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Senator Jeffrey D. Klein
LOB 304
Albany, NY 12248

Assembly Member William Scarborough
LOB 622
Albany, NY 12248

Dear Senator Klein and Assembly Member Scarborough:

The Information Technology Law Committee of the New York City Bar Association is comprised of a wide variety of attorneys who come together to discuss and address legal and policy issues relating to information policy and the Internet. We would like to take this opportunity to share our thoughts on S.6132-A/A.8978-A ("the bill").

The bill would amend Sections 120, 190 and 240 of New York's Penal Law and would explicitly criminalize "electronic stalking of a minor," "criminal impersonation by means of electronic communications," and "aggravated harassment by means of electronic communication." As the bill explains, these modifications are being made to the penal law with the goal of protecting minors against the practice of cyberbullying. The IT Law Committee applauds the legislature for addressing cyberbullying, an issue with very real and painful consequences for young New Yorkers, which the legislature recently addressed by amending New York's Education Law in S.7740/A.10712, signed by the Governor on July 9, 2012.

We agree with the bill's authors that mobile technology and social networking have allowed adolescent cruelty to be "amplified and shifted" from schools to the Internet, where it becomes difficult to contain or undo. These technologies are often inextricably intertwined with the fabric of young people's social identities. This ubiquity, combined with the nearly universal access to social networks and mobile devices for teens of all socioeconomic groups, means that victims of cyberbullying are often unable to find refuge even after they have gone home from school.

We believe, however, that the important aims of this bill to amend New York's Penal Law might be achieved through less expansive means. We write to express a few concerns regarding the bill's possible over breadth.

First, Section 2 of the bill would amend section 120.50 of the Penal Law to criminalize electronic stalking where the perpetrator engages in a course of conduct using electronic communications directed at a child under the age of 21 where such conduct is likely to cause "material harm" to the "emotional health" of such child. The bill goes on to stipulate that for the purposes of section 120.50, any electronic communications need not be received by the child at whom such communications are directed.

We are concerned that this language is overbroad and may over-criminalize the speech of young New Yorkers. What constitutes "emotional harm" is often a highly subjective judgment. What might be considered as casual banter or light teasing by some, could be perceived by others as delivering a crushing emotional blow- a concern only amplified by the emotional difficulties facing young people who are in the midst of understanding their own identities.

As a result, we believe the "likely to cause material harm to the ... emotional health" standard may be too vague to serve as a deterrent to New York's online youth. If a 14-year-old were to email, text or post messages to friends critiquing a classmate's wardrobe over the course of a week's time, the message originator could potentially face criminal investigation and prosecution under the proposed bill's language. This result is particularly troubling in light of studies and reports highlighting the voluminous amount of electronic communications between young adults.¹ There are simply too many young New Yorkers online, sending too many communications each day, for a vague standard to separate mean-spiritedness from the sort of aggressive stalking and tormenting that this bill seeks to punish.²

Further, we believe that existing laws in New York may be adequate to address the problems of cyberbullying. Specifically, Section 120.45, subdivision 2 of the Penal Law defines *stalking in the fourth degree* as causing

material harm to the mental or emotional health of such person, where such conduct consists of following, telephoning or *initiating communication or contact* with such person, a member of such person's immediate family or a third party with whom such person is acquainted, and the actor was previously clearly informed to cease that conduct;

(emphasis added). This language, though perhaps drafted without the perils of contemporary technology in mind, appears sufficient to capture the practices commonly known as

¹ A recent Pew study found that the average teenager sends 60 text messages each day. Chenda Ngak, *Teens are sending 60 texts a day, study says*, CBS News, March 19, 2012. Available at http://www.cbsnews.com/8301-501465_162-57400228-501465/teens-are-sending-60-texts-a-day-study-says/

² We are also concerned at the potential chilling effect on First-Amendment-protected speech, especially in light of the U.S. Supreme Court's recent rulings on the boundaries of protected speech. See *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 08-1448 (2011) (rejecting a ban on the sale of violent video games to minors as an unconstitutional violation of minors' free speech); and *United States v. Stevens*, 559 U.S. ___, 130 S.Ct. 1577 (2010) (rejecting a ban on the creation or sale of films depicting extreme cruelty to animals).

cyberbullying. What's more, its requirement that the actor be previously informed to cease conduct ensures that young New Yorkers do not get ensnared in criminal prosecutions – and be saddled with a criminal record with all of its attendant consequences - resulting from statements that may appear malicious but were perhaps simply thoughtless.

Although we believe that current New York law is sufficient, as an alternative, the IT Law Committee believes that adding explicit language about cyberbullying to existing laws would accomplish the bill's objective of bringing state penal law up-to-date and putting bullies on notice that their actions will not escape the watch of prosecutors or state legislators. Specifically, we believe that adding the following words to the portion of Section 120.45 quoted above would accomplish this goal, while avoiding some of the unintended consequences that might result from the bill in its current form:


...where such conduct consists of following, telephoning or initiating communication or contact, **including electronic communications commonly known as cyberbullying**, with such person...

In addition, recent amendments to New York's Education Law in S.7740/A.10712 have addressed the issue of cyberbullying via non-criminal means. The amendments seek to prevent cyberbullying by requiring that school officials establish protocols to respond to cyberbullying, and to work with law enforcement when appropriate. The committee believes that before new felonies are added to the penal code, the Legislature should first examine the impact of these new school-based policies and determine whether they have been effective at curbing cyberbullying in New York.

In light of the importance of this issue and the concerns we have identified above, we recommend that the Legislature conduct a public hearing and invite representatives from (a) the state and/or local District Attorneys' offices, to present on the laws (and any changes thereto) they believe would be necessary for the prosecution of cyberbullying; (b) children's advocacy organizations, to describe the nature and extent of cyberbullying and any proposed legal remedies; (c) civil liberties organizations, to discuss the potential impact of any change in the law; and (d) social networks, to explain the nature of social networks and how the technology functions. These individuals could also address the following issue: What actions would constitute a warning to the actor that meets the standard of "previously clearly informed to cease that conduct"? Would a statement from a teacher suffice? An oral request from the targeted student? An automated "takedown" notice from the social networking site that the language violated the site's terms of use?

Thank you for considering these comments. Please do not hesitate to contact us if we can be of any further assistance.

Sincerely,



Susan L. Ross
Chair

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