

CYBERBULLYING AMONG CHILDREN: A CROSS JURISDICTIONAL PERSPECTIVE*

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ABSTRACT

The offence of cyberbullying is becoming prevalent in the digital era. This involves embarrassing pictures of the victims, negative comments on social media, and the internet with the intent to harass or shame the victims. In Malaysia, cyberbullying is governed by the Communication and Multimedia Act 1998 and the Penal Code. However, if the perpetrator is a child, the Child Act 2001 governs the criminal process and the disposition of the case, which is punitive in nature. The United Nations encourages state parties to apply restorative justice to deal with cyberbullying. New Zealand has implemented a family group conference to resolve criminal offences committed by children, which includes cyberbullying. The objective of this article is to examine the nature of cyberbullying among children. This article also analyses the process under the United Nations Convention on the Rights of the Child, New Zealand law, and Malaysian law on cyberbullying among children. It is recommended that the Child Act 2001 is amended by allowing children who are involved in cyberbullying to resolve the case through a family group conference as a process of restorative justice, which is recommended by the United Nations. The significance of this research is that it works towards the betterment of children's needs and welfare in Malaysia. This research adopts a qualitative methodology that mainly

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focuses on doctrinal research where the sources include, among others, statutes, journal articles, and books.

Keywords: bullying, cyberbullying, child law, restorative justice, family group conference.

BULI SIBER DI KALANGAN KANAK-KANAK: SUATU PERSPEKTIF RENTAS BIDANG KUASA

ABSTRAK

Jenayah buli siber semakin kerap berlaku di era digital. Pelaku melakukan kesalahan buli ke atas mangsa dengan memuat naik gambar mangsa, mengganggu mangsa dengan komentar negatif atau memviralkan apa-apa pos yang berkaitan dengan mangsa dengan tujuan untuk mengganggu atau memalukan mangsa melalui peranti digital. Di Malaysia buli siber merupakan satu kesalahan di bawah Akta Komunikasi dan Multimedia 1998 dan Kanun Keseksaan. Walau bagaimanapun, jika pelaku adalah seorang kanak-kanak, Akta Kanak-kanak 2001 terpakai bagi mentadbir proses jenayah dan pelupusan kes yang bersifat hukuman. Bangsa-bangsa Bersatu menggalakkan negara ahli untuk menerapkan keadilan restorative bagi menangani buli siber. New Zealand telah melaksanakan persidangan kumpulan keluarga untuk menyelesaikan kesalahan jenayah yang dilakukan oleh kanak-kanak termasuk buli siber. Oleh itu, artikel ini mengkaji sifat buli siber di kalangan kanak-kanak. Artikel ini juga menganalisa undang-undang dan proses di bawah Konvensyen Bangsa-Bangsa Bersatu mengenai Hak Kanak-kanak, undang-undang New Zealand dan undang-undang Malaysia terhadap penyelesaian buli siber yang melibatkan kanak-kanak. Adalah disyorkan bahawa Akta Kanak-Kanak 2001 perlu dipinda dengan membenarkan kanak-kanak yang terlibat di dalam buli siber menyelesaikan kes tersebut melalui persidangan kumpulan keluarga yang merupakan proses keadilan restoratif sebagaimana yang disyorkan oleh Bangsa-bangsa Bersatu. Justeru, adalah penting untuk menjalankan kajian ini bagi memperbaiki keperluan dan kebajikan kanak-kanak di Malaysia. Penyelidikan ini mengamalkan kaedah kualitatif yang tertumpu kepada penyelidikan doktrin iaitu berdasarkan sumber peruntukan undang-undang, artikel jurnal, dan buku.

Kata kunci: buli, buli siber, undang-undang kanak-kanak, keadilan restoratif, persidangan kumpulan keluarga.

INTRODUCTION

In the digital age, children use technology to connect with peers, access to educational resources, and for entertainment purposes. A survey showed that 9 out of 10 children, aged between 5 to 17 have access to and use the internet, while 91.8 percent of them accessed the internet using smartphones.¹ It is undeniable that access to the internet at an early age has its positive impacts on children. Nevertheless, using the internet without proper supervision or control by parents makes it too easy for children to be exposed to inappropriate content and cyberbullying.

The issue of cyberbullying among children either relating to the perpetrator or the victim should not be taken lightly. A survey about cyberbullying among young people in Malaysia was conducted by UNICEF. It revealed that 28 percent of 6,953 young people who were surveyed have been victims of cyberbullying. The data also reveal that 43per cent of these youths were bullied through online games, private messaging, and social media such as Instagram, WhatsApp, YouTube, and Twitter.² Perpetrators of cyberbullying commit these acts due to various reasons which include doing poorly in school, receiving unfair treatment from authorities, and negative life experiences.³ The perpetrator and the victim usually know each other, although most of the time the perpetrator hides his or her identity unless they use a personal account to attack the victim.⁴

¹ "Internet User Survey 2018: Statistical Bried Number Twenty-three, Malaysian Communications and Multimedia Commission: Cyberjaya," Malaysian Communications and Multimedia Commission, accessed December 28, 2019, <https://www.mcmc.gov.my/skmmgovmy/media/General/pdf/Internet-Users-Survey-2018.pdf>.

² Bunny Wira, "3 in 10 Young People in Malaysia Cyber-bullied," accessed October 28, 2019, <https://children4change.unicef.my/3-in-10-young-people-in-malaysia-cyberbullied/>.

³ Thomas J. Holt and Adam M. Bossler, *Cybercrime in Progress: Theory and Prevention of Technology-enabled Offences* (New York: Routledge, 2011), 88.

⁴ Shaheen Shariff, *Confronting Cyber-Bullying: Schools Need to Know to Control Misconduct and Avoid Legal Consequence* (New York: Cambridge University Press, 2009), 44.

The difference between traditional bullying and cyberbullying is the fact that virtual bullying has no boundaries as compared to the physical world. The anonymity of the online bullies and the speed of bullying have encouraged youths to engage in bullying activities.⁵ The implication of cyberbullying on the victim is worse since it can be done anytime and anywhere. The intention of the perpetrator of cyberbullying is to cause emotional and mental distress to the victims.⁶ This often leads to depression, anxiety, loss of confidence, and trauma.⁷ The modus operandi does not involve causing harm to the victim via face-to-face attack; instead, the perpetrator bullies the victims through digital devices such as social media, website, e-mail, or phone call. Compared to the traditional bullying method, the perpetrator of cyberbullying has the intention to cause emotional harm and psychological distress.⁸

Common effects of cyberbullying are that the victims suffer from emotional and mental problems such as depression, anxiety, headache, loss of appetite and others.⁹ Cyberbullying also contributes to self-harm and suicide.¹⁰ In addition, students who are frequently bullied by friends tend to avoid school as they feel insecure and hate the school environment. It is reported that one in five young people

⁵ Nurul Farhana Saharrudin, Akmar Hayati Ghazali, Asnarulkhadi Abu Samah, Aminah Ahmad, and Haslinda Abdullah, "Cyberbullying among Malaysian Youth: The Case of Selangor," *International Journal of Academic Research in Business and Social Sciences*, 9, no.3 (2019): 1060–1070.

⁶ Shaheen Shariff, *Confronting Cyber-Bullying: Schools Need To Know To Control Misconduct And Avoid Legal Consequence* (New York: Cambridge University Press, 2009), 42.

⁷ Linda Sanchez, "Laws Are Needed to Make Cyberbullying A Crime" in *Writing the Critical Essay the Narrative Essay Bulling: An Opposing Viewpoints Guide*, ed. Lauri S. Friedman (United States of America: Christine Nano, 2011), 46.

⁸ Maria, et. all, "Comparative Aspect of Cyberbullying in Italy, England, and Spain: Findings from a DAPHNIE Project" in *Cyberbullying in the Global Playground: Research from International Perspectives*, ed. Qing Li, Donna Cross, and Peter K. Smith (United Kingdom: Blackwell Publishing, 2012), 2.

⁹ Butch Losey, *Bullying, Suicide, and Homicide: Understanding, Assessing, and Preventing Threats to Self and others for Victims of Bullying* (New York: Routledge, 2011), 29.

¹⁰ Holt and Bossler, *Cybercrime*, 88.

across the globe has skipped school due to cyberbullying.¹¹ Therefore, this does not only affect their mental and emotional health but also their education. Nevertheless, victims of cyberbullying often do not talk about the problem with their parents because they fear that their internet privileges will be taken away. Parents should listen to the child, talk to the parents of the perpetrators, and the school authorities regarding the bully and how to overcome the problem.¹² Hence, cyberbullying among children needs to be combated wisely without affecting their needs and welfare.

Various initiatives have been taken by the Malaysian government in addressing the issue of cyberbullying. The law is also important for the management of cyberbullying particularly when it involves children. Restorative justice has been considered by other countries in addressing cyberbullying among children i.e., the perpetrator and the victims. However, Malaysia still implements the traditional justice system as provided under the law. Thus, this article examines the approaches under international law and New Zealand legislation on restorative justice deals with cyberbullies among children.

DEFINITION OF CYBERBULLYING

Cyberbullying has been defined as “any behaviour performed through electronic or digital media by individuals or groups that repeatedly communicate hostile, embarrass, or hurt the people.”¹³ According to Magid, “...a student is being bullied or victimized” when he or she is “exposed repeatedly and overtime to negative actions on the part of one

¹¹ Bunny Wira, “3 in 10 Young People in Malaysia Cyber-bullied”, accessed October 28, 2019, <https://children4change.unicef.my/3-in-10-young-people-in-malaysia-cyberbullied/>.

¹² Larry Magid, “The Problem of Cyberbullying Has Been Exaggerated” in *Writing the Critical Essay The Narrative Essay Bullying: An Opposing Viewpoints Guide*, ed. Lauri S. Friedman (United States of America: Christine Nasso, 2011), 42.

¹³ Robert S. Tokunaga, “Following You Home From School: A Critical Review And Synthesis Of Research On Cyberbullying Victimization”, *Computers on Human Behaviour* 26, no. 3, (May 2010): 278.

or more other students.”¹⁴ Negative actions of bullying include verbal attacks such as threatening, teasing, name-calling, and physical contact such as pushing, kicking, hitting, making faces, or dirty gestures, or restraining others. The victim often suffers repeated attacks on numerous or repeated occasions by the perpetrator, is unable to defend himself and feels helpless.¹⁵

Cyberbullying can occur via electronic mediums such as email, instant messaging, social media, or on a website that is easy to access, but difficult to control. Activities that fall under cyberbullying among others are text messaging that contains threatening or offensive words; spreading of video-clips through mobile phone cameras to others with the intention to make the victim feel embarrassed or to threaten the victim; through email threats; rumours or gossip on social networking sites; or creating a fake account on a social network by using the victim’s profile.¹⁶

Cyberbullying consists of five components, namely (1) the use of communication technologies such as e-mail, instant messaging, and social media, (2) the use of technologies to threat or cause harm to the victims such as spreading rumours or embarrassing the victims, (3) intention of the perpetrators, (4) repeated behaviour of the perpetrator towards the victims, and (5) an individual or group of people who cyberbully another.¹⁷ Cyberbullying can be categorised as direct cyberbullying and indirect cyberbullying. Direct cyberbullying includes physical bullying such as sending a virus file, verbal bullyings such as hurling insults or threatening the victim through telephone, non-verbal bullying such as sending threatening messages or obscene pictures, and social bullying such as excluding someone from a group online. Indirect cyberbullying, on the other hand, is where the

¹⁴ Magid, “The Problem, 42.

¹⁵ Dan Olweus, *Bullying at School: What We Know and What We Can Do* (United States of America: Blackwell Publishing, 2013), 5.

¹⁶ Vanessa Rogers, *Cyberbullying: Activities to Help Children and Teens to Stay Safe in a Texting, Twittering, Social Networking World* (United Kingdom: Jenica Kingley Publishers, 2010), 14-17.

¹⁷ Matthew W. Savage and Robert S. Tokunaga, “Moving Toward a Theory: Testing an Integrated Model of Cyberbullying Perpetration, Aggression, Social Skills, and Internet Self-Efficacy”, *Computer In Human Behavior*, 71 (2017): 353.

perpetrator spreads gossip through email, or social media, or creates a fake account using the victim's information.¹⁸

INTERNATIONAL LAW PERSPECTIVE ON DEALING WITH CYBERBULLYING AMONG CHILDREN

The United Nations and state parties of the United Nations Convention on the Rights of the Child (UNCRC) take the matter of protecting the rights of children very seriously. The rights of the perpetrator and the victim as children are given paramount consideration, especially in addressing the issue of cyberbullying. Based on the rights of children in the UNCRC, several resolutions have been established to overcome the issue of cyberbullying among children in the state parties.

Rights of the Child under the United Nations Convention on the Rights of the Child (UNCRC)

It is clearly stated under the UNCRC that each child has a right to freedom of expression including freedom of seeking information through any media of the child's choice. Nonetheless, this freedom is subjected to certain restrictions provided by the law and the child should respect the rights or reputations of others.¹⁹ Hence, all children have the right to express their thoughts, but not to cause injury to others which may lead to legal action. A child also has the right to education. In ensuring a child's right to education, the state parties shall take measures to encourage regular attendance in schools and reduce the rate of drop-outs. States parties also shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.²⁰ Thus, to discipline a student by imposing punishment is not encouraged, what more to expel the student from school. This is contrary to the UNCRC.

However, if a child's privacy has been infringed, or his reputation has been attacked, Article 16 of the UNCRC acknowledges

¹⁸ Lucy R. Betts, *Cyberbullying: Approaches, Consequences and Interventions* (United Kingdom: Springer, 2016), 43.

¹⁹ Article 13 of the United Nations Convention on the Rights of the Child.

²⁰ Article 28 of the United Nations Convention on the Rights of the Child.

the child's right to the protection of the law against such interference or attacks. Article 19 urges the states parties to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, while in the care of parent(s), legal guardian(s) or any other person who cares for the child. Any other person may also include teachers at school. This article shows that no child should be subjected to bullying and cyberbullying. Such protective measures should include effective procedures for the establishment of social program to provide the necessary support for the child and for those who have a duty to care for the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment, and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Even if a child has allegedly committed a crime, he must be treated as a child. The UNCRC highlighted that the state parties shall recognise the right of every child alleged to have violated the penal law to be treated in a manner consistent with the child's dignity. In case a child is alleged of committing a criminal act, the rights of the child among others include the presumption of innocence until proven guilty according to law; to be informed promptly and directly of the charges against him or her, and not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality; to have the decision reviewed by a higher competent, independent and impartial authority or judicial body according to the law; and to have the free assistance of an interpreter if the child cannot understand or speak the language used.²¹

Hence, state parties are encouraged to take measures in dealing with child offences without resorting to judicial proceedings. A variety of dispositions such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programs and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the

²¹ Article 40 of the United Nations Convention on the Rights of the Child.

offence. Another alternative to institutional care, which is the main subject of this paper, is restorative justice.

Cyberbullying under International Law

Pursuant to the UNCRC, on 18th December 2014, the General Assembly has prepared Resolution 69/158 on protecting children from bullying. This resolution has been adopted by the Human Rights Council to protect children from bullying. The resolution encouraged member states to take measures to prevent and respond to violence against children in schools, including all forms of bullying and requested the Secretary-General to submit a report to its seventy-first Resolution 71/176 session on protecting children from bullies.

In Resolution 71/176, the General Assembly took note of the report, in particular its conclusions and recommendations, and requested the Secretary-General to submit a report to the Assembly. It emphasised state parties to recall all previous resolutions on the rights of children and the resolutions adopted by the Human Rights Council that are relevant to the protection of children against bullying. The resolution also recognised that children are at a greater risk of being bullied and that children may face different forms of bullying, which include cyberbullying. State parties are encouraged to take all appropriate measures to prevent and protect children, including at school, from any form of violence and bullying, and reciprocating such acts. The resolution recognises that bullying and cyberbullying can have direct and indirect forms, bring a negative impact on the rights of the child and affect the child's health, emotional well-being, and academic progress. Thus, in order to combat cyberbullying, state parties are encouraged to take all appropriate measures to protect children, and to provide appropriate support for children affected by, and involved in bullying.²²

The United Nations International Children's Emergency Fund (UNICEF) found that 6 in 10 children aged between 12 to 23 months are subjected to violent disciplinary methods, including physical punishment and verbal abuse, such as shouting, yelling or screaming,

²² Resolution UNCRC 71/176. "Protecting children from bullying" accessed October 29, 2019, <https://undocs.org/en/A/RES/71/176>.

as well as being called offensive names.²³ As such, the UNICEF promotes restorative justice in Resolution 71/176 to deal with offences or disciplinary matters inclusive of issues on bullying and cyberbullying involving children.

Restorative justice is a process that involves all parties affected by a crime participating in the process on how to deal with the offence and plan. This process involves victim-offender mediation, family group conference, and circle sentencing.²⁴ Restorative justice requires both the perpetrators and victims to exchange information regarding incidents of bullying. The perpetrator is required to repair or to amend the harm as agreed by both the perpetrator and the victim, as well as to integrate the relationship of both.²⁵ This makes the perpetrator directly responsible for the victim and at the same time to reduce the victim's fear.

It is noted that the issue of cyberbullying involving children needs to be resolved. The interest and welfare of children are of paramount consideration, including in dealing with the perpetrators of cyberbullying. Although cyberbullies need to be dealt with, by all means, the rights of the perpetrators and the victims as children must also be observed by the authorities. Hence, a balance must be achieved between the punishment and rights of the perpetrator. Restorative justice mechanisms such as peer mediation between the perpetrator and the victim or family group conference with the involvement of both parents should be practiced in dealing with cyberbullying. Punishment does not only affect the perpetrator's personal feelings but also causes a negative relationship between the perpetrator and the victim. Considering the young age of the perpetrator and the victim, both should participate in resolving the problem by discussing how to repair the harm and to restore their relationship.

²³ "A familiar face violence in the lives of children and adolescent", UNICEF, accessed October 29, 2019, <https://www.unicef-irc.org/files/documents/d-3981-UN0139859.pdf>.

²⁴ Tony Marshall, "The Evolution of Restorative Justice in Britain", *European Journal on Criminal Policy and Research* 4, no. 4 (1996): 37.

²⁵ Daniel Van Ness, Allison Morris, and Gabrielle Maxwell, "Introducing Restorative Justice" in *Restorative Justice for Juveniles: Conferencing, Mediation and Circle*, ed. Allison Morris and Gabrielle Maxwell (United States of America: Hart Publishing, 2001), 6.

CYBERBULLYING INVOLVING CHILDREN UNDER THE NEW ZEALAND LAW

New Zealand has implemented laws dealing with cyberbullying which comprise of the Harmful Digital Communication Act 2015, Harassment Act 1997, the Privacy Act 1993, and the Defamation Act 1989. However, in the case where the perpetrator of cyberbullying is a child, the act is governed by the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017.

In New Zealand, the Harmful Digital Communications Act 2015 (the 2015 Act) was enacted with the purpose of curbing damaging electronic communications and the harm caused to individuals through methods such as emails, texts and social media posts.²⁶ Section 22 of the Act provides circumstances where cyberbullying could occur. In determining whether a post would cause harm to the victim, the court may take into considerations a number of factors such as the extremity of the language used, the age and characteristics of the victim, whether the digital communication was anonymous, whether the digital communication was repeated, the extent of circulation of the digital communication, whether the digital communication is true or false and the context in which the digital communication appeared.²⁷ As a result of the Act, various amendments were made to the existing legislations including the Harassment Act 1997,²⁸ the Privacy Act 1993,²⁹ and the Defamation Act 1989³⁰ to elucidate their application to digital communications. The penalties are high and a person who is convicted of an offence could face two-year imprisonment or a fine of fifty thousand New Zealand dollars. Similarly, a body corporate could be fined up to two hundred thousand New Zealand dollars.³¹

²⁶ The Harmful Digital Communications Act 2015 (No. 63) ranging from Sections 22 to 25 came into force on the day after the date on which this Act received the Royal assent. The rest of this Act comes into force on the earlier of a date appointed by the Governor-General by Order in Council; and 2 years after the date on which this Act receives the Royal assent.

²⁷ Section 22 of the Harmful Digital Communications Act 2015.

²⁸ Harassment Act 1997 (No. 92) came into force on 1 January 1998.

²⁹ Privacy Act 1993 (No. 28) controls how 'agencies' collect, use, disclose, store and give access to personal information.

³⁰ Defamation Act 1989 (No. 105) came into force on 1 February 1993.

³¹ Section 23 (3) of the 2015 Act.

Before the coming to force of the Act, there were a number of existing legislations that provide protection against bullying. The most notable one is the Harassment Act 1997 (the 1997 Act). Although the 1997 Act regulates both civil and criminal harassment, it is not designed to deal with offences committed in the digital world hence limiting its response to cyberbullying. One of the major hurdles of applying the 1997 Act in respect of cyberbullying is its definition.³² According to the 1997 Act, harassment requires doing any of the specified acts which are not specifically confined to digital communications.³³ This is illustrated in *Brown v Sperling*,³⁴ where the defendant created a blog under the name ‘Wonderful Now’. Over a period of time, the defendant published a number of posts on her blog site. Some of the posts however caused the plaintiff some concerns with regards to the frequency of the posts and their content. The plaintiff applied for restraining orders pursuant to the 1997 Act. One of the issues considered by the court was whether blog posts can fall within the ambit of the 1997 Act as a means of performing a specified act and if so, under what circumstances? The court in this case held that publishing on a blog could only fall under Section 4(1) (e) if the author knew that the target visited the blog and the communication would come to their attention. Act 1997 is also not suitable to be used for cyberbully cases because of the time limit specified in the statute.³⁵ In the case of *MJF v Sperling*,³⁶ the harassment occurred outside of the 12-month time frame, hence the court had to evade from relying on the

³² Section 4 of the Act provides a definition of harassment and situations where harassment may occur.

³³ The specified acts do not specifically address digital communications. The three most relevant to a cyberbullying situation are mentioned in section 4 (1) of the Act 1997.

(d) making contact with that person (whether by telephone, correspondence, or in any other way),

(e) giving offensive material to that person, or leaving it where it will be found by, given to, or brought to the attention of, that person,

(f) acting in any other way— (i) that causes that person (person A) to fear for his or her safety; and (ii) that would cause a reasonable person in person A’s particular circumstances to fear for his or her safety.

³⁴ BC201262867.

³⁵ In section 3 (1) of the Act, the definition of ‘harassment,’ which requires “doing any specified act” to a person on at least two occasions within 12 months.

³⁶ [2013] NZFLR 715.

time limit since the defendant had restarted her blog although she was ordered to remove it. The matter is now resolved in the 2015 Act, which provides that the act of harassment can occur in one continuing act carried out over any period of time.³⁷

Another important piece of legislation dealing with cyberbullying is the Privacy Act 1993 (the 1993 Act). The application of this Act in relation to cyberbullying is inadequate since Section 56 of the 1993 Act states that privacy does not apply to personal information which is “collected or held by an individual solely or principally for the purposes of, or in connection with, that individual’s personal, family or household affairs.” Hence, the 1993 Act would not apply to the distribution of sexually explicit images or videos of individuals without their permission which falls under cyberbullying. However, the 2015 Act amends this principle by allowing the application of cyberbullying in the sense that such disclosure or use would be highly offensive to an ordinary reasonable person.³⁸

Lastly, the Defamation Act 1992 was formulated to protect the reputation and image of an individual or organisation from being harmed due to defamatory statements. To succeed, the plaintiff must prove that the statement is defamatory, that it refers to the plaintiff and that it has been published to a third party. Each repetition of a defamatory statement creates a new cause of action. The landmark case on defamation made on social media is the case of *Wishart v Murray*.³⁹ In this case, Wishart was the author of a book about Maccsyna King. He sought damages for defamation arising from comments Murray made on a Facebook page set up by him called “Boycott the Maccsyna King” during radio interviews. The court held that statements made on a Facebook page can be defamatory, and also concluded that if the host of a Facebook page knows of a defamatory statement on their page and fails to remove it, the host can be liable. This is because the hosts have the power to control who can access the site, post material and, edit the

³⁷ Refer to Section 3 (3) of the 2015 Act.

³⁸ Panzic, Stephanie Frances, “Legislating for E-Manners: Deficiencies and Unintended Consequences of the Harmful Digital Communications Act,” *Auckland University Law Review*, 21 (2015), 226.

³⁹ [2013] NZLJ 227.

posts, and they cannot, realistically, be regarded as mere conduits of content.⁴⁰

It is noted that New Zealand also applies physical domain offences to deal with cyberbullying, which includes harassment, defamation, intimidation. However, there are difficulties in dealing with cyberbullying involving children, especially if a child is a perpetrator. It is considerably more difficult to prove the element of *mens rea* or intention of the perpetrator. The handling of cyberbullying among children by applying existing criminal offences in the physical domain does not reflect justice that should be applied in order to address this phenomenon efficiently.⁴¹

Family Group Conference for Cyberbullying in New Zealand

In New Zealand, all types of criminal cases committed by a young offender except murder are diverted by courts to the family group conference. A family group conference is an alternative to the criminal justice system. It helps to make the child and young person directly accountable for their offence to the victim.⁴² The involvement of the family in the process and preparing the recommendations, suggestions, and plans are significant for the child and the young person's needs.

The Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017 govern criminal cases committed by a child which also includes cyberbullying. Under the law, a child means a person under the age of 14 years.⁴³ If a child or young person in need of care or protection is over the age of 10 years and under the age of 14 years and has committed an offence,⁴⁴ so long as it can be proven that the perpetrator is within this age, and the criminal offence committed

⁴⁰ The decision made in *Wishart v Murray* is reaffirmed in *Karam v Parker* [2014] NZHC 737.

⁴¹ Liat Franco and Khalid Ghanayim, "The Criminalization of Cyberbullying among Children and Youth," *Santa Clara Journal of International Law*, 17, no. 2 (2019): 1-2.

⁴² Mark S. Umbreit, *Family group Conferencing: Implication for Crime Victims* (United States of America: DIANE Publishing, 2000), 3.

⁴³ Section 2 of the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017.

⁴⁴ Section 14(1)(e) of the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017.

is other than murder, manslaughter or traffic offence, the case will be referred to the Youth Court. Next, the Youth Court shall direct a youth justice coordinator to convene a family group conference to resolve the matter.⁴⁵

Under the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017, there are two situations where the perpetrator of a criminal offence, including bullying, can be dealt with. The first situation is where the victim lodges a police report about an offence committed by the perpetrator and if the perpetrator is not arrested by the police officer, he will be referred to the police youth aid section. By looking at the nature of the offence, the police officer may believe that it can be resolved through a family group conference. In this situation, the case will be referred to a trained facilitator in the community, such as a school teacher to assist the perpetrator and the victim to resolve the dispute. The second situation is where the police officer arrests the perpetrator for an alleged offence (i.e., other than murder, manslaughter or a traffic offence not punishable by imprisonment). In this situation, the court must adjourn the matter to enable a family group conference to be held if there has not been a denial or if there has been a finding of guilt.⁴⁶ Under section 251, the process may also include the youth justice coordinator to convene a conference, the prosecutor or the person intending to commence the proceeding against the child, and a barrister or solicitor representing the child.⁴⁷

Family group conference is a process to educate the perpetrator through responsibility, and by focusing on how to repair the harm suffered by the victim with consideration for the needs and interests of the perpetrator and the victim. Direct accountability of the perpetrator

⁴⁵ Section 246 of the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017.

⁴⁶ Section 214 of the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017.

⁴⁷ Section 251 of the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017.

towards the victim helps the perpetrator to understand the implication of the offence and to prevent repeat offences.⁴⁸

Basically, the process of family group conferences involves the perpetrator and the parents, the victim, and the parents. Importantly, there is a facilitator to assist the parties during the process of gathering information regarding the offence, discussing how to repair any harm caused, and finding a mutual agreement between the perpetrator and the victim. The process, which is based on the provision of section 251⁴⁹ requires the perpetrator to face the victim, and in the presence of both parents with the help of a third-party facilitator. The facilitator helps all parties to communicate well and come up with an action plan. In essence, family group conferences involve three stages (i) to determine what made the perpetrator commit the offence, (ii) to identify how the offence has affected the victim, and (iii) to determine how to repair the harm and to ensure that the perpetrator does not repeat the offence.

The objective of the conference is to consider whether the child or young person should be prosecuted for that offence, or if the matter should be dealt with through other means. The family group conference has to consider what restorative justice actions could be taken in dealing with the offence.⁵⁰ During the process of family group conferences, the parties are free to decide, recommend or come up with plans based on the needs and interests of the perpetrator and the victim. If the child or young person admits to the offence as charged, the parties may make a decision and recommendation. The family group conference may recommend a restorative justice action to be taken to settle the problem.⁵¹ If no agreement is reached on any decisions, recommendations, or plans, a youth justice coordinator shall report to the court.

⁴⁸ Zehr, Harry Mika, "Fundamental Concepts of Restorative Justice", in *Restorative Justice: Critical Issues*, ed. Eugene McLaughlin et.al (London: SAGE Publications, 2003), 48.

⁴⁹ Section 251 of the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017.

⁵⁰ Section 258 of the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017.

⁵¹ Section 260 of the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017.

The process of family group conference focuses on exchanging facts about the problem, such as factors of committing an offence, the implications of the offence on the physical, emotional, and mental state of the victim. Other aspects of the conference are how to resolve the problem by both reintegrating the relationship between the perpetrator and the victim, and at the same time to stop the perpetrator from repeating the same offence. The process of family group conference begins with the perpetrator explaining to the parties what made him attack the victim through electronic devices. The victim also has the opportunity to voice out his feelings and the implication of the act to the perpetrator. The facilitator has to assist all parties to communicate and reach a plan to resolve the problem for the future. After listening to both sides, the parties inclusive of both parents have to discuss how to repair the harm while considering the needs and interests of both the perpetrator and the victim. It is common for the perpetrator to seek forgiveness from the victim, promise not to repeat the offence in the future, and offer to pay compensation to the victim. In a case where the victim is willing to forgive the perpetrator and agrees to accept the compensation, the problem is resolved.⁵² The agreement is recorded and must be signed by the perpetrator and the victim.

By doing this, the perpetrator learns, is remorseful, and feels empathy for the victim. Repairing harm by paying compensation to the victim or doing other community services as requested by the victim helps the perpetrator and the victim to rebuild their relationship. This is what restorative justice aims to achieve. It focuses more on how to repair the harm and rebuild the relationship between the perpetrator and the victim, rather than to punish the perpetrator.

Cases of bullying which include cyberbullying are commonly referred to as family group conferencing. Since a school teacher or a school counsellor can be appointed as a facilitator to assist in the family group conference process, many schools apply family group conference as a resolution for all types of bullying, regardless of whether it happened within or outside the school.⁵³ The process of

⁵² Mark Umbreit & Howard Zehr, "Restorative Family Group Conferences: Differing Models and Guidelines for Practice," *Federal Probation: A Journal of Correctional Philosophy & Practice*, 60 no. 3, (1996), 24.

⁵³ Marg Armstrong, "Unpacking the Myths: Restorative Practices & Bullying", accessed February 20, 2020,

family group conference gives the perpetrator an opportunity to explain why he committed the offence, apologise, feel empathy, repair the harm, and declare that he will not repeat the offence in the future. At the same time, the victim is made aware of the reasons for the and also shares his feelings on how cyberbullying affected his life. As a result, the perpetrator apologises and restores a good relationship with the perpetrator. Though a school teacher plays a vital role in facilitating the process of family group conferences, only the perpetrator and the parents, and the victim and the parents can determine the outcome of the family group conference.⁵⁴

Studies on the implication of family group conferences revealed that the victim is satisfied with the process as they can be directly involved in the process and determine the outcome based on their needs. The family group conference helps the offender feels remorse and this repairs the harm on the victims. This effective process can reduce a repeat of the offence from the same perpetrator and helps the perpetrator reintegrate into the community. In a survey of victims who attended the family group conference in New Zealand in 2000, it was found that participants were satisfied that they were being treated with respect, had a chance to explain the effect of the offence on them, and had the opportunity to express their mind and their needs were met.⁵⁵ However, the family group conference is only successful in handling bullying cases if all parties give full commitment through attendance and full participation. The perpetrator and the victim have to face each other, have a frank discussion, and respect each other during the process.

<https://www.ncab.org.au/media/1629/marg-armstrong-unpacking-the-myths-restorative-practices-bullying.pdf>.

⁵⁴ Susan Hanley Duncan, "Restorative Justice and Bullying: A Missing Solution in the Anti-Bullying Laws," *New England Journal on Criminal & Civil Confinement* 37, (2011), 267.

⁵⁵ Maxwell, G., and others, "Achieving Effective Outcomes in Youth Justice: Final report, Ministry of Social Development", accessed February 20, 2020, <https://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/research/youth-justice/achieving-effective-outcomes-youth-justice-full-report.pdf>; Judge Andrew, "Family Group Conferences: Still New Zealand's Gift to the World?," accessed February 20, 2020, <https://www.occ.org.nz/assets/Uploads/OCC-SOC-Dec-2017-Companion-Piece.pdf>.

A family group conference can be considered as the best approach to deal with cyberbullying involving children because it benefits not only the perpetrator but also the victim. The decision-making is party-driven through the involvement of the perpetrator, the perpetrator's family, the victim, the victim's family, and a youth justice coordinator. This can make them focus on the best solution for the perpetrator and the victim considering the child's needs and welfare.⁵⁶ Moreover, the process is flexible as the parties can determine how to conduct the family group conference and how to redress the suffering caused to the victim.⁵⁷ Direct accountability of the accused towards the victim witnessed by both families prevents the perpetrator from repeating the offence and helps the perpetrator and the victim to restore their relationship. At the same time, this can help the victim to build confidence and feel safe. In addition, the perpetrator is free from having a criminal record, absence of court proceeding or sentencing.

CYBERBULLYING INVOLVING CHILDREN UNDER THE MALAYSIAN LAW

To date, there is no specific law governing cyberbullying, in particular for cases involving children. Any activities that involve cyberbullying of and by children are subjected to the Communication and Multimedia Act 1998, or the Penal Code. This depends on the nature of the act, while the Child Act regulates the court process and punishment. Victims of cyberbullying can lodge a police report for any violation of digital or online acts committed by the perpetrator.

Section 233 of the Communication and Multimedia Act 1998 states that a person who makes any comment, request, suggestion or other communication which is obscene, indecent, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass

⁵⁶ Richard Young and Benjamin Gold, "Restorative Police Cautioning in Aylesbury-from Degrading to Reintegrative Shaming Ceremonies", in *Restorative Justice: Critical Issues*, ed. Eugene McLaughlin et.al (London: SAGE Publications, 2004), 108.

⁵⁷ Anthony N. Malluccio and Judith Daly, "Family Group Conference as Good Child Welfare Practice," in *Family Group Conferencing: New Directions in Community-Centred Child and Family Practice*, ed. Gale Burford, Joe Hudson (United States of America: Transaction Publishers, 2009), 67.

another person, whether continuously, repeatedly or otherwise, using any network facilities or network service with or without disclosing his identity commits an offence. A person, upon conviction for the offence, is liable to a fine not exceeding RM50,000 or to imprisonment for a term not exceeding one year or to both. In addition, such a person shall also be liable to a further fine of RM1000 for every day during which the offence is continued after conviction.

As illustrated in *Mohd Fahmi Reza bin Mohd Zarin v Pendakwa Raya*,⁵⁸ the appellant was charged under section 233(1)(a) of the Communications and Multimedia Act 1998 for using his Facebook account to send fake information with the intention to cause annoyance. The Sessions Court judge found the accused guilty, and sentenced the appellant to one-month imprisonment and a fine of RM30,000.00. The High Court judge also affirmed the decision on conviction, setting aside the sentence of imprisonment and substituting it with a fine of RM10,000.00 in default of one-month imprisonment.

Similarly, in *PP v Rutinin Suhaimin*⁵⁹ the accused was charged under section 233(1)(b) of the Communications and Multimedia Act 1998 for posting offensive remarks pertaining to the Sultan of Perak on the online visitor book with the intention to cause annoyance. The court observed that it is not necessary for the victim to prove annoyance or abuse by the accused, provided it can be shown that the statement has a tendency to annoy or abuse.

In *Moorthy a/l Seklaran & Ors v Public Prosecutor*,⁶⁰ the third applicant was charged under section 377B of the Penal Code for committing carnal intercourse against the order of nature. The alleged act was recorded by video and was distributed to others. The applicant was also investigated under section 233 of the Communications and Multimedia Act 1998 for distributing the video.

Besides the Communication and Multimedia Act 1998, the Penal Code also governs offences that infringes on one's reputation such as intentionally humiliating the victim. For instance, a perpetrator of bullying can be liable for an offence of defamation under section 499 of the Penal Code which says;

⁵⁸ [2019] MLJU 129.

⁵⁹ [2013] 2 CLJ 427.

⁶⁰ [2019] MLJU 761.

“Whoever, by words either spoken or intended to be read or by signs, or by visible representations, makes or publishes any imputation concerning any person, intending to harm, or knowing or having reason to believe that such imputation will harm the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.”

Thus, although the defamatory words were published online through any digital devices and spread to a third party, it is sufficient to make the person liable for defamation. If a person is found guilty, he will be punished with imprisonment for a term which may extend to two years, or a fine, or both.⁶¹ It can be seen in the case of *Abu Hassan bin Hasbullah v Zukeri bin Ibrahim*⁶² where the appellant was a senior lecturer who alleged that the respondent who was also a lecturer had distributed two offensive emails containing defamatory words to all academic, and administrative staff. The appellant also received a text message from his mobile phone that the respondent threatened to send the appellant to jail and falsely accused the appellant of cheating on his grading. Later a group of lecturers and students from his faculty signed a memorandum demanding for his removal as the Dean of the faculty. This had caused the appellant to suffer distress, affecting his reputation. The appellant claimed that the words were defamatory and filed an action in defamation against the respondent, and asked for damages for defamation, injunctive relief, interest and cost. The High Court judge dismissed the appellant’s claim. However, at the Court of Appeal, the judge set aside the decision of the High Court and allowed the claim as he was satisfied that the two offensive emails were defamatory.

Liability for a criminal offence committed by a child would depend on his age. If a child was under ten years old at the time of the offence, or above ten years old and under twelve years old, but has not attained sufficient maturity of understanding of the nature and consequence of his conduct, he or she is free from any criminal responsibility.⁶³ Perpetrators of cyberbullying aged less than ten years old cannot be liable for the act done towards the victim. Similarly, even if the age of the perpetrator is above ten and below twelve years old, he cannot be liable for the offence if the court is satisfied that at the

⁶¹ Section 500 of the Penal Code.

⁶² [2018] 6 MLJ 396.

⁶³ Section 82, section 83 of the Penal Code.

time of committing the offence the perpetrator had no knowledge of the nature and consequence of the act. If it is proven that the perpetrator actually intended to cause harm to the victim by spreading rumours, or harass, or shame the victim through digital devices and realised the nature and consequence of the act to the victim, he must be responsible for the act.

Children under eighteen years old are subject to the Child Act 2001. Section 2 of the Act defines a child as a person under the age of eighteen years. In relation to criminal proceedings, it means a person who has attained the age of criminal responsibility as prescribed in section 82 of the Penal Code. Therefore, a child perpetrator of cyberbullying is subjected to criminal proceedings and criminal disposals as governed by the Child Act 2001.

Criminal proceeding for a child in a trial is governed by section 90 of the Child Act 2001. The Court for Children shall explain to the perpetrator the substance of the alleged offence, and shall ask the child to admit the facts constituting the offence. If the child admits the facts constituting the offence, the court shall ascertain that the child understands the nature and consequence of his admission, and record the guilt. Otherwise, if the child does not admit, the case will proceed to hearing. If the court is satisfied that the child is not guilty, it shall acquit the child. However, if the child is found guilty and convicted, the court has the power to dispose of the case according to section 91 of the Child Act 2001. Section 91(1) of the Child Act 2001 allows the Court for Children to dispose of the case through several ways. They include: admonishing and discharging the child; discharging the child upon him executing a good behaviour bond and to comply with such conditions as may be imposed by the Court; order the child to pay a fine, compensation or costs; and others.

In Malaysia, it can be seen that the process of resolving all criminal offences including cyberbullying is governed by the Child Act 2001. It involves the court proceeding which requires a hearing and producing of evidence during trial. The court has to determine whether the perpetrator is guilty and convicted for the offence as charged. The court also determines the disposal of the case as provided under the Act in which the court will rely on the nature of the crime committed by the child and its consequence on the victim. In short, the process and the finding of the case are guided by the Child Act 2001 which needs to be complied with.

CONCLUSION

From the foregoing, it can be seen that the advent of new technology has led to the creation of new mediums for communication. As such, crimes continue to evolve at these different phases. While traditional bullying continues to occur, cyberbullying takes the lead in the realm of digital communication. Lawmakers around the world continue to wrestle with the issue by enacting new legislation or amending the existing law to punish the individual behind the scene. It has taken a number of cases to push lawmakers to come to terms with the harsh truth of the situation and finally established laws to deal with cyberbullying cases.⁶⁴

Also noted is New Zealand's child justice system that, so long as an offence committed by a child is not serious in nature, which is other than murder, the perpetrator should be referred to the family group conferencing. The perpetrator, the victim and their parents will participate in the process assisted by a facilitator. The facilitator can be a school teacher, a school counsellor or a trained community facilitator, even though a criminal case is committed by the perpetrator outside the school compound. It can be seen that New Zealand is emphasising on family group conference in dealing with all criminal offences committed by young offenders, with the exception of murder. The process benefits not only the victim, but also to the perpetrator for having another chance to amend the harm and be accepted by the community.

There has been a remarkable success under the family group conferences in New Zealand with full participation and commitment by all parties. A facilitator also plays an important role in addressing offences involving children, including cyberbullying. Hence, New Zealand allows a school teacher or a school counsellor to become a facilitator to facilitate the process of family group conference regardless of whether the incident happened at school or outside of school. Nevertheless, if there is no agreement reached by the perpetrator and the victim, the case will be referred to the Youth Court.

⁶⁴ Donegan R, "Bullying and Cyberbullying: History, Statistics, Law, Prevention and Analysis", *Elon Journal of Undergraduate Research in Communications*, 3 no. 1, (2010), 35.

In Malaysia, the offence of cyberbullying committed by a child is also subjected to the Child Act 2001. According to the Act, the disposition of a case involving a child offender is provided under section 91 which states that a criminal case involving a child offender can be disposed of by fines, community service and others. In light of the solution to cyberbullying among children, Malaysia is still focusing on punishment. As compared to New Zealand, Malaysia has no specific provision that allows cases of criminal offences involving a child including cyberbullying to be resolved through restorative justice, specifically the family group conference. Therefore, the perpetrator is not able to learn from the mistakes done to the victim unless the perpetrator on his or her initiative approaches the victim. Moreover, the disposal of a criminal case that is punishing in nature is determined by the court, not the victim.

In the Malaysian child justice system, the law focuses more on sentencing the perpetrator without involving the victim in the process. The victim's voice relating to the implication of the offence is not heard, and the victim is also not allowed to determine the mode of disposition of the case. Besides, the law is also silent on a proper medium for the victim to face the perpetrator and to ask more about the offence except by the victim's initiative. It is feared that the existing child justice system is insufficient to educate children, especially the perpetrator to learn from their mistakes. Moreover, the disposition of a criminal offence under the Child Act 2001 which is punitive in nature may result in prolonged retaliation against the victim. In the case of cyberbullying, the perpetrator may tend to repeat cyberbullying against the same victim or a new victim. In this regard, a family group conference should be incorporated into Malaysia's child justice system to address the issue of bullying including cyberbullying. As such, the perpetrators can be educated on the dangers of cyberbullying and its impact on the victims, with the hope that the perpetrator will be directly responsible to the victims by apologising and completing the agreement based on the outcome of the family group conference.

Hence, it is suggested that the Child Act 2001 is amended by adding a few provisions to enable family group conference as a criminal resolution in dealing with non-serious criminal offences such as cyberbullying committed by a child. For instance, section 91 of the Child Act 2001 can be amended to refer the perpetrator to the family group conferences in order to resolve a criminal dispute. In doing so, a

specific provision is also needed to describe the process of family group conferences in detail.

The current child justice system in Malaysia is inadequate to deal with cyberbullying as the perpetrator needs more than sentencing to understand the implication of his actions against the victim, and to prevent him from repeating the offence. Facing the victim, listening to the victim's voice on the harm suffered because of the act, and giving opportunity to seek the victim's forgiveness can help the perpetrator to learn from his mistake and prevent the perpetrator from repeating the offence as has been successfully done in New Zealand under the process of family group conference. Therefore, the Child Act 2001 should also be amended to enable the restorative justice process through family group conferencing, which can officially be practiced as a way of criminal dispute settlement for child offenders. A special provision should also be included in the Malaysian Child Act to govern the entire process and resolution of family group conferencing.

While restorative justice has been recognised by the United Nations and is implemented in the child justice system of New Zealand, Malaysia still adopts the traditional justice system as governed by the Child Act 2001. Instead of allowing the parties to determine the process and the outcome, the case will be heard at trial and the court will determine how to dispose of the case. It is suggested that restorative justice and family group conferences should be recognised in the Malaysian justice system in line with the United Nations Convention on the Rights of the Child (UNCRC). As a state party of the UNCRC, Malaysia should amend the current Child Act 2001 to incorporate a family group conference into the Malaysian child justice system so that the parties affected by the cyberbully together with their families can get involved in the proceedings and determine the solution based on the needs and welfare of the children. As such, the involvement of the court for hearing and determining cases of cyberbullying involving children is not necessary. This could also help the parties to speedily dispose of the case without while ignoring the court process and proceeding. Most important however is that the rights and welfare of the children are protected.