

Granyák Lívia:  
Children's rights online - legal aspect of cyberbullying:  
is a specific cyberbullying legislation needed?<sup>1</sup>

## **I. Introduction**

Bullying is a well-known, widespread matter all over the world. This is hardly a new phenomenon, it has been part of the society's life for a long time, especially the children's life. However, it has moved from the schoolyard to social networking sites as much Facebook, emails and mobile text messages presenting us with a major challenge. That is why this paper aims at familiarizing cyberbullying with all the most important components. After getting an inside view of cyberbullying the research moves on the state's role to discuss whether cyberbullying legislation is needed and if it does, then which branch of law should regulate this issue. Some countries have already attempted to regulate cyberbullying. Due to this fact, the study focuses on the most significant cyberbullying legislations such as the existing regulations of the United States of America (USA), the United Kingdom (UK) and Australia.

## **II. What is cyberbullying?**

To understand what cyberbullying is, first bullying has to be defined. Bullying means repeated negative behaviours intended to frighten or cause harm based on imbalance of power between the participants. Cyberbullying implies the same conduct using technologies such as e-mail, cell phone and text messages, instant messaging, defamatory personal websites and defamatory personal polling sites. As evidenced by this definition, cyberbullying can take many different forms, including:

- sending mean, vulgar or threatening messages or images;
- posing sensitive or private information about another person; or
- intentionally excluding someone from an online group.

This phenomenon could be more dangerous than its offline version because of some special features that will be discussed below. That is why a reasonable question emerges: who has to undertake the responsibility to tackle this deviance? Victims, parents, schools, NGOs or governments, etc.?

This task cannot be imposed on one individual. In the interest of an efficient solution it is obvious that all of them must take part in the prevention and fight against cyberbullying. So the next question is: what obligations does each person have? Due to the limit of this paper the government's role will be discussed.

---

<sup>1</sup> I would like to express my sincere gratitude and appreciation to Irina Beaton, one of Scottish Child Law Centre's solicitors for giving advices regarding this study.

To find out in which cases the state's responsibility is required, the "simply" hurtful behaviour and an infringing act have to be distinguished from each other. It is really significant, because in the first instance, a state intervention is not well-founded, but in the second case it is more conceivable. As mentioned above there are many cyberbullying behaviours, therefore in order to make a distinction between an unlawful act and "simply" harmful conduct, below are listed the most relevant features of cyberbullying:

- taking place between children,
- based on a real or apparent dominant position,
- using electronic devices which include, but are not limited to, telephones, cell phones or other wireless telecommunication devices, personal digital assistants (PDAs), computers, email, instant messaging, text messaging, and websites,
- intentionally,
- repetitive,
- offensive
- cause severe humiliation, harassment or intimidation.
- 

Due to the various types of cyberbullying, the above mentioned list is not exhaustive. This paper would not try to determine a definition covering all cyberbullying behaviours because that needs another study to be done from another perspective. So now this "definition" is simply confined to this review to summarize the most common and serious elements of cyberbullying.

### **III. The reasons for taking action by the states**

Because of the online area and the electronic devices cyberbullying has unique features threatening children in a more dangerous way. Four arguments for cyberbullying regulation:

#### **1. The extent of this phenomenon taking account of its prevalence and seriousness**

Claim of controlling cyberbullying appears first where cyberbullying behaviours happen frequently and induce serious consequences. Therefore, it is not surprising that the first legislation steps against cyberbullying were made by the USA where unfortunately more cyberbullying has already led to suicide. Due to the high level of the teenager's self-harm in Australia, the Australian legislation has done a pioneer work in ruling cyberbullying as well.<sup>2</sup> Thank to this, Australia can now take pride in having an independent Children's e-Safety Commissioner established by the Enhancing Online Safety for Children Act 2015. This Act implies a huge achievement in combat against cyberbullying that is why this system is going to be discussed in more detail later.

---

<sup>2</sup> The substantive part of the Children's Rights Report 2014 by the National Children's Commissioner focuses on intentional self-harm with or without suicidal intent and death by intentional self-harm. [https://www.humanrights.gov.au/sites/default/files/document/publication/Children%27s%20Rights%20Report%202014\\_2.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/Children%27s%20Rights%20Report%202014_2.pdf) (Downloaded: 30.05.2016)

## 2. Children victims

Nowadays children's rights are protected all over the world. The United Nations Convention on the Rights of the Child adopted on the 20th of November in 1989 is a vital convention in relation to children's rights. Its 54 articles describe the economic, social and cultural rights of the children. Due to the widespread approval by the countries, this is one of the most successful conventions of the United Nations (UN).<sup>3</sup> All state members of the UN ratified it but one, the United States of America.<sup>4</sup> In addition the Charter of the Fundamental Rights of the European Union (EU) obliges the EU and its Member States to protect and promote children's rights when implementing EU law. In December 2009, with the entry into force of the Lisbon Treaty, the Charter was given binding legal effect equal to the Treaties.<sup>5</sup> The Charter contains the first detailed references to children's rights at the EU constitutional level.<sup>6</sup> These legal sources indicate that children need further, specialised legal protection.

## 3. Unbalanced relation between the participants

The imbalance of power between the cyberbullying participants is caused by joining of several components such as anonymity, the distance from the victim and the lack of accountability. These factors contribute to the escalation of the act of cyberbullying which induces more destruction in the children's world. Due to the level of children's maturity and the speciality of the online arena, children are not able to realise the feasible consequences of their actions. Furthermore, online materials are very difficult to control and delete that aggravates the children's defencelessness. The materials – either picture or text- can be spread extremely fast without the consent of the person. This lack of control produces a very vulnerable position for the victims, which makes it very difficult to rescue them from this situation if that is possible at all.

## 4. In public

The most cyberbullying conduct happens in public that justifies the state's intervention by either cyberbullying legislation or by other instruments. This could involve providing opportunity for a direct enforcement of one's rights as well which could lead us to the horizontal effect of fundamental rights also known as third-party effect. This means the application of public law rules to directly effect legal relations between private individuals in their relation with other private law person.<sup>7</sup> In cyberbullying cases this would mean that private individuals could enforce fundamental rights against another private individual instead of the state. Law systems allow third- party effect remarkably

---

<sup>3</sup> 196 states are party of the convention this means these countries ratified it and 1 state, the USA signed it

<sup>4</sup> <http://indicators.ohchr.org/> (Downloaded: 10.04.2016)

<sup>5</sup> Charter of Fundamental Rights.

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l33501> (Downloaded: 27.05.2016)

<sup>6</sup> See more about children's rights within the European law: Handbook on the European law relating the rights of the child.

[http://www.echr.coe.int/Documents/Handbook\\_rights\\_child\\_ENG.PDF](http://www.echr.coe.int/Documents/Handbook_rights_child_ENG.PDF) (Downloaded: 30.05.2016)

<sup>7</sup> <http://www.hanselawreview.org/pdf8/Vol5No2Art02.pdf> (Downloaded: 10.04.2016)

seldom because basically fundamental rights protect individuals from the state and not from another private individuals. There is a chance of horizontal effect of fundamental rights if the breach of fundamental rights happens in public or based on imbalance of power, for example, it happens between an employee and an employer where individuals are not equal. In these kinds of situations one person is more vulnerable than the other, therefore more protection is needed by the state. Moreover, the states have wider scope for manoeuvre in making legislation regarding matters happening in public. Here, emphasis has to be laid on the singularity of the third-party effect. Its possibility in relation to this issue doesn't mean that third-party effect automatically applies to cyberbullying cases.

An additional argument for the state's cyberbullying legislation is one thoughts of István Bibó<sup>8</sup>: „... human freedom and dignity one and indivisible, every harm against someone on the grounds of social status or descent or sex or age jeopardises everyone else's freedom and dignity.”<sup>9</sup>

Following this principle we cannot close our eyes to harm of the individuals caused by cyberbullying, as cyberbullying threatens exactly that - human's freedom and dignity.

Based on all these things the state's legislation could be reasonable in the most serious cyberbullying case. However, there are more ways for its manifestation, for example, it can be either criminal sanctions or civil law provisions. The way of fundamental right's enforcement between private law persons could be also open. Additionally this can happen with the help of administrative law, including education law provisions or creating a new status of a special commissioner, as the Australian example mentioned above. For which country which solution will be the adequate answer for tackling this problem is influenced by the speciality of the legal system and the extent and seriousness of cyberbullying. This means there is no general solution. Every country has to find their own tailor-made „remedy”. Some countries have already found their answer to this deviance and now we shall move on the most important existing cyberbullying legislations within the branches of legal system.

#### **IV. Criminal sanctions**

Due to the special criminal sanctions of cyberbullying within the USA criminal law the United States does a pioneer work on determining cyberbullying. Cyberbullying legislation is divided for state and federal level just like the whole law system in the

---

<sup>8</sup> István Bibó lived from 1911 until 1979. He was a Hungarian lawyer, civil servant, politician and political theorist. During the Hungarian Revolution in 1956 he acted as the Minister of State for National Government. When the Soviets invaded to crush the rebellious government, he was the last Minister left at his post in the Hungarian Parliament in Budapest. He wrote his famous proclamation named For Freedom and Truth in this time.

<sup>9</sup> Find the quote in Hungarian here: [http://tollelege.elte.hu/sites/default/files/articles/szabadsagszereto\\_ember.pdf](http://tollelege.elte.hu/sites/default/files/articles/szabadsagszereto_ember.pdf) (Downloaded: 31.05.2016)

USA. The federal legislation is still in drafting.<sup>10</sup> However, there have already been many state regulations regarding cyberbullying. To be specific there are 24 States ruling cyberbullying from which 7 States have criminal sanctions for it.<sup>11</sup> These States have different definitions of cyberbullying that is why the sanctions are also varied. Despite this fact the common of these legislations is cyberbullying ruled maximum as a misdemeanour and the penalty could be fine or imprisonment or both. Moreover many cyberbullying behaviours have already fallen under existing criminal law, for instance harassment, stalking, certain acts of harm or libel, defamation, intentional infliction of emotional distress, though these laws are infrequently applied.<sup>12</sup>

In contrast to the United States there is no legal definition of cyberbullying within the legislation made by the UK's government. However there is a number of existing laws that can be applied to cyberbullying cases. For example the Protection from Harassment Act (1997) under that if someone harasses another person, the perpetrator can be prosecuted in the criminal courts because of the offence against section 1 prohibited behaviour amounting to harassment of another.<sup>13</sup> Section 4 involves a more serious offence of someone causing another person to fear, on at least two occasions, that violence will be used against them. If a person is found guilty of harassment, he or she is liable on summary conviction to imprisonment for a term not exceeding six months, or a fine.<sup>14</sup> The Criminal Justice and Public Order Act (1994) defines a criminal offence of intentional harassment, which covers all forms of harassment, including sexual.<sup>15</sup> A person is guilty of an offence if with the intent of harassment, alarm or distress

- he or she uses threatening, abusive or insulting words or behaviour or disorderly behaviour;
- or displays any writing sign or other visible representation which is threatening, abusive or insulting, thereby causing that or another person harassment, alarm or distress.<sup>16</sup>

Other source of the legal assistance is the Malicious Communications Act introduced in 1988.<sup>17</sup> Section 1 of this Act involves sending to another of any letters, electronic communications, photographs and recordings which are indecent, grossly offensive or which convey a threat intended to cause distress or anxiety to the person receiving them.<sup>18</sup> The offence refers to the sending, delivering or transmitting, there is no

---

<sup>10</sup> Federal Law – In April 2009 a bill was passed to amend Title 18 of the United States Code, with respect to cyberbullying. The bill is cited as the “Megan Meier Cyberbullying Prevention Act”, after the Missouri teenager who tragically committed suicide following a cyberbullying campaign carried out by an adult neighbour.

<sup>11</sup> <http://cyberbullying.org/Bullying-and-Cyberbullying-Laws.pdf> (Downloaded: 31.05.2016)

<sup>12</sup> <http://www.cyberbullying.us/cyberbullying-legal-issues.pdf> (Downloaded: 24.01.2015)

<sup>13</sup> Protection from Harassment Act is an UK General Act, find here: <http://www.legislation.gov.uk/ukpga/1997/40/contents> (Downloaded: 31.05.2016)

<sup>14</sup> <http://www.legislation.gov.uk/ukpga/1997/40/section/2> (Downloaded: 24.04.2016)

<sup>15</sup> Criminal Justice and Public Order Act is an UK General Act

<sup>16</sup> See Section 154: <http://www.legislation.gov.uk/ukpga/1994/33/section/154> (Downloaded: 30.05.2016)

<sup>17</sup> Malicious Communications Act is a UK General Act

<sup>18</sup> <http://www.legislation.gov.uk/ukpga/1988/27/section/1> (Downloaded: 30.05.2016)

requirement for the communication to reach the person who has the intention to read it. If a person is found guilty of this offence they can receive a maximum prison sentence of 2 years or a fine or both.<sup>19</sup> An anti-social behaviour order (ASBO) under the Crime and Disorder Act 1998 could be used for cyberbullying as well.<sup>20</sup> An ASBO is an order which prohibits an individual from engaging in specific anti-social acts for example vandalism or drunken, threatening behaviour.<sup>21</sup> An ASBO can be made against any person, aged 10 years or over, where there is evidence that their behaviour caused, or is likely to cause, harassment, alarm or distress to others and where an order is needed to protect a person from further anti-social acts.<sup>22</sup>

It has to be mentioned there are different rules in Scotland. For example ASBOs can be issued to anyone over the age of 12.<sup>23</sup> In addition there is Breach of the Peace being an offence at common law in Scotland. A prosecution for breach of the peace may be brought where someone is accused of disorderly conduct being liable to cause fear, alarm or disturbance to others.<sup>24</sup>

Furthermore the Director of Public Prosecutions published guidelines in 2013 for prosecutors. These guidelines should be taken into account when making decisions in relation to cases where it is alleged that criminal offences have been committed by sending communication via social media.<sup>25</sup> This is important to distinguish the cases that imply criminal responsibility from the cases which don't. Moreover this ensures that procedure becomes more child-friendly. According to the guidelines prosecutors may only start a prosecution if a case satisfies the test which has two stages: the first is require of evidential sufficiency and the second involves consideration of the public interest.<sup>26</sup> For this reason the prosecutor must be satisfied that there is a sufficient evidence to provide a realistic prospect of conviction.<sup>27</sup> The case which does not pass the evidential stage must be not proceed. In every case where there is a sufficient evidence to justify a prosecution, prosecutors must go on to consider whether a prosecution is required in the public interest or not. Without the public interest the prosecutor decides that the case should not proceed further.<sup>28</sup> Because children may not appreciate the potential harm and seriousness of their act a prosecution against a child is not likely to be in the public interest that is why this principle is so relevant.

---

<sup>19</sup> <http://www.legislation.gov.uk/ukpga/1988/27/section/1> (Downloaded: 20.04.2016)

<sup>20</sup> Crime and Disorder Act is an UK General Act, find here: <http://www.legislation.gov.uk/ukpga/1998/37/contents> (Downloaded: 30.05.2016)

<sup>21</sup> <https://www.gov.uk/asbo> (Downloaded: 24.04.2016)

<sup>22</sup> <https://www.gov.uk/asbo> (Downloaded: 24.04.2016)

<sup>23</sup> <https://www.mygov.scot/asbos/> (Downloaded: 24.04.2016)

<sup>24</sup> <http://www.mcsporrans.com/breach-of-the-peace.html> (Downloaded: 18.04.2016)

<sup>25</sup> Guidelines on prosecuting cases involving communications sent via social media, find here: [http://www.cps.gov.uk/legal/a\\_to\\_c/communications\\_sent\\_via\\_social\\_media/](http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/) (Downloaded: 30.05.2016)

<sup>26</sup> Guidelines on prosecuting cases involving communications sent via social media, see it within General Principles: [http://www.cps.gov.uk/legal/a\\_to\\_c/communications\\_sent\\_via\\_social\\_media/](http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/) (Downloaded: 30.05.2016)

<sup>27</sup> Id.

<sup>28</sup> Id.

## V. Civil law provisions

Taking into account that cyberbullying happens between private individuals, civil remedy would seem the perfect way to protect cyberbullying victims. Despite this there is no specific cyberbullying definition in civil law. However, some already existing civil provisions could be used in cyberbullying cases, for instance defamation law.

In the United States, federal defamation law is closely tied to the First Amendment. As a result, federal slander and libel laws are more defendant-friendly in the US than those in common law countries, like the UK.<sup>29</sup> An opinion is not considered defamation in the US, just the false statements of fact that harm the reputation of an individual, aren't protected under Constitutional Free Speech provisions.<sup>30</sup>

Concerning the United Kingdom there is the Protection from Harassment Act, mentioned before, under which harassment is both a criminal offence and a civil action. This means, if someone harasses you they can be prosecuted in the criminal courts and it also means that action can be taken against the perpetrator in the civil courts.<sup>31</sup> Section 3 provides civil remedy for the victim.<sup>32</sup> The civil court may grant an injunction to restrain a person from conduct which amounts to harassment and restraining orders are also available to protect the victim.<sup>33</sup> Defamation law also exists within the law made by the UK government as well.<sup>34</sup> It applies to any published material – this includes materials published on the internet as well - that seriously damages the reputation of an individual. Where defamatory material is posted on a website the person concerned can inform the host of its contents and ask the host to remove it.<sup>35</sup> Once the host knows that the material is there and that it may be defamatory, it can no longer rely on the defence of innocent dissemination in the Defamation Act 1996.<sup>36</sup> The person affected could obtain a court order to require removal of the material, and could sue either the host or the person who posted the material for defamation.<sup>37</sup>

## VI. Education law rules and human rights-based approach

The most common solution for fighting against cyberbullying is giving a big role to the schools which is reasonable taking account of cyberbullying could be connected with school environment in some way. Besides the law or instead of making legislation

---

<sup>29</sup> <http://kellywarnerlaw.com/us-defamation-laws/> (Downloaded: 30.05.2016)

<sup>30</sup> [Id.](#) (Downloaded: 30.05.2016)

<sup>31</sup> <https://www.citizensadvice.org.uk/discrimination/taking-action-about-discrimination/taking-action-about-harassment/> (Downloaded: 18.04.2016)

<sup>32</sup> Section 3 is about injunction: <http://www.legislation.gov.uk/ukpga/1997/40/section/3>,

Section 5 is about restraining order on conviction, Section 5A is about restraining order on acquittal: <http://www.legislation.gov.uk/ukpga/1997/40/contents> (Downloaded: 30.05.2016)

<sup>33</sup> The main difference between an injunction and a restraining order is that a restraining order is issued at the end of a criminal case, but you can ask the court for an injunction even if someone has not been charged with a criminal offence.

<sup>34</sup> See Defamation Act 2013, Defamation Act 1996, Defamation Act 1952 which are UK General Acts

<sup>35</sup> <http://old.digizen.org/cyberbullying/fullguidance/understanding/> (Downloaded:31.05.2016)

<sup>36</sup> <http://www.legislation.gov.uk/ukpga/1996/31/contents> (Downloaded: 31.05.2016)

<sup>37</sup> <http://old.digizen.org/cyberbullying/fullguidance/understanding/> (Downloaded: 24.04.2016)

concerning cyberbullying school policy is required to handle this issue. This means that the schools are required to develop policies on the prevention and reporting, investigation of bullying. Restorative measures are often encouraged. The state laws usually allow schools to discipline students for their off-campus harassment that substantially interferes with or limits the victim's ability to participate in or benefit from services, activities or opportunities offered by the school. Nevertheless, this doesn't mean that schools have universal authority in all cases. For instance in *Emmett v. Kent School District No. 415* (2000), the US District Court reviewed a case where a student was initially expelled for creating a webpage entitled the "Unofficial Kentlake High Home Page" that included mock obituaries of students and an online mechanism for visitors to vote on who should die next.<sup>38</sup> The major issue in this case was that the school failed to demonstrate that the website was "intended to threaten anyone, did actually threaten anyone, or manifested any violent tendencies."<sup>39</sup> In sum it can be said the US courts are oriented toward supporting First Amendment guaranteeing freedom of expression for the students. However the intervention is allowed if the behaviour:

- substantially or materially disrupts learning,
- interferes with the educational process or school discipline,
- utilizes school-owned technology to harass,
- threatens other students or infringes on their civil rights.<sup>40</sup>

The schools have to be very cautious before taking step in this area, because they cannot violate the student's rights to freedom of expression. In some cases, there can be just a very slight difference between a cyberbullying conduct and free speech. At this point a note has to be made of that in this paper's view in the case of cyberbullying's definition given above, the protection of free speech cannot be conceivable.

The UK government also pays attention to this serious matter and encourages the schools initiative role. The Department for Education created a non-statutory advice for headteachers and all school staff on how to tackle cyberbullying.<sup>41</sup> The Education Act 2002 places duty on the school governing bodies in England and Wales to have a behaviour policy in place which includes measures to prevent all forms of bullying among pupils.<sup>42</sup> The Education and Libraries Order 2003 requires all state schools in Northern Ireland to have an anti-bullying policy.<sup>43</sup> The Scottish Education Act 2004

---

<sup>38</sup> *Emmett v. Kent SchoolDist. No. 415*, 92 F. Supp. 2d 1088 (W.D.Wash. 2000), find here: <http://law.justia.com/cases/federal/district-courts/FSupp2/92/1088/2529495/> (Downloaded: 31.05.2016)

<sup>39</sup> Sameer Hinduja, Ph.D. and Justin W. Patchin, Ph.D.: *Cyberbullying Legislation and Case Law - Implications for School Policy and Practice*, 2. p. <http://cyberbullying.org/cyberbullying-legal-issues.pdf> (Downloaded: 01.05.2016)

<sup>40</sup> Id. 3. p.

<sup>41</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/374850/Cyberbullying\\_Advice\\_for\\_Headteachers\\_and\\_School\\_Staff\\_121114.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/374850/Cyberbullying_Advice_for_Headteachers_and_School_Staff_121114.pdf) (Downloaded: 24.04.2016)

<sup>42</sup> A UK Public General Act, find here: <http://www.legislation.gov.uk/ukpga/2002/32/contents> (Downloaded: 31.05.2016)

<sup>43</sup> A Northern Ireland Order in Council, find here: <http://www.legislation.gov.uk/nisi/2003/424/contents> (Downloaded: 31.05.2016)

requires local authorities and schools to provide extra help to all children with additional support needs, including bullying.<sup>44</sup>

Besides the education law rules there is another very good solution to fight against cyberbullying. This is provided by the well-developed Australian ombudsman system which includes a unique Children's e-Safety Commissioner established by the Australian Enhancing Online Safety for Children Act.<sup>45</sup> The Commissioner is to be appointed by the Minister for Communications who may give directions to the Commissioner. A key function of the Commissioner is to administer a complaints system for cyberbullying material targeted at an Australian child.

In the eye of this Act cyberbullying material involves the following conditions:

1. it is provided on a social media service or relevant electronic service,
2. an ordinary reasonable person would conclude that:
  - it is likely that the material was intended to have an effect on a particular child and
  - the material would be likely to have the effect on the child of seriously threatening, intimidating, harassing or humiliating
3. Australian child is the target of this material.<sup>46</sup>

These factors help to distinguish the “simple” hurtful, unpleasant content from the cyberbullying materials which is really significant to not understate this phenomenon. When every bad thing that happens to children gets called cyberbullying, we end up with misleading narratives.

In compliance with the Act the complaint against cyberbullying material could be made by a child who has reason to believe that he or she was the target of the cyberbullying material or a parent, guardian of the child or someone who the child has authorised to make a complaint about the matter.<sup>47</sup> The Commissioner may investigate the complaint.<sup>48</sup> A very important component of the new complaint system is the two-tier scheme aimed at providing children and young people a pathway for the removal of potentially harmful cyberbullying material. Any social media services may volunteer to participate in tier 1 including small social media services.<sup>49</sup> If a service corresponds to the conditions of tier 1 social media service after its application the Commissioner must declare that the social media service is a *tier 1 social media service*.<sup>50</sup> The Commissioner can make a recommendation that large social media services to be declared Tier 2.<sup>51</sup> The declaration

---

<sup>44</sup> An Act of the Scottish Parliament, find here: <http://www.legislation.gov.uk/asp/2004/12/contents> (Downloaded: 31.05.2016)

<sup>45</sup> This federal Act came into force in March 2016, find here: <https://www.legislation.gov.au/Details/C2015A00024/Controls/> (Downloaded: 31.05.2016)

<sup>46</sup> Enhancing Online Safety for Children Act 2015, Section 5.

<sup>47</sup> Id. Section 18.

<sup>48</sup> Id. Section 19.

<sup>49</sup> Tier 1 social media service for example Ask.fm, Twitter, Yahoo!7 Answers

<sup>50</sup> Enhancing Online Safety for Children Act 2015, Section 23.

<sup>51</sup> Tier 2 social media service for example Facebook, Google+, Instagram, YouTube

of tier 2 social media service is made by the Minister for Communications based on the Commissioner's recommendation.<sup>52</sup> The most significant difference between the tier 1 and tier 2 social media services is that the last one is subject to legally binding notices and penalties.<sup>53</sup> It is very important to highlight this because a legally binding decision is one of the most efficient ways to enforce one's rights.

An additional innovation is the end-user notice that may be given the cyberbullying's perpetrator to do any or all of the following:

- take all reasonable steps to ensure the removal of the material,
- refrain from posting any cyberbullying material for which the child is the target,
- apologise for posting the material.<sup>54</sup>

In sum the complaints system involves the following remedies:

- a 2-tiered scheme for the rapid removal from social media services of cyberbullying material,
- a tier 1 social media service may be requested to remove from the service cyberbullying material,
- a tier 2 social media service may be given a notice (a social media service notice) requiring the removal from the service of cyber-bullying material,
- a person who posts cyber-bullying material targeted at a child may be given a notice (an end-user notice).<sup>55</sup>

## VII. Conclusion

To conclude, the intervention by the state could be well-founded in relation to the most serious cyberbullying cases. However, as mentioned before, there are more potential ways for its manifestation. In the eye of this study the criminal sanctions and the civil law provisions don't have the proper capacity to tackle this matter, due to the *erga omnes* nature of criminal law and considering that civil law regulates relationships between equal individuals. Taking into account the singularity of direct enforcement of the fundamental rights between private law persons, this could imply the slippery slope fallacy, therefore this doesn't seem a satisfying solution either.<sup>56</sup> After all these and based on the existing examples discussed above, the administrative law, including education law provisions or creating a new, specific commissioner looks the exceptional answer to

---

<sup>52</sup> Enhancing Online Safety for Children Act 2015, Section 30.

<sup>53</sup> <https://www.esafety.gov.au/social-media-regulation/social-media-service-tier-scheme> (Downloaded: 31.05.2016)

<sup>54</sup> Enhancing Online Safety for Children Act 2015, Section 42.

<sup>55</sup> Id. Section 3.

<sup>56</sup> Slippery slope fallacy is when a relatively insignificant first event is suggested to lead to a more significant event, which in turn leads to a more significant event, and so on, until some ultimate, significant event is reached, where the connection of each event is not only unwarranted, but with each step it becomes more and more improbable.

handle cyberbullying. In the eye of this study the human-based approach seems the best way to fight against cyberbullying, because this view is capable to keep in mind and handle the seriousness and speciality of cyberbullying.

However we have to bear mind that for which country which solution is the adequate resolution for tackling cyberbullying is influenced by the speciality of the legal system, the extent and seriousness of cyberbullying. This means every country has to find their own tailor-made „remedy”.