collard [2005] 1 Cr App R (S) 34, 155).

The ability to make a restraining order ensures that the 1997 Act becomes extremely flexible. Finch makes the point that it sends a signal that continuing harassment will be considered seriously (200, p. 251). The flexibility is likely to help to justify the use of section 2 in preference to other prosecutorial avenues.

Civil Law

Although the criminal law would appear to cover this behaviour, there may be concerns as to its use (although, as was seen in the first part of this article, the behaviour can be extremely disturbing for victims and cause real harm). For completeness, it will be necessary to examine, in brief, whether civil law could be used to tackle this behaviour.

Law of Tort

Leaving aside the concept of a private prosecution, since this is an unwieldy and expensive route to invoking the criminal law, it is possible that a person may seek a remedy in the civil courts by invoking the law of tort.

Public nuisance, inter alia, covers those situations where an unwarranted act interferes with morals or with the public’s comfort (Deakin et al., 2003, p. 489). However, this may be a most unsatisfactory form of tort, because it is an uncertain concept and bears little resemblance to traditional tort (p. 489). Another difficulty is that it focuses on the public at large rather than on specific victims; although, where a victim can show ‘special damage’, i.e. conduct above and beyond that experienced by others, it is possible that a remedy can be obtained (Finch, 2001, pp. 137–138). It is not uncommon for internet users to harass more than one person (Ybarra & Mitchell, 2004, pp. 1311–1312), but the chances of the victims knowing each other’s identities and being able to substantiate the harassment are small. Where it is known that a person is subjecting more than one person to harassment, it may be appropriate to consider public-law remedies.
Where an individual victim wishes to take action, it is more likely that the Protection from Harassment Act 1997 would be used. As noted above, this Act created a statutory tort based on the proposition of a ‘course of conduct’ as set out in section 1. The principal remedy that is likely to be sought upon an application under the 1997 Act is an injunction restraining the offender from pursuing harassing behaviour. Whereas proving a breach of an injunction is normally the responsibility of the victim, under the 1997 Act breach amounts to a criminal offence and is, thus, the responsibility of the police and the CPS (Finch, 2001, p. 244). This quasi-criminal approach led to a debate about whether the standard of proof for making an injunction should be the civil or criminal standard (pp. 244–245). However, the matter appears to have been resolved by *Hipgrave v Jones* [2005] 2 FLR 174, where Tugendhat J held that the civil standard should be applied on the basis that an application was sufficiently different from, inter alia, an anti-social behaviour order under section 1, Crime and Disorder Act 1998 (p. 195).

The primary justification for this is that, whilst both are civil orders and bear a significant degree of similarity in their drafting, the order under the 1997 Act is a private law application made by an individual, whereas the order under the 1998 Act is a public law application (p. 187). This is an important distinction and is akin to other private law torts where private parties have only the civil burden and standard of proof. Where it is the state that is seeking to control the activities of an individual it would be more justifiable to impose a higher standard (not least to take into account the equality of arms principles), but it is less easy to justify this for an individual.

However, using this legislation could still be difficult. Whilst it is likely to be of assistance in those cases where the perpetrator of the abuse is known to the victim, it may be of less assistance where the perpetrator is unknown. Whilst internet service providers (ISPs) are willing to co-operate with the police, they do not, generally, co-operate with individuals as regards naming offenders. They prefer to impose their own sanctions. However, such action is often not followed through and, in any event, is easy to circumvent through the creation of multiple persona or by using non-ISP based services. In these circumstances, a victim is unlikely to have any person to serve an injunction on. This effectively rules out private law action.

### Anti-social Behaviour

The deficiencies of the private law arena with regard to dealing with harassment may lead one to assume that the criminal law is the only option available where the harassment is serious, or where it is not possible for the individual victim to ascertain the identity of the perpetrator. However, this need not be the case. It has been argued that harassment on the internet is anti-social behaviour, with society being replicated in cyber-space (Bocij & McFarlane, 2004, pp. 204–205). If this is true then it is quite possible that state agencies have an additional tool open to them, the anti-social behaviour order (ASBO).

The term ASBO has become entrenched in every-day language. The use of ASBOs has increased significantly in recent years, although the extent of their use differs
across England and Wales (Fitzpatrick, 2005, p. 591). The background to the introduction of ASBOs was perceived unsocial behaviour in public places such as streets and housing estates, where this behaviour impacted on the right of the general public to a peaceful life (see Collins & Cattermole, 2004, pp. 2–6). However, this need not prevent the use of an order in cyber-space.

It has been argued that there is a ‘right’ to use the internet without harassment (O’Connell et al., 2004, p. 10). Whilst this right may not yet have been upheld by the courts, there is some logic to this argument. The UK has traditionally adopted the position of treating the on-line and off-line world as the same, and recent government and judicial initiatives have demonstrated that they are not shy of attempting to regulate the internet. The test for an ASBO is simply whether the respondent has acted in an anti-social manner. This, according to section 1(1)(a) includes, ‘… [acting] in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons …’. An interesting feature of this definition is that there is no actual requirement that a person was caused harassment, alarm or distress, merely that such action was likely to do so. This can be contrasted with the criminal offences of harassment under the 1997 Act. The formulation of one or more persons would appear useful in terms of taking account of the fact that bullies often target more than one individual. Accordingly, where enforcement authorities detect that multiple harassment has taken place, this should be taken into account.

An interesting question, with regards to cyber-space, is what happens if the victims are outside the jurisdiction? Section 1 simply states that the victims are to be outside of the perpetrator’s household, but statutes are normally to be considered territorial and it is submitted, therefore, that this is the construction that the courts would use; not least because recent legislative terms expressly include phrases such as ‘in any part of the world’ (most notably in the Sexual Offences Act 2003). Where the victims are within the jurisdiction, however, nothing within the Act appears to specifically require any geographical proximity and, accordingly, it could be argued that the anti-social behaviour takes place in the location where the perpetrator logs onto the internet, since this is where the harassment, alarm or distress originates.

An ASBO application is a public law remedy, in that it is an application by the state and not an individual. The usual applicants are the police (although local authorities and other specified public bodies are able to make an application (section 85, Anti-social Behaviour Act, 2003) and they are also the most likely applicant for cyber-bullying. The standard of proof is the criminal standard (see R (McCann) v Manchester Crown Court [2003] 1 A.C. 787) and it could, therefore, be questioned as to why the police may take this action when the same behaviour is likely to amount to a criminal offence. This is often a policy decision and some forces take the approach that it is better to apply for an ASBO since a breach of this is punishable by up to five years’ imprisonment (section 1(10)). This could be a higher sentence than that for the substantive crime. However, the ability of the courts to impose restraining orders under the 1997 Act may militate against this argument. Where the perpetrator is an adolescent, another advantage of preferring an ASBO over a prosecution is that it is a civil order and, thus, the subject will not have a criminal
conviction. That said, the use of ASBOs on juveniles remains controversial. One problem noted is that some juveniles look on ASBOs almost as a ‘badge of honour’ (Lovell, 2005, p. 16). Whether this would apply to those in cyber-space is perhaps more open to question.

If an ASBO is imposed, the Magistrates’ Court can prohibit the respondent from doing anything stated on the order. This would appear to mirror section 5 of the 1997 Act. In *R v McGrath* [2005] EWCA Crim 353, the Court of Appeal held that the requirements need not be restricted to the direct prohibition of conduct that would cause harassment, alarm or distress. Accordingly, an order could be used to curb the wider on-line activities of the respondent. Proportionality must remain central to any prohibitions, but where the cyber-bullying has been intense, and to a number of victims, it is quite possible that significant restrictions could be made. It may be thought that, given the nature of the internet, it could be difficult to police restrictions on its use. However, the courts have applied such restrictions in other contexts (see, for example, *R v Beaney* [2004] 2 Cr App R (S) 82). Although the ease of policing is to be taken into account, it is simply one factor (p. 447). The advantage of the orders is that, if the prohibitions are listed and the offender is found to have breached them (for example, because a victim or internet service provider informs the police), then this is a substantive criminal offence and no other liability is needed in order for proceedings to occur.

**Conclusion**

This article has demonstrated that there are legal solutions to the problem of cyber-bullying and harassment. That is not to say, however, that the law must always be used or indeed that it should be a measure of first resort. A number of non-legal solutions exist to the problem of cyber-stalking (Ellison & Akdeniz, 1998, pp. 43–45) and, arguably, more exist for cyber-bullying. Perhaps the most important of these is education (O’Connell *et al.*, 2004, pp. 2–3). Educating adolescents could take two formats: helping victims to understand the dangers and how to take simple steps to minimise any threat and educating those who believe that cyber-bullying is harmless.

However, education and non-legal solutions are not answers by themselves. Sometimes the law will be needed. There will be occasions when the law cannot apply, most notably where territoriality difficulties arise, but this will not be a problem for all cases. Cyber-bullying, similar to off-line bullying and harassment, can cause real damage. Where non-legal solutions do not work, or where they are inappropriate (e.g. where there is significant harm or an adult perpetrator), the law can be an effective way of punishing inappropriate behaviour. It should be possible to use the criminal law and it has been seen that the most likely vehicle for liability will be the Protection from Harassment Act 1997, which has had some successes in the off-line world. The criminal law need not be the only option, however, and although the ASBO regime is controversial it is possible that it could be used to protect the victim without using the full force of the criminal law. Where, for example, the non-legal solutions have been ineffective, it may be a way of placing the perpetrator ‘on notice’
that cyber-abuse will not be tolerated. If ASBOs are to be used, however, it is
important that proportionality is considered and that any restrictions are not so
onerous that they lead to an inevitable breach. Achieving this balance may not be
easy, but it could help to ensure that cyber-space is somewhat safer for the victims of
cyber-bullies.

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