



# Cyberbullying: In Search of a Legal Definition and a Legal Response

Prof. Anne SY Cheung

Department of Law

HKU, 4 Sept 2018

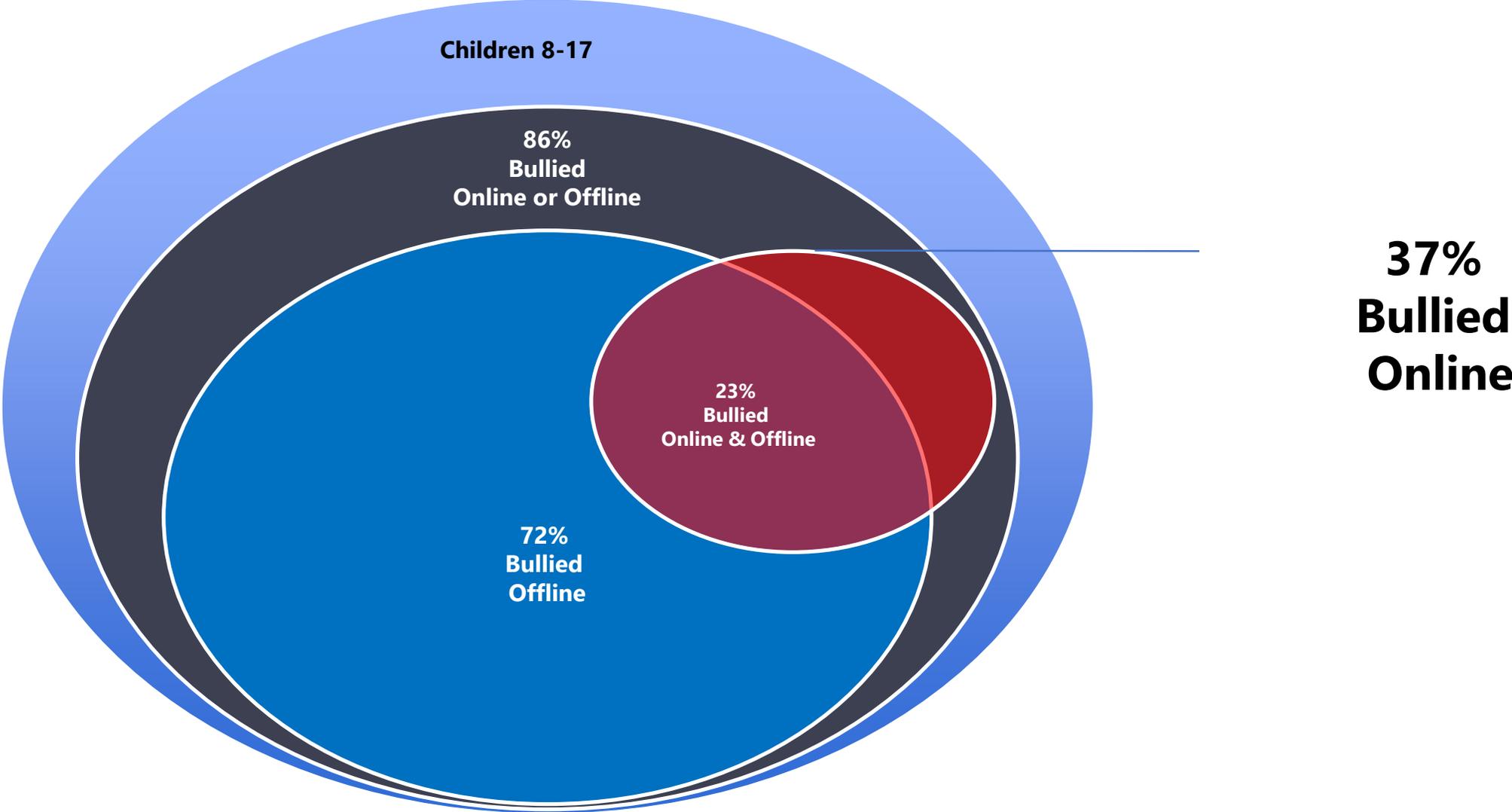
Which legal model is suitable for HK to tackle cyberbullying in the social networking age?



# Outline

1. Its Manifestation and its Prevalence
2. An Evolving Definition of Cyber-bullying
3. HK Legal Position
4. New Zealand: harm based
5. Australian: children-focused
6. Lessons for HK

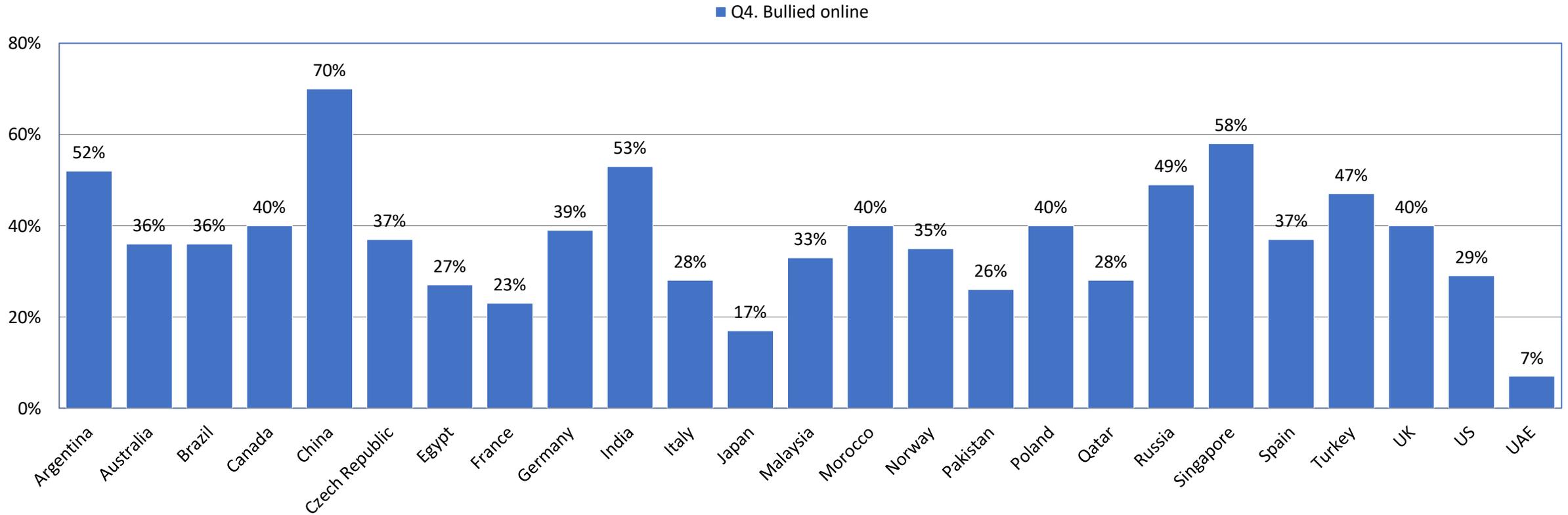
# Microsoft 2012 Report



#### Q4. Online Bullying Definition

- Other children have been unfriendly or mean toward you on the Internet
- Other children have made fun of you or teased you on the Internet
- Other children have called you mean names on the Internet

#### Children Who've Been Bullied Online



# Old Problem in New Disguise?



Source: Chris Kasurak

## **Bullying**

1. making fun of others
2. giving them nicknames
3. spreading rumours
4. giving insulting comments
5. shoving or physical assault

## **CB (HK Playground Assoc Survey 2016)**

1. Denigration
2. Masquerade
3. Impersonation
4. Sexting
5. Happy slapping
6. Outing
7. Harassment
8. Flaming
9. Cyberstalking
10. Exclusion

# Cyber-Bullying

- cyberbullying is an *intentional* aggressive act to inflict psychological harm on another individual, *repeatedly*, through digital technologies and online mediums

*(Hinduja & Patchin, 2014)*

- “any aggressive, *intentional* act carried out by a group or individual, using electronic forms of contact, against a victim *who cannot easily defend himself or herself*”

*UN Special Representative of the Secretary-General on Violence against Children, Annual Report 2016*

- Distinguished from cyberstalking and cybercrime





# Hong Kong Legal Position

Criminal intimidation (s. 24 Crimes Ord)	Criminal damage (s. 60 Crimes Ord)	Procuring unlawful sexual acts by threats (s. 117(1A) Crimes Ord)	Access to computer with criminal or dishonest intent (s.161 Crimes Ord)
Blackmail (s. 23 Theft Ord)	Possession of child pornography (s.3(3) Prevention of Child Pornography Ord)	Distribution of indecent and obscene articles (Obscene and Indecent Articles Ord.)	Offensive telephone calls and messages (s. 20 Summary Offences Ord)
intentional infliction of psychological harm	s.64: offence Unauthorised use/disclosure of personal data (PDPO)	Defamation (tort)	Intimidation and harassment (tort)

# HK Current legal remedies



# limitations

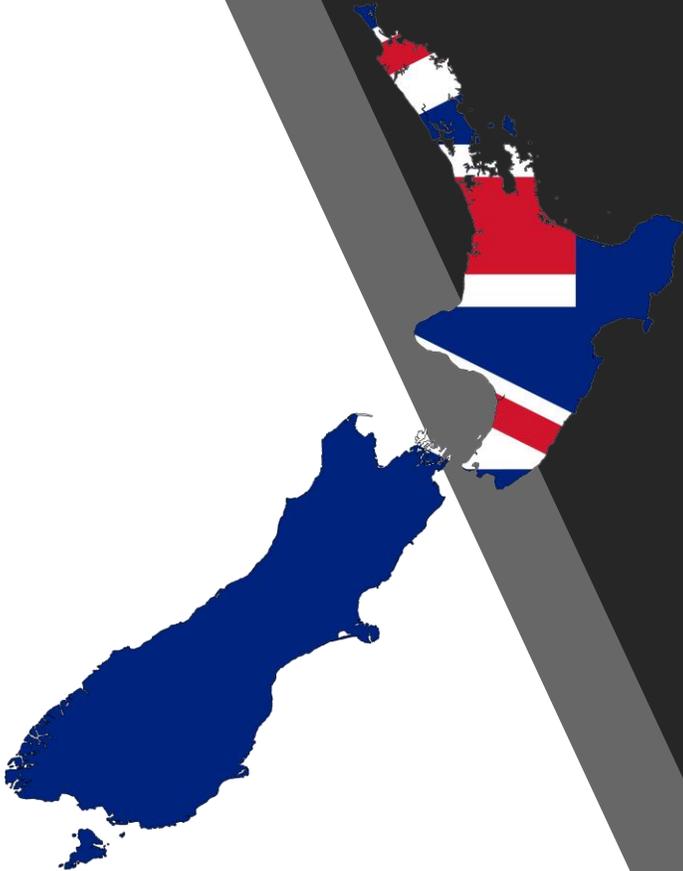
- Do not know whom to sue
- Costly and lengthy
- Conceptual difficulty:
  - a. intentional
  - b. repeatedly
  - c. aggressive behavior > power imbalance
- AND



# New Zealand

## *Harmful Digital Communications Act 2015*

1. Creation of a new criminal offence tailored for digital communication
2. Amendments to statutes to ensure that they can readily be applied to digital communications
  - a. Crimes Act 1961
  - b. Harassment Act 1997;
  - c. Human Rights Act 1993; and
  - d. Privacy Act 1993.
3. Establishing a special complaints and mediation agency: NetSafe
4. Admin reg regime and criminal offences
5. Liability of ISP



# Harmful Digital Communications

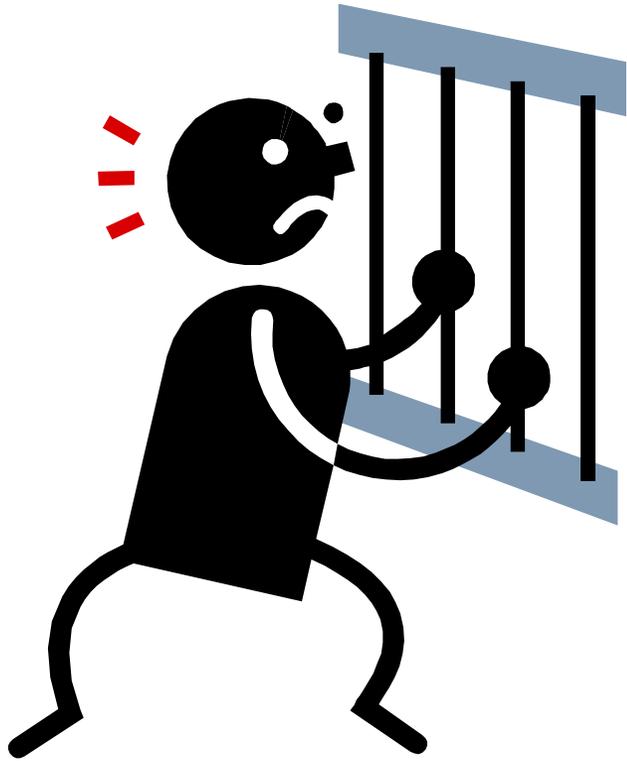
## Digital Communication

- Any form of electronic communication; and
- Includes any text message, writing, photograph, picture, recording, or other matter that is communicated electronically (s.4)

## Harm

1. Makes that person seriously emotionally distressed (harm; s. 4)
2. Could seriously breach one or more of the 10 communications principles under s.6





New Offence:  
Causing harm by posting  
digital communication s. 22(1)

- a. The person posts a digital communication with the intention that it cause harm to a victim
- b. Would cause harm to an ordinary reasonable person in the position of the victim
- c. Causes harm to the victim

10 Principles  
(s.6)  
Digital  
communication

Should  
NOT:

1. disclose sensitive personal facts about a person;
2. be threatening, intimidating, or menacing;
3. be grossly offensive;
4. be indecent or obscene;
5. be used to harass a person;
6. make a false allegation;
7. breach confidences;
8. incite or encourage anyone to send a deliberately harmful message;
9. incite or encourage a person to commit suicide; and
10. denigrate a person's colour, race, ethnic or national origins, religion, gender, sexual orientation or disability.

# Liability of Online Content Host

- No liability if after receiving notice of complaint, comply with s.24
- Notify the author
- Take down or disable the specific content within 48 hours



# Criminal sentence under DHCA 2015-17 statistics

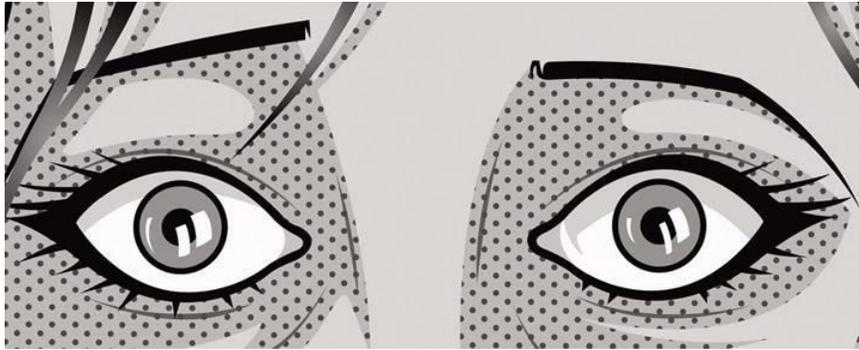


Convicted: 84

- Age under 19: 12

Sentence

- Imprisonment: 21
- Home detention: 15
- Community detention: 11
- Others: 84



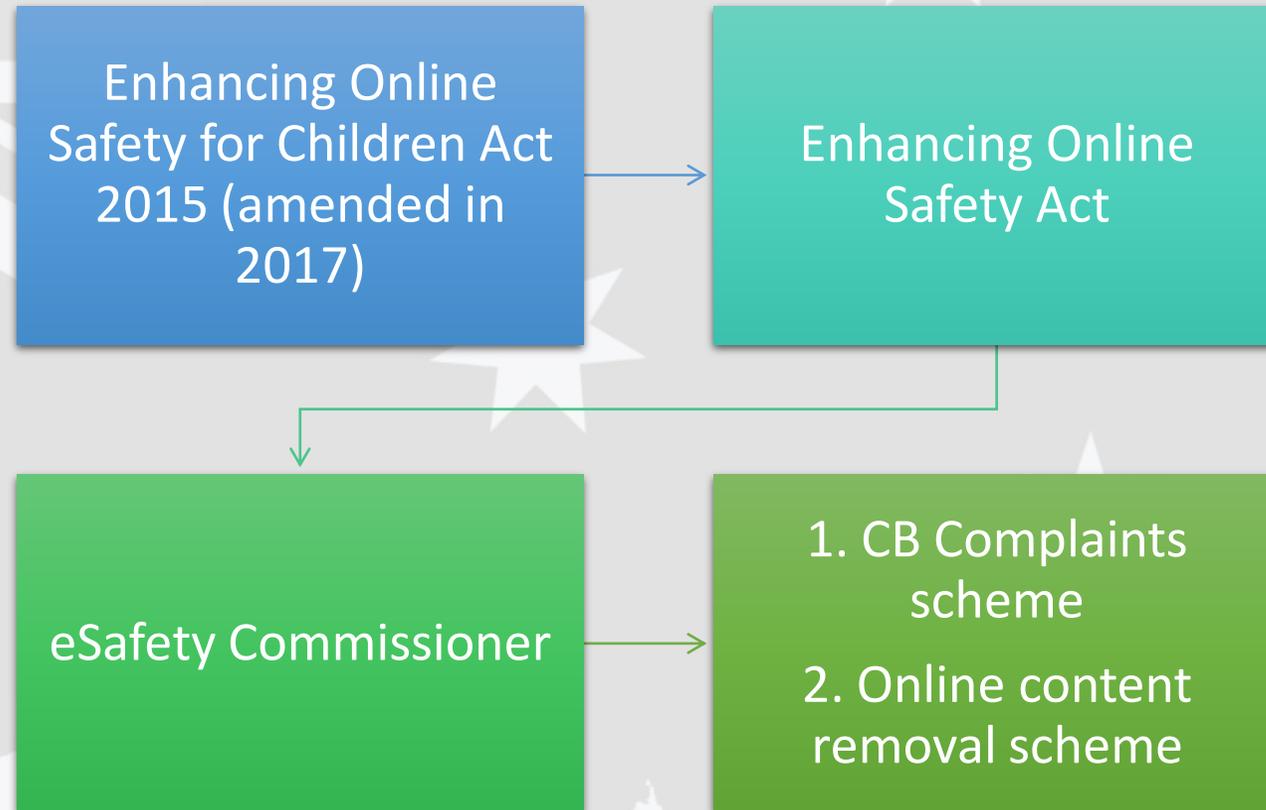
# NZ Police v Richard Moore [2017] NZDC 14864

- Facts:
- S. 22 of DHCA
- Starting point 6 months' imprisonment
- Df. was 17 at the time of offence: 6 months community detention, curfew from 8 p.m. to 6 a.m.

# Before NetSafe Jan- March 2018



# Australia



# CB Material targeted at an Australian child s. 5

- a) Material on social media service or relevant electronic service
- b) An ordinary reasonable person would conclude that
  - i. it is likely the material was intended to have an effect on a particular Aust. Child; and
  - ii. The material would be likely to have the effect on the child of seriously threatening, seriously intimidating, seriously harassing or seriously humiliating
- (c) Other conditions as set out in the legislative rules

# Enforcement



Against  
social  
media  
service

Tier 1: sms that have online safety requirements, complaints scheme and removal process s.31

Tier 2: none

Fine of a maximum Aust\$105,000 for failure to remove for Tier 2 (s.36, 46)

Against  
end user  
(author):

removal; refrain and apologise  
(s. 41)

Against  
Both

injunction

Complaints  
1 July 2016-  
30 June  
2017

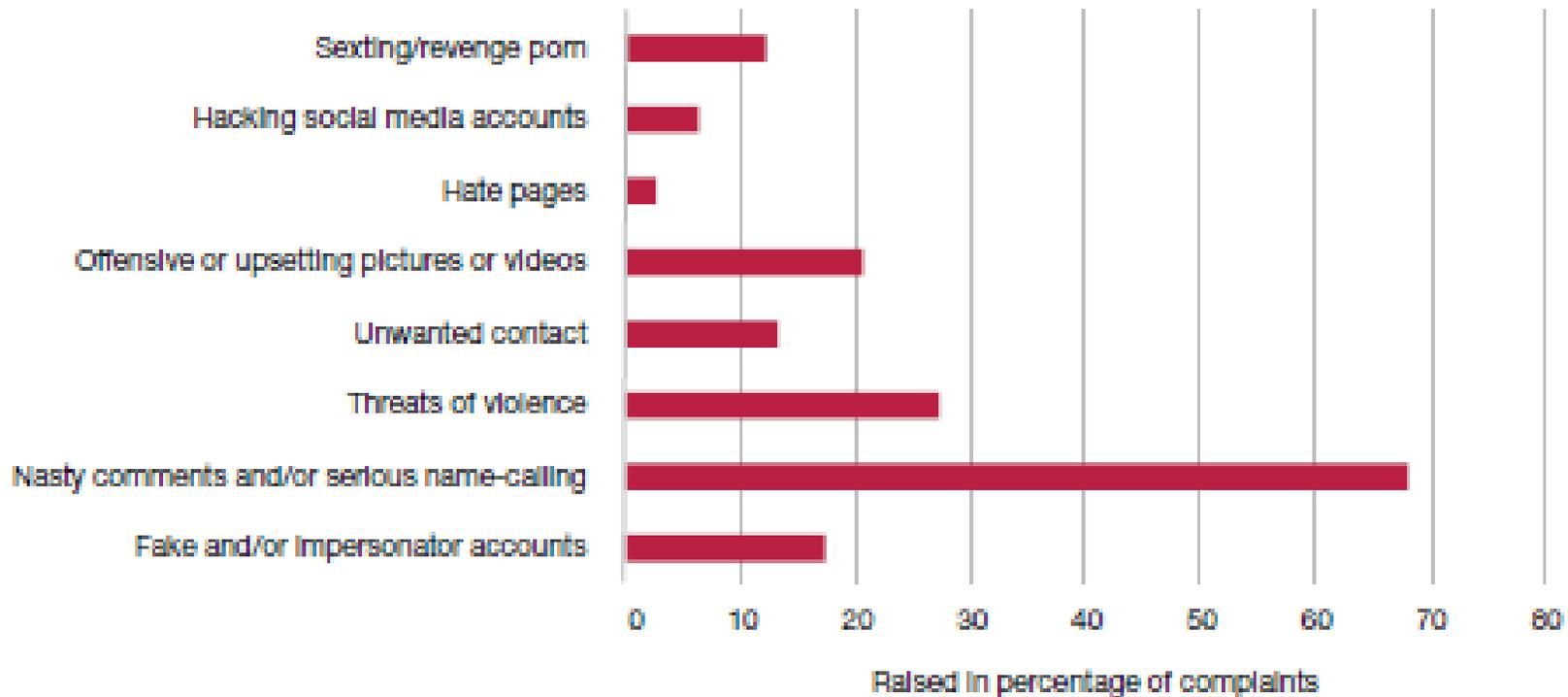
305 complaints on serious CB, an increase of 63% from 2015-16

Primary targets were children between 12 and 16

Worked with 11 major social media service providers

# Australia CyberReport 2016-17

Figure 6.4: Percentage of complaints identifying general categories of cyberbullying, 2016-17



Note: A complaint may have multiple categories, so figures may not equal 100 per cent.

# Conclusion



- HK law is inadequate, uncertain and inaccessible
- specific CB act vs. harm/effect based > conceptual to operational definition
- civil admin/regulatory; civil and criminal
- children as victims; adult as victims
- single contact point: separate agency or Commission
- ISP or SNS: notice based; safe harbour regime
- defence??

anne.cheung@hku.hk

Thank You



## Harm s. 22 (2)

- In determining whether a post would cause harm, the court should take into account
  - a. the extremity of the language employed;
  - b. the age and characteristics of the victim;
  - c. whether the message was anonymous;
  - d. whether the message was repeated;
  - e. the extent of the circulation of the message;
  - f. whether the message is true or false (in some contexts truths are more hurtful than falsity);
  - g. the context in which the message appeared.