

## **SHOULD HONG KONG LEGISLATE ON CYBER-BULLYING? IF SO, HOW?**

### ***1. INTRODUCTION***

Imagine watching a YouTube video. A video of 15-year-old girl, who does not speak. Instead, she tells her story by showing a series of flash cards. *She was stalked online and blackmailed into exposing her breasts via webcam. This photo of her was then circulated on the Internet and shown to her friends. She then plunged into anxiety, depression, drugs, alcohol, and self-mutilation. Even after changing schools countless of times, she was constantly attacked, both physically and emotionally.* This 9-minute video was a cry for help from Amanda Todd, who then committed suicide weeks after posting the video onto YouTube.<sup>1</sup> Her video has been watched more than 17 million times, and has sparked global awareness of the damaging impact of cyber-bullying.

#### ***1.1. What exactly is cyber-bullying?***

There is no legal definition of cyber-bullying in Hong Kong. However, cyber-bullying has been defined by the Youth Community Legal Information Centre as the “repeated activity using information and communication technology, such as social networking sites, instant messaging, or SMS text messages, for deliberate, repeated, hostile behaviour by an individual or group targeting another person or persons with intent to harm”.<sup>2</sup>

The three critical elements of bullying, as identified by researchers, are:-

- (i) repetition;
- (ii) intent to cause physical, psychological and/or emotional harm; and

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<sup>1</sup> Associated Press “Canadian teen found dead weeks after posting wrenching YouTube video detailing bullying”, *Fox News*, 12 October 2012, accessed 13 February 2015, <http://www.foxnews.com/world/2012/10/12/canadian-teen-found-dead-weeks-after-posting-wrenching-youtube-video-detailing/>

<sup>2</sup> Youth Community Legal Information Centre “Cyberbullying”, 2015, accessed 13 February 2015, <http://youth.clic.org.hk/en/topics/Cyber-bullying/>

(iii) power imbalance between the offender(s) and the victim(s) so that the victim(s) cannot defend themselves.<sup>3</sup>

For cyber-bullying, there is a further element of using information and communication technologies to bully.

Compared to traditional bullying, cyber-bullying has the “ability to reach the target 24 hours a day, 7 days a week” globally.<sup>4</sup> This form of bullying is much more public and permanent, adding a new dimension to the powerlessness felt by the victim.

Furthermore, cyber-bullies have a decreased sense of personal responsibility,<sup>5</sup> because he sits passively behind a computer, making him anonymous and hard to find, and he can continue to harass the victim by creating another online account if the current account is blocked.

The term “cyber-bullying” is normally used in cases where the victim is a child or teenager; whereas if the victim is an adult, the conduct would be referred to as “cyber-harassment” or “cyber-stalking”.<sup>6</sup>

## ***1.2. What are the consequences of cyber-bullying?***

The victims of cyber-bullying often experience fear, suffering, depression, loss of self-esteem, and other long-lasting psychological distress.

Some are driven to commit suicide – Tyler Clementi, an 18-year-old student who committed suicide in America after a wave of cyber-bullying over his sexuality;<sup>7</sup> or Rehtaeh Parsons, a 17-year-old Canadian girl who committed suicide after a photo of her allegedly being sexually assaulted circulated online.<sup>8</sup>

In the current digital era with rising importance of technology, issues relating to the Internet, including cyber-bullying, are also rapidly

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<sup>3</sup> Katz, Adrienne, *Cyberbullying and e-safety* (2012) London: Jessica Kingsley Publishers, p.20

<sup>4</sup> Butler, Des et al. “Cyber bullying in schools and the law: Is there an effective means of addressing the power imbalance?” (2009) *eLaw Journal: Murdoch Electronic Journal of Law* 16, pp.84–114

<sup>5</sup> NoBullying.com “Cyberbullying in the United Kingdom in 2014”, 13 February 2015, accessed 20 February 2015, <http://nobullying.com/cyberbullying-in-the-united-kingdom-in-2014/>

<sup>6</sup> *ibid* 2

<sup>7</sup> Evans, Annemarie “Former Hong Kong schoolboy Cason Crane completes ascent of seven highest summits”, *South China Morning Post*, 14 July 2013, accessed 13 February 2015, <http://www.scmp.com/news/hong-kong/article/1282090/former-hong-kong-schoolboy-cason-crane-completes-ascent-seven-highest>

<sup>8</sup> Associated Press in Halifax, Nova Scotia “Two charged in deadly Canadian cyberbullying case”, *South China Morning Post*, 9 August 2013, accessed 25 January 2015, <http://www.scmp.com/news/world/article/1295472/two-charged-deadly-canadian-cyberbullying-case>

increasing. The Hong Kong Privacy Commissioner for Personal Data has revealed that there has been a fourfold increase in cyber-bullying,<sup>9</sup> causing widespread public concern. A leaflet “Cyber-bullying – What you need to know” was published to remind the public of privacy and legal issues related to cyber-bullying and remarked that it is an “alarming trend” whereby,

“Technological innovations have in many ways made human interactions more efficient and more creative. However, increased connectivity leads to problems when strangers, critics, bystanders or even friends interact irresponsibly and without due regard to people’s right to privacy. People’s lives offline may be adversely affected as a result. Cyber-bullying is one notable example of such unfortunate consequences as it inflicts harm on the victims that can have devastating effects. In the most tragic of consequences, the victims have taken their own lives because of cyber-bullying.”<sup>10</sup>

The courts have also recognised the seriousness of the new technological era, remarking that “the threatened means of dissemination via the computer must have filled the victim with alarm; it is common knowledge that the Internet knows no borders and once uploaded information is difficult to erase”.<sup>11</sup>

Therefore, Hong Kong must legislate on cyber-bullying.

## **2. CURRENT LAWS IN HONG KONG**

There is no specific statutory law in Hong Kong which directly governs cyber-bullying because the activities are wide-ranged; instead cyber-bullying is addressed by the various existing legislation.

### **2.1. Criminal offences**

Currently, a cyber-bully could be prosecuted by the police if they involve the following criminal offences:-

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<sup>9</sup> Kao, Ernest “Occupy Central protests blamed for increase of cyberbullying in Hong Kong”, *South China Morning Post*, 27 January 2015, accessed 11 February 2015, <http://www.scmp.com/news/hong-kong/article/1693585/occupy-central-protests-blamed-increase-cyberbullying-hong-kong>

<sup>10</sup> Hong Kong SAR Office of the Privacy Commissioner for Personal Data “Privacy Commissioner published leaflet reminding internet users to abide by the law as cyber-bullying arouses public concern” (Media statement), 30 October 2014, accessed 20 February 2015, [http://www.pcpd.org.hk/english/news\\_events/media\\_statements/press\\_20141030.html](http://www.pcpd.org.hk/english/news_events/media_statements/press_20141030.html)

<sup>11</sup> *HKSAR v Chai Mei Kwan* [2001] 3 HKC 181 at §18

- 2.1.1. Criminal intimidation if the cyber-bully threatens the victim with injury to that person, reputation or property.<sup>12</sup>

Although this addresses a wide range of threatening conduct, it is hard for the police to prosecute because it requires identification of the cyber-bully.

- 2.1.2. Criminal damage if the cyber-bully intentionally destroys or damages the property belong to another without lawful excuse.<sup>13</sup>

In *HKSAR v Ko Kam fai*<sup>14</sup>, the cyber-bully was charged with criminal damage because he damaged the victims' computers and emails. He made the computers and emails inoperative by hacking into the victims' computers, changing the data in their computers, sending numerous emails, including obscene and depraved materials and threatening to rape the victims.

- 2.1.3. Procuring unlawful sexual acts by threats if the cyber-bully procures the victim to do an unlawful sexual act<sup>15</sup> by threats or intimidation.<sup>16</sup>

In *HKSAR v Wong Dawa Norbu Ching-shan*<sup>17</sup> and *HKSAR v Liang Fu Ting*<sup>18</sup>, the cyber-bullies threatened to publish nude photographs of the victims onto the Internet unless the victims agreed to have sexual intercourse with them. In both cases, the victims engaged in unwanted sexual intercourse with the cyber-bullies as a result of the threats.

- 2.1.4. Offensive telephone calls and messages if the cyber-bully sends any message by telegraph, telephone, wireless telegraphy or wireless telephony which is grossly offensive or of an indecent obscene or menacing character.<sup>19</sup>

However this section only provides protection against cyber-bullies who use telegraph, telephone and wireless telegraphy,

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<sup>12</sup> *Crimes Ordinance* (Cap.200) (“CO”) s.24

<sup>13</sup> *CO* s.60

<sup>14</sup> [2001] 3 HKC 181

<sup>15</sup> “Unlawful sexual act” is defined under *CO* s.117(1A)

<sup>16</sup> *CO* s.119

<sup>17</sup> DCCC 70/2013 (unreported, 10 June 2013)

<sup>18</sup> DCCC 535/2011 (unreported, 31 August 2011)

<sup>19</sup> *Summary Offences Ordinance* (Cap.228) s.20

and not the medium of the Internet. The *Unsolicited Electronic Messages Ordinance* (Cap.593) enacted “to provide for the regulation of the sending of unsolicited electronic messages and for connected purposes” also does not address the sending of offensive indecent or obscene content in such electronic messages.<sup>20</sup>

Furthermore, this offence imposes a high standard and proof, such that the message must be grossly offensive or of an indecent, obscene or menacing character.

- 2.1.5. *Blackmail* if the cyber-bully makes any unwarranted demand with menaces with a view to gain for himself or another or with intent to cause loss to another.<sup>21</sup>

The cyber-bully was charged with blackmail in *Chai Mei Kwan*<sup>22</sup>. After having sexual intercourse with the victim, the cyber-bully sent SMS messages to the victim threatening to distribute a video clip of their intimacies to “everyone” unless the victim provided the cyber-bully with money.

- 2.1.6. *Possession of child pornography* by the cyber-bully under s.3(3) of the *Prevention of Child Pornography Ordinance* (Cap.579) (“*PCPO*”). The police must prove that the cyber-bully knew of the existence of the child pornography on the computer and that the cyber-bully knew the exact nature of the material was child pornography.<sup>23</sup>

Although there are a number of defences to this charge under *PCPO* s.4, none of them would be applicable to cyber-bullies who intimidate a child into sexual activity, record that on a webcam and store it in their computers.<sup>24</sup>

## 2.2. Civil action

Victims of cyber-bullying could also bring a civil claim against the cyber-bullying if the cyber-bully has committed a civil wrong:-

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<sup>20</sup> *HKSAR v Chan Yau Hei* [2014] HKC 52

<sup>21</sup> *Theft Ordinance* (Cap.210) s.23

<sup>22</sup> *ibid* 11

<sup>23</sup> *HKSAR v Kwok Po Lun* DCCC 64/2012 (unreported, 19 March 2013)

<sup>24</sup> Youth Community Legal Information Centre “Cyberbullying: Possession of child pornography”, 2015, accessed 13 February 2015, <http://youth.clic.org.hk/en/topics/Cyber-bullying/#Possession-of-child-pornography>

2.2.1. Torts of intimidation and harassment if the cyber-bully:-

- (i) uses unlawful threat successfully to compel another to act (or refrain from acting) in a particular manner that would cause harm (tort of intimidation); or
- (ii) “whether by words or action, directly or through third parties, sufficiently repetitive in nature as would cause, and which he ought reasonably to know would cause, worry, emotional distress or annoyance to another person”<sup>25</sup> (tort of harassment).

In *Lau Tat Wai v Yip Lai Kuen Joey*<sup>26</sup>, the Plaintiff was granted an injunction to restrain the Defendant from further harassment, and was awarded aggravated and exemplary damages based on the torts of harassment and intimidation. After the Plaintiff ended a relationship with the Defendant, the Defendant acted maliciously towards the Plaintiff and the Plaintiff’s family, friends and colleagues, intended to damage the Plaintiff’s life, for the next six years. The Defendant sent spiteful emails to the Plaintiff, hacked into the Plaintiff’s email account, made nuisance calls him, and stalked him. The Plaintiff had to change his telephone number, email address, resign from his job, and suffered from insomnia and anxiety.

2.2.2. Tort of defamation if the cyber-bully harms the victim’s reputation by spreading false information about the victim to a third party.<sup>27</sup>

In 2013, a photo of Ms. Crystal Ho was circulated online after being mistakenly identified as the girl in a viral video<sup>28</sup> who slapped and scolded her kneeling boyfriend in the streets of Hong Kong.<sup>29</sup> As a result of harassment from many people on Facebook, she suffered from insomnia. At the time, she was exploring her legal options for defamation against news outlets

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<sup>25</sup> *Lau Tat Wai v Yip Lai Kuen Joey* [2013] 3 HKC 361 at §56

<sup>26</sup> *ibid*

<sup>27</sup> Youth Community Legal Information Centre “Cyberbullying: The tort of defamation”, 2015, accessed 13 February 2015, <http://youth.clic.org.hk/en/topics/Cyber-bullying/#The-tort-of-defamation>

<sup>28</sup> Chiu, Peace “Video of woman slapping and scolding kneeling boyfriend in Hong Kong goes viral” *Yahoo News*, 7 October 2013, accessed 20 February 2015, <http://news.yahoo.com/blogs/what-is-buzzing/video-woman-slapping-scolding-kneeling-boyfriend-hong-kong-082736194.html>

<sup>29</sup> Young Post “Mistaken identity”, 10 October 2013, accessed 20 February 2015, <http://yp.scmp.com/article/5586/mistaken-identity>

and has reported the case of cyber-bullying to the police.<sup>30</sup> However, it is likely that the victim has not pursued this course of action as there has been no recent news regarding this case.

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<sup>30</sup>馮國良,林茵”遊港遭點錯相照片被瘋傳兼上頭版 澳門女喊冤「我唔係 14 巴港女」”蘋果日報, 9 October 2013, accessed 20 February 2015, <http://hk.apple.nextmedia.com/news/art/20131009/18456516>

### **2.3. *Is this adequate?***

For *criminal offences*, the police decides whether or not to prosecute depending on whether there is sufficient evidence for a reasonable prospect of obtaining a conviction. If there is insufficient evidence, then the victim of cyber-bullying would be left hopeless.

A success *civil cause of action in tort* could result in an award of damages and an injunction may be granted to prevent a repetition of the harassment; however, these proceedings are expensive, time-consuming, emotionally draining, and there is no guarantee of success.

As the term “cyber-bullying” is used when the victims are children or teenagers, they are unable to start civil proceedings in their own names if they are under 18 years old. Instead, the cases are usually conducted in the name of the victim’s parent, which creates practical problems relating to time, resources, competency and capacity to pursue the proceedings for the victim.<sup>31</sup>

Therefore, these civil actions in tort are generally not an appropriate response to cyber-bullies.

## **3. *OTHER JURISDICTIONS***

The issue of adequate regulation of cyber-bullying is not restricted to Hong Kong, these problems are currently discussed and debated around the world.

### **3.1. *United Kingdom***

Similar to Hong Kong, the United Kingdom does not have a specific legislation for bullying or cyber-bullying. Instead it has various laws which deal with the criminal or civil offence, namely the *Protection from Harassment Act 1997*, the *Criminal Justice and Public Order Act 1994*, *Malicious Communications Act 1988*, the *Communications Act 2003*, and the *Defamation Act 2013*.<sup>32</sup>

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<sup>31</sup> Youth Community Legal Information Centre “Cyberbullying: Civil procedures”, 2015, accessed 13 February 2015, <http://youth.clic.org.hk/en/topics/Cyber-bullying/#Civil-Procedures>

<sup>32</sup> De Waal, Anastasia “Cyberbully: it’s becoming a bigger problem than ever, so what can be done about online bullying”, *The Independent*, 16 January 2015, accessed 20 February 2015, <http://www.independent.co.uk/life-style/health-and-families/features/cyberbullying-what-to-do-9983103.html>



However, it has statutory provisions which state that every school must have measures in place to prevent all forms of bullying<sup>33</sup>:-

3.1.1. *s.89 of the Education and Inspections Act 2006 (“EIA”)* provides that state-maintained school must have measures to encourage good behaviour and prevent all forms of bullying amongst pupils, which must be part of the school’s behaviour policy and communicated to all pupils, school staff and parents.

3.1.2. *The Independent School Standard Regulations 2010* provides that the proprietor of an independent school is required to ensure that an effective anti-bullying strategy is implemented.

The *EIA* gives teachers a legal right to discipline pupils for bullying and are given specific powers to deal with the conducts of pupils outside school premises. Teachers are also allowed to confiscate items, such as mobile phones, if they are used to bully other pupils.

3.1.3. *The Children Act 1989* provides that the school should report their concerns to their local authority children’s social care regarding any incident of bullying when there is “reasonable cause to suspect that a child is suffering, or is likely to suffer, significant harm”.

3.1.4. *The Education Act 2011* also provides teachers with powers to tackle cyber-bullying by allowing them to search for and, if necessary, delete inappropriate images or files on electronic devices.

On 12 February 2015, United Kingdom passed a new law criminalising the public sharing of posting “revenge porn” online, whereby the offender can face up to two years in jail. Scotland and Northern Ireland are also considering implementing similar laws.<sup>34</sup>

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<sup>33</sup> United Kingdom Department for Education “Preventing and tackling bullying: Advice for headteachers, staff and governing bodies”, October 2014, accessed 20 February 2015, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/368340/preventing\\_and\\_tackling\\_bullying\\_october14.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/368340/preventing_and_tackling_bullying_october14.pdf)

<sup>34</sup> BBC “‘Revenge porn’ illegal under new law in England and Wales”, 12 February 2015, accessed 22 February 2015, <http://www.bbc.com/news/uk-31429026>

### 3.2. *United States of America*

Many cyber-bullying offences already fall under existing criminal or civil laws in America, but there are a few states that have criminal sanctions specifically for cyber-bullying. As of January 2015, 49 states have passed bullying prevention laws, requiring schools to have policies to deal with bullying.<sup>35</sup>

Most states have opted to direct schools to address the cyber-bullying problem and are able to intervene in off-campus cyber-bullying;<sup>36</sup> however, they do not have universal authority in all cases.<sup>37</sup>

The laws regarding bullying are widely varied across the states and the *Megan Meier Cyberbullying Prevention Act* (“*MMCPA*”) was proposed to criminalise cyber-bullying at a federal level in 2009. However, the Act was not passed due to its “over-criminalisation” and “vagueness”, as well as issues somewhat contradicting the United States Constitution First Amendment<sup>38</sup>, Fourth Amendment<sup>39</sup>, and the Due Process Clause of the Fourteenth Amendment<sup>40 41</sup>.

While new laws and amendments continue to emerge in different states, the United States Congress is still reviewing the *MMCPA*.<sup>42</sup>

### 3.3. *Australia*

Analogous to other jurisdictions, Australia criminalises cyber-bullying when it falls under existing criminal, civil and work health and safety offences.<sup>43</sup>

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<sup>35</sup> Hinduja, Sameer and Patchin, Justin “Cyberbullying legislation and case law: Implications for school policy and practice” *Cyberbullying Research Center*, January 2015, accessed 20 February 2015, <http://www.cyberbullying.us/cyberbullying-legal-issues.pdf>

<sup>36</sup> *J.S. v Bethlehem Area School District* (2000)

<sup>37</sup> *Emmett v Kent School District No. 415* (2000)

<sup>38</sup> “No law... abridging the freedom of speech.”

<sup>39</sup> “Security of person and property from unreasonable searches, without judicial sanction based on probably cause.”

<sup>40</sup> “Nor shall any State deprive any person of life, liberty, or property, without due process of law.”

<sup>41</sup> Agate, Jennifer and Ledward, Jocelyn “Cyberbullying: legislative reform and an international perspective” (2014) *Entertainment Law Review* 25(7), pp.236–239

<sup>42</sup> Abrahams, Nick and Johnson, Daniel “Cyberbullying and why we need an e-safety commissioner” *The Sydney Morning Herald*, 10 February 2015, accessed 20 February 2015, <http://www.smh.com.au/digital-life/digital-life-news/cyberbullying-and-why-we-need-an-esafety-commissioner-20150210-13adxk.html>

<sup>43</sup> NoBullying.com “Cyberbullying laws: Australia cracks down on cyberbullying” 24 November 2014, accessed 20 February 2015, <http://nobullying.com/cyberbullying-laws-australia/>

*s.60E Crimes Act 1900*, amended by the *Crimes Amendment (School Protection) Act 2002* criminalises assault, stalking, harassment or intimidation of any staff or student while attending the school, but does not apply to events occurring outside the school premises. Schools may also be open to an action for negligence for breach of duty of care owed to a student if the student was subjected to cyber-bullying whilst under the care of the school, which resulted in harm.<sup>44</sup>

On 3 December 2014, the federal government of Australia introduced the *Enhancing Online Safety for Children Bill 2014 (“EOSCB”)* to address cyber-bullying. In brief, the *EOSCB* proposes to establish the Office of e-Safety Commissioner, which will have powers to order website to remove material which is intimidating, harassing or humiliating to an Australian child or children and to issue substantial fines for non-compliance.<sup>45</sup>

### 3.4. Canada

On 12 December 2014, Royal Assent was given to make *House Government Bill C-13 (“Bill C-13”)*<sup>46</sup> into law. *Bill C-13* changes anti-cyber-bullying laws<sup>47</sup>:-

- (i) It is now a crime for “non-consensual distribution of intimate images” whereby the cyber-bully distributes intimate photos and videos, also known as “revenge porn”, without the consent of the person(s) in the photos and videos.
- (ii) A Canadian court of proper jurisdiction can now compel cyber-bullies to remove the offending photos or videos from the Internet with all costs paid by the cyber-bully.
- (iii) Property used to commit the offence is forfeited.
- (iv) A recognisance order is issued by the court to prevent distribution of the photos or videos.

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<sup>44</sup> Gallagher-Watson, Aoife “Cyberbullying – laws struggling to keep up with technology”, *Colin Biggers & Paisley*, 25 June 2014, accessed 20 February 2015, <http://www.cbp.com.au/Publications/Cyberbullying-laws-struggling-to-keep-up-with-te>

<sup>45</sup> Gallagher-Watson, Aoife “Cyberbullying – government introduces *Enhancing Online Safety for Children Bill 2014*”, *Colin Biggers & Paisley*, 16 December, accessed 20 February 2015, [http://cbp.com.au/Publications/Cyberbullying-government-introduces-Enhancing-On?utm\\_source=Mondaq&utm\\_medium=syndication&utm\\_campaign=View-Original](http://cbp.com.au/Publications/Cyberbullying-government-introduces-Enhancing-On?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original)

<sup>46</sup> *An Act to amend the Criminal Code, the Canada Evidence Act, the Competition Act and the Mutual Legal Assistance in Criminal Matters Act* and in short, *Protecting Canadians from Online Crime Act*

<sup>47</sup> NoBullying.com “Cyberbullying laws in Canada”, 9 February 2015, accessed 20 February 2015, <http://nobullying.com/cyberbullying-laws-canada/>

- (v) A convicted cyber-bully's use of computer and the Internet is restricted.
- (vi) For any type of criminal cyber-bullying under investigation, the police can compel Internet Service Providers to preserve information that is data about communications or tracking of transactions.
- (vii) For any type of criminal cyber-bullying under investigation, the police can obtain investigative warrants easier to intercept private communications.

Prior to *Bill C-13*, cyber-bullying was addressed if the conduct fell within the ambit of existing civil or criminal law. These laws remain effective.

### ***3.5. Hong Kong's comparative standing***

All the common law jurisdictions, including Hong Kong, attack cyber-bullying through the relevant civil and criminal law if it has the respective elements.

However, no specific statute in Hong Kong require school to implement policies against bullying. Hong Kong schools currently do not have any duty to ensure any anti-bullying policies are implemented. In fact, very few schools have a policy to handle cyber-bullying in Hong Kong.<sup>48</sup>

Instead the Education Bureau (“**EDB**”) adopts a zero tolerance policy on school bullying, which includes cyber-bullying, and has issued a circular to all schools to “ask them to take the matter seriously and implement positive measures to ensure the safety of students at school and create a harmonious school environment”.<sup>49</sup> It is not enough.

## ***4. THE WAY FORWARD***

### ***4.1. Reform? Or not to reform?***

It is evident that Hong Kong should legislate on cyber-bullying due to the global impact and devastating and everlasting emotional strain to victims.

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<sup>48</sup> Wong, Yat-hei “Terror from your tablet: Hong Kong students may speak up about cyber-bullying, but schools should be doing more to help” *Young Post*, 6 March 2013, accessed 20 February 2015, <http://yp.scmp.com/article/4804/terror-your-tablet>

<sup>49</sup> Hong Kong SAR Information Services Department “LCQ12: Cyber-bullying” (Press release) 19 December 2012, accessed 20 February 2015, <http://www.info.gov.hk/gia/general/201212/19/P201212190360.htm>

Hong Kong has been addressing some aspects of cyber-bullying, but the current law do not address cyber-bullying directly and there seems to be gaps which need to be filled.

The next essential question now is, “how?”

## 4.2. *Proposal*

The Hong Kong should first update its legislation to cater for technology. For example:-

4.2.1. *Offensive messages on the Internet* – As explained above in paragraph 2.1.4, currently there is no way of regulating offensive messages on the Internet. These loopholes cannot be fixed by the judges, whereby the Courts have expressed the need for the Legislature to update and extend statutory provisions to address the “mischief of lewd, obscene and disgusting material posted on or communicated via the Internet... In addition, additional clarity could be achieved by the issuance by the Director of Public Prosecutor of guidelines regarding the circumstances in which cases involving communications sent via the Internet would be prosecuted”.<sup>50</sup>

Although EDB adopts a zero tolerance policy on school bullying, the Hong Kong should impose statutory duties for schools to implement anti-bullying policies, similar to those in the United Kingdom and America. Researchers suggest that programs for “the prevention of cyber-bullying should be incorporated in school curricula and include thorough instruction on internet safety”.<sup>51</sup>

The Anti-Defamation League (“ADL”) has a model statute (“**Model Statute**”)<sup>52</sup> for states in America to combat bullying and cyber-bullying. The Model Statute would require school districts to adopt an anti-bullying policy that is “comprehensive, practical, and effective”.<sup>53</sup> Hong Kong should modify and customise the Model Statute, which would require all

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<sup>50</sup> *ibid* 19 at §92

<sup>51</sup> von Marées, Nandoli and Petermann, Franz “Cyberbullying: An increasing challenge for schools” (2012) *School Psychology International* 33(5) pp.467–476, p.474

<sup>52</sup> Anti-Defamation League “Cyberbullying prevention law: An ADL model statute” (2012), accessed 20 February 2013, <http://www.adl.org/assets/pdf/education-outreach/ADL-Cyberbullying-Prevention-Law-Model-Statute.pdf>

<sup>53</sup> Ainsley, Gregory “Cyberbullying: The new gender harassment and how legislatures can protect free speech while ensuring that laws keep pace with technological advances” (2011) *Wisconsin Journal of Law, Gender & Society* 26 pp.313–348

schools work with parents, teachers, students, law enforcement and community stakeholders in the creation and implementation of a school policy (the “**Proposed Ordinance**”). The Proposed Ordinance should include sections specifically dealing with how the school policy should be drafted:-

- 4.2.2. A strong definition of bullying, which includes cyber-bullying. This is essential because the definition would notify everyone exactly what is unacceptable. If the definition is too broad or vague, then it would cause confusion and may contradict free speech.
- 4.2.3. Address off-campus behaviour because the cyber-bully could be using devices not owned by the school or located outside school premises.
- 4.2.4. Include notice requirements for students and parents by publicising the policy in conduct codes, handbooks, bulletin boards, school websites, and other appropriate places. This would send a message to the community that cyber-bullying is a serious issue and an inappropriate conduct. It would also help all parties identify, respond and report incidents of cyber-bullying.
- 4.2.5. Set out clear reporting and investigation procedures so the victims of cyber-bullying know it is safe and effective to report incidents.<sup>54</sup> Schools should create a clear process of how to report to superintendents, who should report to a designated government agency.
- 4.2.6. Require regular training for teachers, students and guardians about how to recognise and respond to bullying and cyber-bullying. Students must understand that cyber-bullying is illegitimate, unacceptable, and will be taken seriously. Adults must become more aware of the numerous negative potential of the Internet and cyber-bullying,<sup>55</sup> so that they can become more supportive of victims, to identify possible offenders, and to prevent incidents of cyber-bullying. Everyone must learn how to protect themselves.

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<sup>54</sup> *ibid* 20, p.472

<sup>55</sup> *ibid*

- 4.2.7. Establish consequences to deter potential cyber-bullies from offending or re-offending and to punish their inappropriate behaviour.
- 4.2.8. Provide counselling as the effects of cyber-bullying often has long-lasting effects.
- 4.2.9. Gather and submit statistics to the designated government agency annually so the schools and Hong Kong can evaluate the success of their policies and try to improve it.<sup>56</sup>

The proposed policy requires school superintendent to report to designated government agency. Although EDB deals with education-related issues in Hong Kong, the Proposed Ordinance should establish a designated department, similar to that proposed in the *EOSCB*, whereby the Deputy will have the power to:-

- 4.2.10. Issue a notice to websites requiring them to remove offensive and harmful materials;
- 4.2.11. Issue a notice to the cyber-bully requiring them to remove offensive and harmful materials from the Internet, to refrain from posting such materials, and to apologise for posting such materials; and
- 4.2.12. Impose fines to anyone who fails to comply with the notices.

Under the Proposed Ordinance, teachers should be given the legal right to:-

- 4.2.13. confiscate the items used for cyber-bullying behaviour, like the *EIA*;
- 4.2.14. search for, and if necessary, delete inappropriate images or files on the electronic devices, like the *EA*;
- 4.2.15. restrict the cyber-bully's use of the Internet and electronic devices, similar to *Bill C-13*;

Although Hong Kong could create a new statute criminalising cyber-bullying, such as criminalising 'revenge porn', it is strongly advised not to

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<sup>56</sup> Schoenberg, Shira "Massachusetts House passes updated anti-bullying bill", MassLive, 26 February 2014, accessed 20 February 2015, [http://www.masslive.com/politics/index.ssf/2014/02/massachusetts\\_house\\_passes\\_ant.html](http://www.masslive.com/politics/index.ssf/2014/02/massachusetts_house_passes_ant.html)

do so. There are already laws which exist that criminalise these behaviours and it may not be as reasonable or effective as the proposed inclusive school policies.<sup>57</sup> The current Proposed Ordinance should be considered and evaluated first.

#### **4.3. Issues which need to be addressed**

The Proposed Ordinance addresses any concerns which may be raised by the public:-

4.3.1. Article 27<sup>58</sup> Hong Kong Basic Law (“HKBL”) – similar to the First Amendment debate in the United States, there may be concerns that school cyber-bullying policies will “run afoul” of this Article and “interfere with students’ right to free speech”.<sup>59</sup> Thus, the Proposed Ordinance specifies that all cyber-bullying policies implemented by the schools must be drafted carefully, with careful consideration on the definition of “cyber-bullying” as explained in paragraph 4.2.2 above.

This issue of free speech will always be of concern, but Article 27 HKBL does not entitle a person to harm others.

4.3.2. Hong Kong Basic Law Article 30<sup>60</sup> – schools and the government must act without violating this principle. Unlike the controversial law which took effect on 1 January 2015 in Illinois,<sup>61</sup> the Proposed Ordinance does not require the cyber-bully to reveal their passwords. Instead it provides the school and government authorities to deal with the issue in a proportionate manner by asking the cyber-bully and/or the website to remove the offending material.

4.3.3. Due process – the public may have concerns whether they are treated fairly. Therefore, the Proposed Ordinance stipulates that

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<sup>57</sup> Anti-Defamation League “ADL opposes criminalising cyberbullying”, 9 April 2014, accessed 20 February 2015, <http://denver.adl.org/2014/04/09/23161/>

<sup>58</sup> “Hong Kong residents shall have freedom of speech”

<sup>59</sup> Goodno, Naomi “How public schools can constitutionally halt cyberbullying: A model cyberbullying policy that survives First Amendment, Fourth Amendment, and due process challenges” (28 April 2011) Wake Forest Law Review 2011

<sup>60</sup> “The freedom and privacy of communication of Hong Kong residents shall be protected by law. No department or individual may, on any grounds, infringe upon the freedom and privacy of communication of residents except that the relevant authorities may inspect communication in accordance with legal procedures to meet the need of public security or of investigation into criminal offences.”

<sup>61</sup> Rushe, Dominic “Cyberbullying law requires students to reveal Facebook passwords”, *The Guardian*, 23 January 2015, accessed 20 February 2015, <http://www.theguardian.com/us-news/2015/jan/23/cyberbullying-law-schoolkids-facebook-passwords>



the all school policies must provide proper notice of their policies and consequences. Schools must ensure that their policies are not too vague, they must collect data to constantly evaluate their own policies, and they must submit their findings them to the government agency.

## 5. CONCLUSION

Currently, there are no specific statutory legislation concerning cyber-bullying but there are different methods of tackling cyber-bullying through criminal convictions and civil actions. However, these laws are inadequate and need to be updated to protect the welfare of children.

“Power and control by an e-safety commissioner will always be less effective than promoting positive digital citizenship; and digital citizenship is a concomitant of good citizenship generally.”<sup>62</sup> Therefore, the Proposed Ordinance is designed to educate students and to create a healthy environment.

Everyone is responsible for creating a healthy environment and eliminating cyber-bullying. Hong Kong is correct to express that “it is more appropriate to promote security awareness among the public and educate them on how to protect themselves using the Internet” regarding cyber-bullying.<sup>63</sup> In fact, Hong Kong is proactive in raising public awareness of cyber-bullying and lending a hand to help at-risk youth.<sup>64</sup> EDB should continue organising “seminars and workshops to strengthen teachers’ capability of preventing and handling student bullying problems”,<sup>65</sup> with the help of the Proposed Ordinance and the community.

Cyber-bullying is a matter of urgency and utmost importance – to prevent further harm and to promote healthy relationships so that the children of Hong Kong can grow to become good citizens of the world.

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<sup>62</sup> Heath, Phillip “Who’s responsible for tackling cyberbullying”, *The Sydney Morning Herald*, 30 July 2014, accessed 20 February 2015, <http://www.smh.com.au/comment/whos-responsible-for-tackling-cyber-bullying-20140729-zy0xv.html>

<sup>63</sup> *ibid* 49

<sup>64</sup> Hong Kong SAR Family Council “Paper FC 3/2014: Child Fatality Review Panel – First Report”, May 2013, accessed 20 February 2015, [http://www.familycouncil.gov.hk/english/home/files/FC\\_Paper\\_3\\_2014\\_Child\\_Fatality\\_Background\\_with%20Annex%20A.pdf](http://www.familycouncil.gov.hk/english/home/files/FC_Paper_3_2014_Child_Fatality_Background_with%20Annex%20A.pdf), p.74

<sup>65</sup> *ibid* 49