Developing a law and policy framework to regulate cyber bullying in South African schools

by

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DEDICATION

This dissertation is dedicated to my son, Alexander Hills. May you always work hard to achieve your dreams.

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Foremost, I would like to give my deepest gratitude to my supervisors: Prof SA Coetzee, you are not only a supervisor, but a mentor and friend as well. I cannot measure the value of everything I have learned from you. Prof CA Waschefort, a deep thank you for your input, insights, and continuous efforts in helping me to complete my research.

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To my parents: For encouraging me to follow my dreams, your unconditional support, and for my education.

Lastly, I would like to thank all the participants in the study. You have made an invaluable contribution to this report.

DECLARATION

I, Riana Hills, student number 426-093-05 declare that

DEVELOPING A LAW AND POLICY FRAMEWORK TO REGULATE CYBER BULLYING IN SOUTH AFRICAN SCHOOLS is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

I have not previously submitted this work, or part of it, for examination at Unisa for another qualification or at any other higher education institution.

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CA Hills

2017-06-01

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Date

ABSTRACT

Cyber bullying is a growing phenomenon in schools all over the world, and it is evident that cyber bullying presents certain unique problems for schools in the regulation thereof. From the number of different definitions of cyber bullying, it is also evident that there is no clear concept of the exact nature of cyber bullying, and how it should be addressed in schools. The existing legal framework in South Africa can be used to address cyber bullying in schools, but there is no legislation or policy that is directly aimed at the regulation of cyber bullying at school level.

The purpose of this research is to develop a law and policy framework for the effective regulation of cyber bullying in schools. Firstly, a literature review was conducted to determine the nature of cyber bullying and to examine how cyber bullying in American schools is regulated by law. Secondly, a literature study determined the human rights obligations with regard to protecting learners against cyber bullying, and reviewed how current South African law and policy speaks to addressing cyber bullying in schools. In order to investigate the occurrence of cyber bullying in South African schools practically, a case study was conducted at a South African school. All the resources mentioned above were used to develop an education-specific law and policy framework to address cyber bullying in South African schools effectively. This framework includes a suggested insertion in the South African Schools Act, draft Guidelines for the regulation of cyber bullying in schools, draft provisions for schools' Codes of conduct for learners and an information brochure on cyber bullying.

Keywords: Code of conduct, communication technology, constitution, cyber bullying, education law, human rights obligations, information and legal framework, misconduct.

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List of abbreviations and acronyms

DoBE	Department of Basic Education
ICT	Information and communication technology
IHRI	International Human Rights Instrument
IHRL	International Human Rights Law
LO	Life Orientation
MEC	Member of Executive Council

List of abbreviated titles of laws and policies

ACHPR	African Charter on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
African Convention on Cyber Security	African Union Convention on Cyber Security and Personal Data Protection
CRC	Convention on the Rights of the Child
Children's Act	Children's Act 38 of 2005
Child Justice Act	Child Justice Act 75 of 2008
ICESCR	International Covenant on Economic, Social and Cultural rights
ICCPR	International Covenant on Civil and Political Rights
Films and Publications Act	Films and Publication Act 65 of 1996
Guidelines for Code of conduct	Guidelines for the Consideration of Governing Bodies in adopting a Code of conduct for Learners
Schools Act	South African Schools Act 84 of 1996
Sexual Offences Act	Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007
South African Constitution	Constitution of the Republic of South Africa, 1996
Regulations for safety measures	Regulations for safety measures at public schools
Regulations to prohibit initiation practices	Regulations to prohibit initiation practices in public schools
Beijing Rules	United Nations Standard Minimum Rules for the Administration of Juvenile Justice
Riyadh Guidelines	United Nations Guidelines for the Prevention of Juvenile Delinquency

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Definition of key terms

Code of conduct for learners

A **Code of conduct for learners** is an instrument pertaining to the discipline in schools. It is drawn up by the school governing body, and must comply with the Constitution of the Republic of South Africa, 1996, all the provisions of relevant education legislation and policy.[1]

Information and communication technology (ICT)

In order to understand the concept of **cyber bullying**, one must first understand the meaning of **information and communication technology**. The most relevant definition can be found in TechTerms.com.[2] It describes **Information and Communication Technology (ICT)** as "technologies that provide access to information through telecommunications. It is similar to Information Technology (IT), but focuses primarily on communication technologies. This includes the Internet, wireless networks, cell phones, and other communication mediums".

Cyber bullying

Cyber bullying is defined as "the use of information and communication technologies to support deliberate, repeated, and hostile behaviour by an individual or group that is intended to harm others."[3] (cf. chapter 2)

International human rights instruments

This concept refers to legally binding treaties, covenants and conventions that define the duties of State Parties to the treaty, covenant or convention as part of

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1 For more information, see section 8 of the South African Schools Act 84 of 1996. In this report the consolidated South African Schools Act 84 of 1996 as amended by the Education Laws Amendment Act 100 of 1997, Education Laws Amendment Act 48 of 1999, Education Laws Amendment Act 53 of 2000, Education Laws Amendment Act 57 of 2001, Education Laws Amendment Act 50 of 2002, Education Laws Amendment Act 1 of 2004, Education Laws Amendment Act 24 of 2005, Education Laws Amendment Act 31 of 2007), Basic Education Laws Amendment Act 15 of 2011 was used. (Hereinafter referred to as the Schools Act).

2 http://www.techterms.com/definition/ict, (Last accessed on 1 December 2016).

3 Kift, S., Campbell, M. and Butler, D. 'Cyberbullying in social networking sites and blogs: legal issues for young people and schools' 2009/2010(20) *Journal of Law, Information and Science* 61 at 62.

international law in ensuring the human rights of individuals and groups.[4] This includes regional human rights instruments such as the African Charter on the Rights and Welfare of the Child.

Law and Policy Framework

Law can consist of all forms of law and includes common law, statutory law, indigenous law and case law. A law, thus legislation, is "a written statute enacted by those legislative bodies which have the authority to make laws".[5]

Policies are not seen as legislation, because they are not adopted by the legislature, as mentioned above.[6] Policies are adopted by the Executive branch of Government, or by organs of state.[7] Policy is not law, and thus not mandatory, but plays a role in law, as it can be used to complement and inform existing law.[8]

In this research, law and policy is referred to as a single framework, which recognises the fact that although policy is not binding law, it will be used to complement the suggested legislation.

Learner

A **learner** is any "person receiving education or obliged to receive education."[9] It is important to note that for purposes of this study, "child" refers to a person under the age of 18 years.[10] When reference is made to learners in this study, it refers to learners who are protected by the "child's best interests" standard, e.g. children under the age of 18 years (cf. chapter 4).[11]

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4 *Human rights-based approaches to programming. Glossary of human rights terms* https://www.crin.org/en/library/publications/glossary-human-rights-terms (Last accessed on 1 December 2016).

5 Botha, C. *Statutory interpretation: an introduction for students.* 2012 Juta at 3.

6 Coetzee, S.A. 'Education law sources regulating classroom management' in Coetzee, S.A. and Van Niekerk, E.J. (ed). *An educator's guide to effective classroom management.* 2015 Van Schaik 195-203 at 196-197.

7 Ibid.

8 Ibid.

9 Schools Act (note 1).

10 Section 28 of the South African Constitution. Hereinafter referred to as the South African Constitution.

11 Coetzee, S.A. and Mienie, C.A. 'The "best interests of the child" standard in education: An overview of South African case law' 2014(19)(1) *Southern African Public Law Journal* 90 at 90.

School

A 'school' in this report refers to a public school which enrols learners in one or more grades between grade eight and grade 12.[12] The focus of this research is on learners between grade eight and 12, and thus the use of a secondary school.

School governing body[13]

In this study a **school governing body** refers to a statutory body established in terms of section 16(1) of the South African Schools Act 84 of 1996 (hereinafter referred to as the Schools Act). This body is responsible for the governance of a public school.

School principal

School principal is defined as an educator appointed or acting as the head of a school.[14]

Social media

"A group of Internet-based applications that build on the ideological and technological foundations of Web 2.0 and that allow the creation and exchange of user-generated content."[15] This may include "magazines, internet forums, weblogs, social blogs, micro-blogging, wikis, social networks, podcasts, photographs or pictures".[16]

Misconduct in schools

For the purposes of this study, **misconduct in schools** refers to learner misconduct as set out in schools' Codes of conduct for learners.[17] Cyber bullying may constitute

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12 Department of Basic Education. 2010b. *Education Information standards: Dictionary of education concepts and terms* 2010 at 105.

13 Ibid.

14 Ibid.

15 Kaplan, A.M. and Haenlein, M. 'Users of the world, unite! The challenges and opportunities of social media' http://www.slideshare.net/guestef2b2f/social-media-definition-and-classification, (Last accessed on 1 December 2016).

16 Purusothaman, U.R. 'Cyber bullying: A study' 2013(2)(4) *International Journal of Logistics & Supply Chain Management Perspectives* 483 at 483.

17 For more information, see: Misconduct of learners at public schools and disciplinary proceedings Published under General Notice 6903 of 2000 (*PG* 144 of 4 October 2000) as amended by General Notice 2591 of 2001 (*PG* 72 of 9 May 2001).

a form of misconduct and a crime at the same time. For example, a learner who cyber bullies another learner:

- May be charged with misconduct (e.g. contravening the school's Code of conduct for learners). The learner may be found guilty (after a disciplinary hearing conducted by the governing body) of committing a specific form of misconduct and a disciplinary measure could be imposed. The form of misconduct and the disciplinary measure must be provided for in the school's Code of conduct for learners. The disciplinary measure could be suspension, for example. There is a requirement set down by the court in *Antonie v Governing Body, Settlers High School* that both the form of misconduct and the sanction for the misconduct must be included in the code of conduct.[18]
- May be charged with (the crime of) *crimen iniuria*. The charge is laid with the police and will be investigated by the police, there will be a court hearing and the court will decide on the sanction. The sanction cannot be suspension from school. Learners may also face a civil claim for damages for instances of defamation. See *Le Roux and Others v Dey* for an example of where the learners were sentenced to community service (in the criminal case) and damages were allocated to the plaintiff (in the civil case).[19]

18 2002 (4) SA 739 (C).

19 CCT 45/10) [2011] ZACC 4; 2011 (3) SA 274 (CC) ; 2011 (6) BCLR 577 (CC).

CHAPTER 1

INTRODUCTION

would you kill someone? [20]
because you can.
not with a knife
a gun
or your own two hands.
the words you say
your devious ways
makes somone's life a living hell.
you called him gay
the poor thing, poor thing.
you called him weak
the poor thing, poor thing.
you pushed him beyond his limits.
his life was taken
his own two hands
murder can be invisible
its happend.
it can.
but you can change it. change your ways.
brush away the rainy days.
apoiligize
for those evil ways.
because in the end, it realy pays.
and for all you poor things,
no more need for the sighs
i promis, promis that you will get by.
there realy is no reason to die
you can always turn a ink blot, into a butterfly(sic)

by Teresa Motherway

1.1 Introduction

This chapter briefly explains the background to the research problem – the research aim and objectives as well as the methodology used to achieve these objectives.

[20] This poem was posted on a website dedicated to Ryan Patrick Halligan, a 13-year-old American teenager who committed suicide after being cyber bullied. http://www.ryanpatrickhalligan.org/Dedications/dedications.htm (Last accessed on 1 December 2016). The poem is quoted verbatim from the website.

1.2 Background to the study

In this study a distinction is made between traditional and cyber bullying. Traditional bullying is defined as "intentional peer-victimisation, either physical or psychological, that can involve teasing, spreading rumours, deliberate exclusion from group activities and physical violence such as hitting and kicking."[21]

Numerous studies have been done on traditional bullying, and it is recognised as a common experience during childhood.[22] It is prevalent on various continents and not limited to a specific culture.[23] The nature of bullying and the link to cyber bullying is discussed in more detail in Chapter 2 (cf. section

2.2 T).

With the emergence of technologies such as cellular telephones and the internet that are freely available to children, a new form of bullying has surfaced.[24] This type of bullying is commonly called cyber bullying. Although the concept of **cyber bullying** is elucidated in Chapter 2, it is essential for the purpose of intelligibility to define it briefly here. The term **cyber bullying** was first coined by Bill Belsey. He defines cyber bullying as "the use of information and communication technologies to support

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21 Fleming, L.C. and Jacobsen, K.H. 'Bullying among middle-school students in low and middle income countries' 2009(25)(1) *Health Promotion International* Oxford University Press 73 at 73.

22 Blake, P. and Louw, J. 'Exploring high school learners' perceptions of bullying' 2010(22)(2) *Journal of Child and Adolescent Mental Health* 111 at 111.

23 Williams, J.H. and Veeh, C.A. 'Continued Knowledge Development for Understanding Bullying and School Victimization' 2012 (51) *Journal of Adolescent Health* 3 at 3-5. **"**For example, in a sample from countries in Asia and Africa, researchers found prevalence rates of bullying behaviours and school victimization of 31.4% in India, 40% in South Korea, 36.3% in South Africa, and 31% in Taiwan (1-5). Prevalence rates in Australia at 47.3% and the United States at 29.9% are also comparable with other countries (6, 7)."

24 Beale, A.V. and Hall, K.R. 'Cyberbullying: What school administrators (and parents) can do' 2007(81)(1) *Clearing House: A Journal of Educational Strategies, Issues and Ideas* 8 at 8. For statistics of cyber bullying in South Africa, see Evans, S. 'SA can't live without cell phones' http://www.timeslive.co.za/business/article348468.ece/SA-cant-live-without-cellphones (Last accessed on 1 December 2016).
A study carried out by Johannesburg-based market research company, Synovate found that 86% of South Africans who participated in the study believe they cannot live without their cell phones. The study showed that:

- 87% of respondents used the alarm clock function.
- 82% used their phones to snap pictures with the camera.
- 66% listened to or downloaded music on their phones.
- 71% played games on their phones.
- Almost a third sent and received e-mails, while 46% used their phones for internet browsing.
- 47% watched video clips and 15% watched TV.

deliberate, repeated, and hostile behaviour by an individual or group that is intended to harm others."[25]

Shariff states that "cyber bullying has roots in traditional bullying that takes place in the physical school setting; however, the medium of cyber-space allows it to flourish in distinct ways and creates numerous challenges."[26] Due to the nature of cyber bullying, schools may face specific, hard to address problems when regulating cyber bullying.[27] These problems may include the following:[28]

- The anonymity of electronic media.
- The fast pace of development in electronic media may make it hard for educators to understand relevant electronic forums.
- It is easy for learners to send disparaging comments about fellow learners to a large audience in a short space of time.
- Learners punished for cyber bullying may claim that a school lacked the authority to punish them as the act of cyber bullying may have occurred outside the school or school hours.
- The posting of bullying content can reach a much wider audience than originally intended. See *Le Roux and Others v Dey* for example.[29]

There are many different forms of cyber bullying. Thus, any definition of cyber bullying, or any legislation and policy addressing cyber bullying should be wide enough to include all forms of cyber bullying. Recognised forms of cyber bullying include:[30]

- Flaming – Online fights using electronic messages containing angry or vulgar language.
- Harassment – Repeatedly sending nasty, mean and insulting messages.

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25 Kift, Campbell and Butler (note 3) at 62.

26 Sharrif, S. and Hoff, D.L. 'Cyber bullying: clarifying legal boundaries for school supervision in cyberspace' 2007(1) *International Journal of Cyber Criminology* 76 at 77.

27 Shariff, S. *Confronting cyber-bullying: what schools need to know to control misconduct and avoid legal consequences.* 2009 Cambridge University Press at 39.

28 Lane, D.K. 'Taking the lead on cyberbullying: why schools can and should protect students online' 2011(96) *Iowa Law Review* 1791 at 1795–1796; Manuel, N.R. 'Cyber-bullying: its recent emergence and needed legislation to protect adolescent victims' 2011(13) *Loyola Journal of Public Interest Law* 219 at 229.

29 *Le Roux* (note 19).

30 Hayward, J.O. 'Anti-cyber bullying statutes: threat to student free speech' 2011(59) *Cleveland State Law Review* 85 at 89.

- Denigration – 'Dissing' or disrespecting someone online; sending or posting gossip or rumours about a person to damage his or her reputation or friendships.
- Impersonation – Pretending to be someone else and sending or posting material to get that person in trouble or damage their reputation.
- Outing – Sharing someone's secrets or embarrassing information or images online.
- Exclusion – Intentionally and cruelly excluding someone.

Cyber bullying remains a relatively under-researched phenomenon.[31] Limited studies show that cyber bullying exists in South Africa.[32] Existing South African legislation protects learners in schools from bullying in general,[33] but there is no legislation or policy directly aimed at regulating cyber bullying in schools.[34] To understand education specific legislation, one must first understand the unique position of public schools in the South African legal system. As already mentioned, public schools are organs of state, and thus bound by all the provisions in the South African Constitution.[35] In terms of certain provisions in the South African Constitution, South Africa, and thus schools as organs of state, is bound by a number of international obligations.[36] These provisions include section 39(1) (the interpretation clause), section 231 (dealing with international agreements), section 232 (dealing with international customary law), and section 233 (dealing with the interpretation of legislation) (cf. section 3.2 T).[37]

Secondly, because the South African Constitution is the supreme law of the country, it is of great importance to public schools, and relevant provisions must be analysed in detail. The South African Constitution guarantees a number of rights in the Bill of

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31 Badenhorst, C. 'Legal responses to cyber bullying and sexting in South Africa' CJCP Issue Paper No. 10 August 2011 at 5.

32 A study done by the Centre for Justice and Crime Prevention in 2009, found that one in three young South Africans interviewed had experienced cyber bullying at school (Burton, P. and Mutongwizo, T. 'Inescapable violence: Cyber bullying and electronic violence against young people in South Africa' CJCP Issue Paper No. 8, December 2009). See also 'Bullying on the rise – Study' http://www.news24.com/SouthAfrica/News/Bullying-on-the-rise-study-20120723 (Last accessed on 1 December 2016).

33 Moodley, I. 'Cyber bullying: A legal framework for South African educators' 2012(27) *South African Journal of Public Law* 539 at 540.

34 Ibid.

35 *Western Cape Minister of Education and Others v Governing Body of Mikro Primary School* 140/2005 (2005) ZASCA 66 at paragraph 20.

36 Coetzee, S.A. and Mienie, C.A. 'South African educators' mutually inclusive mandates to promote human rights and positive discipline' 2013(31)(1) *Perspectives in Education* 87 at 88.

37 Ibid.

Rights. A public school, as an organ of state and a juristic person, is bound by these rights.[38] Rights such as the right to equality, the right to human dignity, the right to freedom and security of the person, and children's rights impact directly on both cyber bullies and victims of cyber bullying. These rights, and the way they are interpreted by South African courts were examined to determine what impact they have on the cyber bully, the victim of cyber bullying and the rights and duties of the public school (3.3 C).

General national law is the law that applies and is enforced in South Africa. The word 'general' indicates that it is law that applies generally (such as the Children's Act);[39] as opposed to education specific law (such as the Schools Act) that is national law applicable only to the education sphere. These laws may include legislation, case law and common law. Legislation such as, *inter alia,* the Schools Act and the Children's Act are relevant to cyber bullying in South African schools.[40] Furthermore, because of the nature of cyber bullying, it may have criminal and civil legal implications as well. These implications were examined in Chapter 3 (cf. section 3.5 S).

In broad terms Education Law can be defined as law (general and education specific national law) regulating education. Legislation such as the Schools Act and policy documents such as the Guidelines for the Consideration of Governing Bodies in Adopting a Code of conduct for learners,[41] and the Regulations Relating to the Prohibition of Initiation Practices are relevant to cyber bullying in South African

38 South African Constitution (note 10) at section 8(1).

39 In this report the Consolidated Children's Act as amended by the Children's Amendment Act 41 of 2007 and Child Justice Act 75 of 2008 updated to *Government Gazette* no 33076 of 1 April 2010 was used. Hereinafter referred to as The Children's Act.

40 Regulations to prohibit initiation practices in schools. (Government Notice 1589 of 2002). *Government Gazette* 24165, 13 December 2002. Hereinafter referred to as the Regulations to prohibit initiation practices.

41 South Africa (Republic). 1996. Guidelines for the consideration of governing bodies in Adopting a Code of conduct for Learners. (General Notice 776 of 1996). *Government Gazette* 1800, 15 May 1996 at paragraph 11(m). Hereinafter referred to as Guidelines for Code of conduct.

public schools[42] (cf. section 3.5 S). It is important to understand that policy is not mandatory. Guidelines can be adopted as policy just as policy can be given the force of law if adopted as sub-ordinate legislation (regulations).

Coetzee identified unique characteristics of public schools that courts should take into account when considering cases dealing with searches and seizures. I contend that courts and school governing bodies also have to consider these contextualising characteristics when deciding cases dealing with cyber bullying. The contextualising characteristics identified by Coetzee with a few additions, are,[43] *inter alia*:

- The majority of occupants of schools are minors. Numerous IHRL instruments guarantee child learners, as minors, special protection against harm. Educators and learners are in a public law relationship. A learner in this public law relationship is entitled to protection under the Bill of Rights because the Bill of Rights is an undertaking by the state (of which the education authorities form a part) to protect and guarantee the rights and freedoms of the individual in this vertical (authoritative) relationship. This is thus a case of the vertical application of the Bill of Rights.
- Schools are juristic persons and organs of state and as such they (and educators as their functionaries) are bound by the Bill of Rights. Educators are not only representatives of the state but also representatives of the parents because they act *in loco parentis*.
- It is important to keep in mind that due to the professional status of educators, they are held to a high standard of reasonableness in instances of negligence; e.g. where, for example, nothing was done about cyber bullying. Similarly, due to their professional status, the maxim “ignorance of the law is no excuse” applies to educators in criminal cases; e.g. where an educator sexually harass a learner by sending nude photos, and/or ‘love’ messages to the learner.[44]
- In the South African context the right to education is seen as central, in that it speaks to the development imperatives of the South African Constitution.

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42 Regulations to prohibit initiation practices (note 40).

43 Coetzee, S.A. ‘Education law, policy and public documents on searches and seizures in South African public schools’ 2009(72)(1) *Journal for Contemporary Roman Dutch Law* 26 at 28-29.

44 Neethling, J. and Potgieter, J.M. *Law of delict.* 2010 LexisNexis at 139.

- The primary purpose of a school is teaching and learning. It is important to rid schools of negative practices that may influence the quality of teaching and learning.

From the paragraphs above it is clear that addressing cyber bullying in schools presents a number of unique challenges. The question whether the laws, policies and methods of regulating traditional bullying in schools is sufficient to also regulate cyber bullying in schools, needs to be answered. Before this question can be answered, one must understand the difference between the impact of traditional bullying and the impact of cyber bullying. The differences in the nature of cyber bullying and traditional bullying was examined and listed in chapter 2 (cf. section

2.2.3 The unique nature of cyber bullying).

Once the question regarding the current legal situation in South Africa is answered in the negative, a legal framework for regulating cyber bullying in South African schools can be developed. In order to develop an effective framework in line with the South African Constitution, one must study IHRL, general South African law, as well as education specific South African law and policy and foreign law. Chapters 2 and 3 of this dissertation contain a literature study of these legislative frameworks.

1.3 Motivation for the research

The topic of cyber bullying first came to my attention through newspaper articles. My interest was heightened when I watched a haunting YouTube video dedicated to the victims of cyber bullying who committed suicide, some of them as young as 13 years old.[45] Another chilling YouTube video documents the pain of a cyber bullying victim, Amanda Todd.[46] An added dimension of cyber bullying when compared to traditional bullying, is the fact that the victim cannot escape the reach of the bully. The bully follows him or her home on his or her cellphone, tablet or computer. Furthermore, the humiliation is made public and millions of people can become online witnesses to the learner's humiliation. Children do not have the emotional resources to deal with being bullied and learner victims of cyber bullying should be regarded as a vulnerable group that needs protection.

45 See http://www.youtube.com/watch?v=P1mKK_FeJKc (Last accessed on 1 December 2016).

46 Ibid.

The fact that cyber bullying is on the increase in South Africa (cf. footnote 32), and a lack of child centred and education specific cyber bullying laws in South Africa was the main reason for choosing to research cyber bullying in schools.

1.4 Research problem

The question that needs to be answered is what should be included in the existing South African law and policy framework to regulate cyber bullying in South African schools effectively? In order to answer the question stated above, I investigated the following sub-problems:

- What is cyber bullying (cf. CHAPTER 2)?
- What guidelines can be taken from American law with regard to regulating cyber bullying in schools (cf. section 2.5 T)?
- What protection do human rights offer against cyber bullying in schools (cf. section 3.3 C)?
- What is the current South African law and policy framework for regulating cyber bullying in schools (cf. 3.5 S)?
- What are the current problems that the participant school experience with regard to cyber bullying, and how is the school handling those problems (cf. **Error! Reference source not found.**)?

1.5 Aim and objectives of the research

The overall aim of this study is to develop a law and policy framework for the effective regulation of cyber bullying in schools. This framework is based on the international human right requirements for protection of learners, the current South African legal framework, examples from foreign (American) law, and the results from a study on the current situation in a selected South African school.

The objectives achieved by this study were:

1. To determine the definition, nature and forms of cyber bullying.
2. To examine how cyber bullying in American schools is regulated by law.

3. To explore human rights obligations that provide for the protection of learners in schools against cyber bullying.
4. To review current South African law and policy and how it may speak to cyber bullying in schools.
5. To get a practical view on the occurrence of cyber bullying by investigating the phenomenon and how it is dealt with in a selected South African school.
6. To develop an education-specific law and policy framework to address cyber bullying in South African schools effectively.

1.6 Significance of the study

In General Comment no 13, the Committee on the Rights of the Child stresses that "Measures to end violence must be massively strengthened and expanded in order to effectively put an end to these practises which jeopardize children's development and societies' potential non-violent solutions for conflict resolution."[47]

Among other acts of violence mentioned in paragraph 21(g) of the Comment are "Psychological bullying and hazing by adults or other children, including via information and communication technologies (ICT's) such as mobile phones and the Internet (known as cyber bullying)".[48] This study thus speaks directly to one of the directives set by the Committee on the Rights of the Child.

From the pilot study, it was already clear that schools were hungry for more information regarding cyber bullying. By taking into account the needs at school level to inform the legal framework that I have developed, I ensured that the research had practical value on ground level. Woolman and Fleisch[49] accurately summarises the careful balance when legislating education:

> When lawyers argue [about education], they tend to cherry pick the evidence to be found in educational policy statements and the secondary literature. …they seem uninterested in how primary and secondary schools actually work… they engage[d] in the most arid and

47 General Comment No.13 (2011) The right of the child to freedom of all forms of violence CRC/C/GC/13 http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.13_en.pdf (Last accessed on 1 December 2016).

48 Id at paragraph 21(g).

49 Woolman, S. and Fleisch, B. *The Constitution in the classroom: Law and education in South Africa.* 2009 Pretoria University Law Press at 2.

> disengaged ruminations on what our basic law required…. Educators were perfectly content to discuss policy. But they appeared constitutionally incapable of discussing; in a meaningful or subtle fashion, the law and its ramifications for the state of education in this country [South Africa] … they tend to eschew engagement with the sophisticated constitutional, statutory and regulatory arrangements that bracket education policy. Nor do you see most educators looking at legal texts for support of their propositions.

Although this is a legal study and the research was done from a legal viewpoint, the practical situation in South African schools was not discounted and was used to inform the law and policy developed. Thus, a study based on the needs of schools, governing bodies, learners and educators informed the research and the development of the legal framework.

In this study, the following contributions towards a law and policy framework were developed:

- an insertion in paragraph 11 of the Guidelines for Code of conduct
- an insertion in paragraph 4A in the Regulations for safety measures
- draft guidelines for the prevention and regulation of cyber bullying in public schools
- draft provisions for schools' Codes of conduct for learners
- information brochure on cyber bullying.

Although the findings in the research cannot be generalised, these contributions can be adopted by any public school, and the suggested insertions in paragraph 11 of the Guidelines for the consideration of governing bodies and the Regulations for safety measures has national applicability. This study can also be replicated in any public school, and the school can then use the findings to adapt the Draft provisions for schools' Codes of conduct for learners (cf. 6.4.4 Draft provisions for schools' Codes of conduct for learners) to suit the specific needs of the school.

1.7 Research methodology

In this section, the research paradigm, approach and design, the type of data, and the corresponding methods for data collection and data analysis are explained. The "epistemological, ontological and methodological premises of the research" is

referred to as the research paradigm or basic set of beliefs that guide a researcher's actions.[50] Because the paradigm "informs and guides the approach taken" it was essential to address the paradigm first.[51]

1.7.1 Research paradigm

This research falls in the paradigm of critical realism, which is supportive of qualitative and quantitative research designs.[52] Roberts states that critical realism is important for the advancement of social science methodology, especially qualitative research.[53] Critical realism is defined as:[54]

> a specific form of realism whose manifesto is to recognize the reality of the natural order and the events and discourses of the social world and holds that we will only be able to understand – and so change – the social world if we identify the structures at work that generate those events and discourses.

One of the main characteristics of critical realism is that context is recognised. Bryman explains that "appreciation of context is crucial to critical realist explanations because it serves to shed light on the conditions that promote or impede the operation of the causal mechanism."[55]

This means that a scientific attitude to social research is maintained while recognising the "reality of the natural order and the events and discourses of the social world".[56] Due to the complex nature of cyber bullying, it is important for any research on this phenomenon to recognise the specific context in which cyber bullying takes place. Another important contextual matter is the complex and unique nature of education law and policy regulating the South African school system.

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50 O'Reilly, M. and Kiyimba, N. *Advanced qualitative research: A guide to using theory.* 2015 SAGE at 3.

51 Ibid.

52 Bryman, A. *Social research methods.* 2012 Oxford University Press at 57.

53 Roberts, J.M. 'Critical realism, dialectics, and qualitative research methods' 2014(44)(1) *Journal for the Theory of Social Behaviour* 1 at 1.

54 Bryman (note 52) at 57.

55 Id at 20.

56 Carlsson, S.A. 'Critical realism: A way forward in IS research' in Ciborra, R. Mercurio, M. de Marco, M. Martinez, M. and Carignani, A. (Eds.) *Proceedings of the Eleventh European Conference on Information Systems* 2003 Naples, Italy at 2-3.

Because critical realism "emphasises that social action takes place in the context of pre-existing social relations and structures, which have both constraining and facilitating implications for actions",[57] this paradigm enforces the statement made below that law must not be studied in isolation (cf. section 1.7.2 Research approach). It further facilitates the recognition of the social and human aspect of cyber bullying.

As for the "critical" part of critical realism, this paradigm enabled me to introduce "changes that can transform the status quo,"[58] and thus advance the research objective of developing an education-specific law and policy framework to address cyber bullying in South African schools effectively.

1.7.2 Research approach and design

It has been argued that law must not be studied in isolation from the societal context, as law is aimed at creating an ordered society and to influence human behaviour. In socio-legal studies, attempts are made to use social scientific and comparative approaches to research to understand and study the law better.[59]

The University of Bristol Law School describes Socio-legal studies as the type of research where:[60]

> we consider law in the context of broader social and political theories. We look at whether and how law is implemented and enforced, at the exercise of discretion, the nature of disputes and disputing, and crime and criminal justice. By exploring law's connections with broader social and political forces – domestic and international – we gain perspective on ideology, culture, identity and social life.

One of the main reasons for conducting legal research is to study sources of law applicable to understanding a legal problem and to find a solution in the law. However, socio-legal research requires a **law-in-context** investigation. The

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57 Smith, C. and Elger, T. 'Critical realism and interviewing subjects' Working Paper Series SoMWP-1208, December 2012 at 6.

58 Bryman (note 52) at 20.

59 Van Hoecke, M. *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* 2011 Oxford: Hart Publishing at 7.

60 http://www.bristol.ac.uk/law/research/centres-themes/socio-legal-studies.html (Last accessed on 1 December 2016).

qualitative approach is the best suited approach for such research because the legal research requires typical qualitative data collection methods such as literature study and document analysis while the **socio** part is addressed best by interviews and focus groups (cf. sections 4.6.2 Questionnaires and
4.6.4 Focus groups).

Another reason for following the qualitative approach is that this approach allows a researcher to see the research topic through the eyes of the participants.[61] In this case, the participants were the learners, educators, and school principal that have to face cyber bullying in school context.

The following table by Durrheim neatly summarises the characteristics of qualitative inquiry.[62]

Table 1: Characteristics of a qualitative enquiry

Naturalistic	Studying real-world situations as they unfold naturally; non-manipulative, unobtrusive, and non-controlling; openness to whatever emerges – lack of predetermined constraints on outcomes.
Holistic	The whole phenomenon under study is understood as a complex system that is more than the sum of its parts; focus on more complex interdependencies, not meaningfully reduced to a few discreet variable and linear, cause-effect relationships.
Inductive	Immersion in the details and specifics of the data to discover important categories, dimensions, and interrelationships; begin by exploring genuinely open questions rather than testing theoretically derived (deductive) hypotheses.

Source: Reprinted from *Research in practice* (p 48) by Terre Blanche, M., Durrheim, K. and Painter 2006 Juta

The characteristics mentioned above, especially the naturalistic and holistic nature of a qualitative enquiry, enabled me to study the complex nature of a real-world problem (cyber bullying), and the inductive nature of this enquiry made it possible to identify categories of cyber bullying and find answers to the unique problems that the selected school faces in regulating cyber bullying by immersing myself in the data. This enquiry thus led me to the needs that have to be addressed in the

61 Bryman (note 52) at 380.
62 Durrheim, K. 'Research design' in Terre Blanche, M., Durrheim, K. and Painter, D. *Research in practice.* 2006 Juta 33–59 at 48.

education-specific law and policy framework for regulating cyber bullying in schools to not only prevent cyber bullying but also to provide sufficient protection to victims of cyber bullying when it occurs.

There is a close link between critical realism, socio-legal studies, the qualitative approach and case study design. Critical realism recognises the importance of the **context** of research; socio-legal studies argue that law should not be isolated from the **social context**; the qualitative research approach allows a researcher to view the research through the eyes of the participants, and thus in **context;** and a case study design focuses on studying a phenomenon in its actual **context**. This research will thus include a socio-legal case study.

Yin defines the case study research design as

> an empirical inquiry that investigates a contemporary phenomenon in its real-life context, when the boundaries between phenomenon and context are not clearly evident, and in which multiple sources of evidence are use(d).[63]

In line with the definition by Yin, the phenomenon of cyber bullying in a particular school was investigated. The school was thus the "case". One of the advantages of a case study is that it enables the researcher to study data in the specific context, in this instance the school environment. Another advantage is that it enables the researcher to understand and explain complex situations in real environments.[64] One of the criticisms against case studies as a qualitative design is that it is not possible to make a generalised conclusion from a single case study, or that information may not be valid.[65] Case study researchers do not aim for generalisation but to produce findings that are transferable.[66] Transferability refers to whether the results in a qualitative study can be used in other contexts or settings.[67]

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63 Yin, R.K. *Case study research: Design and Methods.* 1994 SAGE at 13.

64 Bryman (note 52) at 4.

65 Lindegger, G. 'Research methods in clinical research' in Terre Blanche, M., Durrheim, K. and Painter, D. *Research in practice.* 2006 Juta 455–475 at 461; Bryman (note 52) at 74.

66 Rule, P. and John, V. *Your guide to case study research.* 2011 Van Schaik at 105.

67 Kumar, R. *Research methodology: a step by step guide for beginners.* 2014 SAGE at 219.

Transferability can be established by carefully documenting the approach used, so it can be adopted by other researchers to follow.[68]

The scope of this research falls in South African law and policy. As the same law and policy will regulate cyber bullying in all public schools, this study has a high transferability value.

1.7.3 Population and sampling

Population is defined as "a group of elements or cases, whether individuals, objects, or events, that conform to specific criteria, and to which we intend to generalize (or in qualitative research 'transfer') the results of the research."[69]

To make sure the proposed legal framework for the effective regulation of cyber bullying in schools has practical applicability, a case study was completed in a selected secondary school.

I used purposive sampling. This means that subjects are chosen because they are in the position and have the ability to provide information that are relevant to the topic under investigation.[70] During sampling, representativeness is important.[71] The sample selected must represent the population from which the conclusions will be drawn.[72] In the selected school, my sample consisted of the school principal, the Life Orientation educator (LO) Educator, the discipline officer of the school (an educator at the participant school in charge of dealing with discipline at the school), 4 school counsellors and the learners in the grade 9 LO classes.

Theoretical sampling is a form of purposive sampling.[73] This means:[74]

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68 Ibid.

69 McMillan, J.H., McMillan, J. and Schumacher, S. *Research in education: Evidence based inquiry* 2006 Prentice Hall at 119.

70 Bryman (note 52) at 418.

71 Durrheim (note 62) at 49.

72 Ibid.

73 Bryman (note 52) at 418.

74 Glaser and Strauss in Bryman (note 52) at 419.

> the process of data collection for generating theory whereby the analyst jointly collects, codes and analyses his data and decides what data to collect next and where to find them, in order to develop his theory as it emerges.

Bryman states that this form of sampling is a continuous process.[75] Keeping sampling open was extremely important due to the sensitive nature of my study. One must keep in mind that the bullies and the victims may be known to the rest of the learners. This might have prevented full participation in my studies. Theoretical sampling, however, allowed me to adapt as information emerged.

1.7.4 Literature review

In this study the researcher distinguishes between a literature review and literature study. Coetzee explains in a Report Back to her M and D students that:[76]

> For me, the difference between a literature review and a literature study is that a review is used to determine what is written on a specific topic, e.g. what literature is available on the specific topic. A literature review provides the framework against which you will interpret your data. A literature study on the other hand is a data collection method, e.g. where documents are used to collect data.

A literature review is an essential part of any research. The literature review allows the researcher to acquaint herself with the available body of knowledge on the research topic, to place her research in this existing body of knowledge and to interpret her findings in the framework of this body of knowledge.[77] A literature review was done to put the concepts of traditional bullying and cyber bullying into context (cf. section 2.2 f).

1.7.5 Data collection

The following table summarises the objectives of the research and the data collection methods I used to achieve those objectives.

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75 Bryman (note 52) at 419.

76 Coetzee, SA. 2015. *Report Back to M and D group, May 2015. Personal communication between students and supervisor.* Although the use of this source is unusual, no other source that so clearly explained the difference between a literature study and a literature review could be found.

77 Kumar (note 67) at 48.

Table 2: Data collection methods

Objective	Data Collection Method	Population Sample
1. To determine the definition, nature and forms of cyber bullying	Literature review – no data collected	None
2. To investigate the international and regional instruments that provide for the protection of learners in schools.	Literature study	None
3. To investigate how cyber bullying in American schools is regulated by law.	Literature study: In this study, I focused on cyber bullying laws in America for a foreign law comparison. In America, 49 of the states have passed cyber bullying laws, and a number of court cases have been decided on cyber bullying.[78] This provided ample information for a comparison and examples of good practice.	None
4. To review current South African law and policy and how it may speak to cyber bullying in schools.	Literature study	None
5. To investigate the problems in addressing cyber bullying in South African schools, and how it is dealt with by the participant school.	Document analysis of school's Code of conduct for learners Semi-structured interviews Questionnaires Focus groups	Semi-structured interviews: The school principal, the LO educator, the school discipline officer Questionnaires: learners in the grade 9 LO classes. Focus group: the school counsellors

1.7.5.1 Literature study

A literature study was done to determine the human rights obligations for regulating cyber bullying in South African schools, as well as current South African legislation that may be used to regulate cyber bullying in schools (cf. CHAPTER 3). It was also used to investigate the laws and policy dealing with cyber bullying in the United States of America for examples of best practice, or possible shortcomings (cf. section 2.5 T).

78 Mienie, C.A. 'Managing cyber-bullying in schools: Lessons from American and Australian law' 2013(28) *Southern African Public Law* 146 at 149.

1.7.5.2 Questionnaires

Questionnaires normally consist of "… open-ended items for qualitative responses, and other questions that elicit demographic information" from participants.[79] I believed this to be the most appropriate method to extract data from learners. Because there is a great possibility that the victim and the offender may be in the same class, the victim of cyber bullying might be exposed to the cyber bully further if focus groups were used to collect data. Victims might also not be comfortable to open up to me as a stranger. I thus opted for questionnaires because that ensured the best protection of the learner victims' anonymity.

I followed the process of constructing questionnaires explained by Peterson:[80]

1. Review the information requirements necessitating a questionnaire.
2. Develop and prioritise a list of potential research questions that will satisfy the information requirements.
3. Assess each potential research question carefully.
4. Determine the type(s) of questions to be asked.
5. Decide on the specific wording of each question to be asked.
6. Determine the structure of the questionnaire.
7. Evaluate the questionnaire.

One of the methods in ensuring effective questionnaires is a pilot study. A pilot study uses a small number of participants to identify possible problems with the data collection instruments, before the main study is started.[81] These steps were invaluable in developing the questionnaires for the learner participants, and are discussed in more detail in chapter 4 (cf. section 4.2 R).

1.7.5.3 Document analysis

Webster, Lewis and Brown define documentary analysis as "the study of existing documents, either to understand their substantive content or to illuminate deeper

79 Kanjee, A. 'Assessment research' in Terre Blanche, M., Durrheim, K. and Painter, D. *Research in practice.* 2006 Juta 476-498 at 490.

80 Peterson, R.A. *Constructing effective questionnaires.* 2000 SAGE at 13-14.

81 Kanjee (note 79) at 490.

meanings which may be revealed by their style and coverage".[82] The Code of conduct for learners of the selected school in Gauteng was studied to determine whether they make adequate provision for cyber bullying.

1.7.5.4 Interviews

According to Alvesson, the field of interviews are divided up as follows:[83]

1. Structure: This can be divided up into structured, semi-structured and unstructured interviews.
2. Size: Will a single person or a group of persons be interviewed?
3. Communication media: The media of interviews may be face-to-face, telephonic or electronic.
4. Category: The category of persons interviewed may call for specific considerations, for example special ethical measures have to be considered when interviewing children.

For the purpose of objective 5 of this study, a school principal, school discipline officer and an LO Educator were interviewed to evaluate whether the school has plans and policies regarding cyber bullying in place. These interviews also include questions regarding incidences of cyber bullying at school, and the responses of the school, parents, victims and bullies to such incidences. The interviews were all semi-structured, face-to-face, single person interviews. The interview process is discussed in more depth in chapter 4 (cf. section 4.6.2 Questionnaires).

1.7.5.5 Focus groups

A focus group was used to determine the views of school counsellors regarding cyber bullying in schools. What makes focus groups important for studying the context of cyber bullying in schools, is that focus groups give a researcher the opportunity to see how individuals make sense of, and construct meanings towards a certain phenomenon in a collective manner.[84] A focus group was conducted with the school counsellors for their unique perspective on the effects and causes of cyber bullying in the school. In focus group studies, participants can present their own

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82 Strydom, H. and Delport, C.S.L. 'Information collection: document study and secondary analysis' in De Vos, A.S., Strydom, H., Fouche, C.B. and Delport, C.S.L. *Research at grassroots.* 2011 Van Schaik 341–375 at 377.

83 Alvesson, M. *Interpreting Interviews.* 2011 SAGE at 9–10.

84 Bryman (note 52) at 504.

views, but they also get to hear the views of other participants.[85] This nature of focus groups raises specific ethical dilemmas (See section 4.10.5 Anonymity and confidentiality). During the focus group, the school counsellors did not disclose the names or particulars of any learners when giving examples of instances of cyber bullying at school. This addresses the issue of anonymity. All the participants in the group were also assured of the confidentiality of the information given in the consent forms.

1.7.6 Data analysis and interpretation

During data analysis, data is reduced. With qualitative research, this involves "grouping textual material into categories like themes ..."[86]

There are many ways to interpret qualitative data. There is no single methodological framework for interpreting this form of data, and it will depend on the purpose of the research.[87] This is discussed in more detail in chapter 4. The analysed data was interpreted and used to develop an education-specific law and policy framework for regulating cyber bullying in schools.

1.8 Research quality and integrity

Quality assurance and verification of data in research is critical.[88] By referencing responsibly and correctly and ensuring the data is reliable and valid, the researcher can ensure that research was done responsibly.[89]

Vithal and Jansen indicate a number of ways to ensure validity:[90] All of these steps were followed to ensure the research quality and integrity.

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85 Finch, H., Lewis, J. and Turley, C. 'Focus groups' in Ritchie, J., Lewis, J., Mcnaughton Nicholls, C. and Ormston, R. *Qualitative research practice* 2014 SAGE 211–242 at 212.

86 Bryman (note 52) at 13.

87 Schurink, W., Fouche, C.B. and De Vos, A.S. in De Vos, A.S., Strydom, H., Fouche, C.B. and Delport, C.S.L., *Research at grassroots* 2011 Van Schaik 397–423 at 400.

88 Maree, K. and Van der Westhuizen, C. *Head start in designing research proposals.* 2009 Juta at 28.

89 Ibid.

- Comparing data extracted by means of one instrument with data extracted by means of another instrument.
- Returning draft reports to participants for accuracy checks.
- Considering rival explanations for the same issue or question.

I compared data extracted by means of the questionnaires, interviews and document analysis to ensure the quality and integrity of my research.

1.9 Ethical considerations

Research ethics are essential to protect the welfare of participants in research.[91] As most of the participants were children, my overriding concern was always to ensure that they were not harmed in any way. I took special care of complying with the ethical process as prescribed by Unisa,[92] and ethical clearance was granted by the College of Law Ethical Committee (Appendix F).

Research involving children is governed by strict ethical guidelines, and there are strict procedures to be followed to protect the children from harm and exploitation.[93] The researcher took the following advice of Phelan and others to heart:[94]

> conducting ethical research with children involves an on-going commitment to research reflexivity and that the tenets of enabling safety, dignity and a voice for children can prove helpful in assisting researchers to navigate the complex ethical issues that transpire when working with children.

Issues of consent, power imbalances and confidentiality are often pointed out as main concerns.[95] Careful planning in the methodology phase and constant reflexivity

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90 Vithal, R. and Jansen, J.D. *Designing your first research proposal: A manual for researchers in education and the social sciences.* 2010 Juta at 33.

91 Wassenaar, D.R. 'Ethical issues in social science research' in Terre Blanche, M., Durrheim, K. and Painter, D. *Research in practice* 2006 Juta 60–79 at 61.

92 Unisa Policy on Research Ethics, 2013.

93 Coyne, I. 'Research with Children and Young People: The Issue of Parental (Proxy) Consent' 2010(24) *Children & Society* 227 at 227.

94 Phelan, S.K. and Kinsella, E.A. 'Picture this safety, dignity, and voice – Ethical research with children: Practical Considerations for the reflexive researcher' 2013 *Qualitative Inquiry* 19 at 82.

95 See for example ibid and Kirk, S. 'Methodological and ethical issues in conducting qualitative research with children and young people: A literature review' 2007(44)(7) *International Journal of Nursing Studies* 1250 at 1250–1260.

and awareness of the safety and dignity of the research subjects was always my aim.

The identities of all the parties involved were kept anonymous, and the participants to the study were provided with information on the study, including possible risks and benefits. The participants were made aware of the fact that the study is voluntary, and that they need not participate, or may withdraw from the study at any time.

Because the overriding ethical consideration was to ensure that participants were not subjected to harm or victimisation as a result of the study, the school's counsellor and/or LO educator was also requested to keep a close eye on the participating learners to ensure they were not victimised for taking part in the study, or that they suffered no adverse psychological effects from their participation.

Table 3: Ethical considerations

Sample/Participants	Process to obtain permission and consent	Letter requesting permission /participation/ consent/assent	Informed consent letter	Data collection instrument	Appendix
School principal	Permission letters: • DoBE: Gauteng Province • Principals	***Form*** requesting permission from the DoBE: Gauteng Province Letter requesting participation and consent from the principals ***Appendix A***	DoBE: permission letter to the researcher on an official letterhead. ***Appendix C*** Consent from principals ***Appendix B*** Signed letters are kept securely on file	Interview guide for the Principal is included in chapter 4.	Appendixes A to C
LO educator	Requesting participation and consent from LO educator	Letter requesting participation and consent from the educator ***Appendix A***	Consent from educator ***Appendix B*** Signed letters are kept securely on file	Interview guide for the educator is included in chapter 4.	Appendixes A and B
Grade 9 learners	Underage learners – consent from parents/guardians and assent from learners	Letter requesting learner participation and consent from parents of underage learners ***Appendix D*** Letter requesting participation and assent from underage learners ***Appendix E***	Consent from parents and assent forms of underage learners will be held securely on file and be available to examiners and REC on request	Questionnaire is included in chapter 4.	Appendixes D and E
Discipline officer	Requesting participation and consent from discipline officer	Letter requesting participation and consent from the discipline officer ***Appendix A***	Consent from discipline officer ***Appendix B*** Signed letters are kept securely on file	Interview guide for the discipline officer is included in chapter 4.	Appendixes A and B
School counsellors	Requesting participation and consent from school counsellors	Letter requesting participation and consent from the school counsellors ***Appendix A***	Consent from school counsellors ***Appendix B*** Signed letters are kept securely on file		Appendixes A and B

1.10 Scope of the study

The geographical scope of the study was focused on South Africa. Legislation and policy that may contain provisions relevant to cyber bullying in public schools were examined and analysed. In an even narrower sense, a qualitative study was done in a selected North-Gauteng secondary school to determine the current problems and experiences with regard to cyber bullying.

International and regional IHRL norms were examined to determine the obligations for protection of children in general, and in instances of cyber bullying specifically. Furthermore, a comparative study was done with American cyber bullying provisions and case law. The reason for choosing the USA is because most states in the USA have passed anti-bullying laws, a substantial number of court cases dealing with cyber bullying or related cybercrimes in schools have also been decided and provide guidelines for South African courts in addressing cyber bullying in schools and navigating the minefield of possible clashes among different human rights.

1.11 Assumptions

The following assumptions were made in this dissertation:

- cyber bullying has a more complex nature than traditional bullying
- cyber bullying is more difficult to regulate than traditional bullying
- the South African legal framework does not adequately regulate cyber bullying in schools

1.12 Chapter division

The thesis was divided into six chapters. Chapter 1 gives an introduction into cyber bullying as well as an overview of the thesis. Chapter 2 consists of a conceptualisation of cyber bullying and a study of the American law and policy on cyber bullying in schools. Chapter 3 is a literature study on current South African law and policy and how it speaks to cyber bullying in schools. Specific attention was given to human rights pertaining to cyber bullying. Chapter 4 describes the methodology used to do a qualitative study on cyber bullying in schools. Chapter 5 contains a discussion of my

findings during this qualitative study. Chapter 6 concludes with an education-specific law and policy framework for regulating cyber bullying in South African schools.

1.13 Conclusion

In this chapter I gave an overall introduction and background to the study. The complex nature and uniqueness of cyber bullying was mentioned briefly. I also laid out the context, motivation and significance of the study. The research design and methods I followed were discussed briefly and are explained further in the methodology chapter (cf. CHAPTER 4). In order to understand the nature of cyber bullying, and the unique problems this relatively new form of bullying may present to schools, I next present a literature review on cyber bullying and traditional bullying in order to conceptualise cyber bullying. Chapter 2 also contains a literature study on American legislation, policy and case law so that the researcher could draw on that to determine what should be included in a framework regulating cyber bullying in schools.

CHAPTER 2

CONCEPTUALISING CYBER BULLYING, THE SCHOOL AND THE LAW

2.1 Introduction

Any attempt at regulating cyber bullying requires an understanding of the phenomenon of cyber bullying. This chapter contains a literature review and a literature study. A literature review was done to determine the definitions, elements, prevalence, harmful results and prevention strategies for traditional bullying and cyber bullying. This information was used to develop a working definition for cyber bullying in schools and to determine the specific problems relating to the regulation of cyber bullying in schools. A literature study was done where the law and policy framework already in place in the United States of America was used to identify guidelines in correctly managing school specific problems relating to cyber bullying.

2.2 The distinct nature of cyber bullying

In order to identify the unique nature of cyber bullying, it first needs to be compared to traditional bullying.

2.2.1 The definition and types of cyber bullying

Traditional bullying is a common form of youth violence to which many learners are subjected while at school.[96] Olweus describes traditional bullying as:[97]

> when someone is exposed, repeatedly and over time, to negative actions on the part of one or more other students, and he defines a negative action as when someone intentionally inflicts or attempts to inflict injury or discomfort upon another.

96 Patchin, J.W. and Hinduja, S. 'Bullies move beyond the schoolyard: A preliminary look at Cyberbullying' 2006(4) *Youth Violence and Juvenile Justice* 148 at 148.

97 Olweus, D. *Bullying at school: What we know and what we can do.* 1993 Blackwell Publishers at 9.

Bullying is often described as "a sub-set of aggressive behaviours, intended to be harmful which are characterised by repeated aggressive acts in which there is an imbalance of powers between the perpetrator(s) and the victim(s)".[98]

Stephenson and Smith define bullying as:[99]

> a form of social interaction in which a more dominant individual (the bully) exhibits aggressive behaviour which is intended to and does, in fact, cause distress to a less dominant individual (the victim). The aggressive behaviour may take the form of a direct physical and/or verbal attack or may be indirect as when the bully hides a possession that belongs to the victim or spreads false information about the victim.

Nansel *et al* describe bullying as:[100]

> a specific type of aggression in which (1) the behavior is intended to harm or disturb, (2) the behavior occurs repeatedly over time, and (3) there is an imbalance of power, with a more powerful person or group attacking a less powerful one.

Definitions of traditional bullying often identify the three elements of intention to harm, repetition and a power imbalance as key elements of bullying.[101] Stone argues that the three key elements of traditional bullying might not fit into the definition and understanding of cyber bullying.[102]

Camacho *et al* point out that there is no uniform agreed upon definition of cyber bullying in academic literature; this can be ascribed to the ongoing debate regarding the constituting elements of cyber bullying.[103] Shariff is of the opinion that existing

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98 Blake and Louw (note 22) at 111.

99 Stephenson, P., Smith, D. 'Bullying in junior school' in Tattum, D.P. and Lane, D.A. (ed) *Bullying in Schools* 1989 Trentham at 45.

100 Nansel, T.R., Overpeck, M., Pilla, R.S., Ruan, W., Simons-Morton, B. and Scheidt, P. 'Bullying behaviors among US youth: Prevalence and association with psychosocial adjustment' 2001(285)(16) *JAMA* 2094 at 2094.

101 Stone, K. 'Looking at bullying and cyberbullying: mapping approaches and knowledge' http://www.sccyp.org.uk/ufiles/Looking-at-bullying-and-cyberbullying.pdf (Last accessed on 1 December 2016) at 2; Olweus, D. and Breivik, K., 'Plight of victims of school bullying: The opposite of well-being' in Ben Arieh, A., Cassas, F., Frones, I., Korbin, J.E., *Handbook of Child Well-being.* 2014 Springer 2593–2616 at 2595.

102 Stone (note 103) at 5.

103 Camacho, S., Hassanein, K. and Head, M. 'Understanding the factors that influence the perceived severity of cyber bullying' 2014(8527) *Lecture Notes in Computer Science* http://link.springer.com/chapter/10.1007/978-3-319-07293-7_13 (Last accessed on 1 December 2016) at 133.

definitions of cyber bullying are too simplistic and "[fail] to recognise its nuances and complexities".[104] Shariff further states that "cyber-bullying must be understood in the specific paradigmatic context in which it is presented."[105] This is especially important when defining cyber bullying for the school milieu.[106] Cyber bullying episodes may be impacted by "the context of the situation (i.e. message, bully, medium and audience) and the victim characteristics".[107] The definitions of cyber bullying discussed below reveal the abundance of definitions of cyber bullying, and the fact that these definitions are inherently open-ended. However, while differing in certain aspects they also contain several common elements.[108]

The first definition of **cyber bullying** is a descriptive term attributed to Canadian educator and anti-bullying activist Bill Belsey. He defines cyber bullying as "the use of information and communication technologies to support deliberate, repeated, and hostile behaviour by an individual or group that is intended to harm others".[109]

From this definition, it is possible to deduce the following elements of cyber bullying: the use of information and communication technologies, intent, repeated behaviour, hostile behaviour and harm.[110]

Doering's definition goes even further in stating what form the information and communication technologies can take:[111]

> Cyberbullying can be generally defined as using the Internet, cell phones, e-mails, text messaging, online chat rooms, and other forms of electronic communication to deliberately harass, mock, defame, intimidate or threaten someone.[112]

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104 Shariff (note 27) at 39.
105 Ibid.
106 Mienie (note 78) at 131.
107 Camacho, Hassanein, and Head (note 103) at 135.
108 Mienie (note 78) at 149.
109 Kift, Campbell and Butler (note 3) at 62.
110 Mienie (note 78) at 148.
111 Ibid.
112 Doering, S.L. 'Tinkering with school discipline in the name of the First Amendment: expelling a teacher's ability to proactively quell disruptions caused by cyberbullies at the schoolhouse' 2008/2009(87) *Nebraska Law Review* 630 at 635.

This definition therefore includes intent and hostile behaviour, and the forms that hostile behaviour can take. However, the requirements (identified above) that behaviour must be repeated and that the victim must suffer harm as a result of the cyber bullying are absent.

Farrington argues that although bullying is a form of aggressive behaviour, bullying is not the same as aggression or violence as "not all aggression or violence involves bullying, and not all bullying involves aggression or violence".[113] It may be an act of aggression and violence when two boys get in a physical fight at school, but it is not bullying. Similarly, excluding a classmate from a group may constitute bullying, but aggression and violence is absent. This emphasises the complex and unique nature of bullying. Even though studies indicate that girls are becoming more violent,[114] research has shown that girls are more inclined to indirect and verbal bullying, while boys are more inclined to physical aggression.[115]

Smith *et al* include aggression as an element and define cyber bullying as "an aggressive intentional act carried out by a group or individual using electronic forms of contact, repeatedly and over time against a victim who cannot easily defend him or herself".[116]

Campbell *et al* focus on the intentional harm and an element of power in defining cyber bullying as "repeated, harmful interactions which are deliberately offensive, humiliating, threatening, and power assertive, and are enacted using electronic equipment, such as cell (mobile) phones or the internet, by one or more individuals towards another".[117]

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113 Farrington, D.P., Ttofi, M.M. 'School-Based Programs to Reduce Bullying and Victimization' 2009(6) *Campbell Systematic Reviews* 5 at 9.

114 Coeyman, M. 'Sugar and Spice and not entirely nice' April 12, 2003. http://www.csmonitor.com/2003/0429/p16s01-lecs.html, (Last accessed on 1 December 2016) and Cunningham, M. 'Adolescent female aggression: Proposal for a research agenda' 1 July 2000 http://www.lfcc.on.ca/agenda.html, (Last accessed on 1 December 2016) at 1.

115 Swart, E. and Bredekamp, J. 'Non-physical bullying: exploring the perspectives Grade 5 girls' 2009(29) *South African Journal of Education* 405 at 407; Gini, G. 'Bullying as a social process: The role of group membership in student's perception of inter-group aggression at school' Reprint of an article published in 2006(44) *Journal of Psychology* 2 at 5.

116 Cited in Kift, Campbell and Butler (note 3) at 63.

117 Campbell, M.A., Slee, P.T., Spears, B., Butler, D. and Kift, S. 'Do cyberbullies suffer too? Cyberbullies' perceptions of the harm they cause to others and to their own mental health' 2013(34)(6) *School Psychology International* 613 at 613.

In their definition of cyber bullying Patchin and Hinduja concur with Belsey (see above) in requiring a repetitive element, which they describe as "wilful and repeated harm inflicted through the medium of electronic text".[118] Doering's definition does not identify repetition as a constituting element of cyber bullying.[119]

From the above definitions, the following constituting elements of cyber bullying can be identified:

- an act
- the intention to harm the bullied learner/person/individual
- the use of a communication device to commit the act
- actual harm to the bullied victim
- repetitiveness

A traditional bully typically has some sort of advantage over the victim.[120] This can include confidence, age, sex, race, physical, intellectual, and/or social advantage over the victim.[121] Victims feel powerless to strike back.[122]

Three types of bullying have been identified:[123]

- direct physical bullying – hitting, kicking, pushing, vandalising property
- direct verbal bullying – name calling, public insults, derogatory remarks
- indirect bullying – This is also called relational bullying or social bullying – includes social exclusion, gossiping, isolation and spreading rumours about a person

Due to the nature of cyber bullying, aggression will mostly take the form of direct verbal bullying, relational bullying or indirect bullying. In a study by Huang and Chou it

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118 Patchin, J.W. and Hinduja, S. 'Making friends in cyberspace' 1996(46)(1) *Journal of Communication* 80 at 80; Kift, Campbell and Butler (note 3) at 62.

119 Mienie (note 78) at 148.

120 Swart and Bredekamp (note 115) at 407.

121 Swart and Bredekamp (note 115) at 407; Patchin and Hinduja (note 96) at 150.

122 Garcia, S. '*Cyberbullying: A guide for educators, school counselors, and parents*' A Capstone project submitted in partial fulfilment of the requirements for the Master of Science Degree in Counselor Education at Winona State University, 2010 at 2; Patchin and Hinduja (note 96) at 150.

123 Swart and Bredekamp (note 115) at 407; Gini (note 115) at 2.

was determined that victims of cyber bullying most often report verbal threats, harassment, being made fun of, and rumour spreading.[124] Direct verbal cyber bullying takes place where a cyber bully publicly posts insults about the victim on social media such as Facebook. It can also be argued that sending insulting or threatening WhatsApp messages can be direct verbal bullying as it is a form of name calling taking place between the cyber bully and the victim, the only thing that differs is the medium via which the cyber bullying takes place. Verbal bullying may not always be direct, instances where a message is spread by other parties may not qualify as direct verbal bullying. In the same vein, it can also be argued that there is a form of direct or indirect bullying that does not contain a verbal element. Will posting private or insulting pictures qualify as verbal bullying? All these factors strengthen the argument that a law and policy framework that addresses these different aspects of cyber bullying is needed to combat cyber bullying in schools.

With the exception of relational bullying, traditional forms of bullying are relatively easy for parents and educators to respond to as evidence of wrongdoing can be labelled and identified easily.[125] Responding to relational bullying can be difficult, due to the discreet manner in which rumours are spread.[126] More recent research focusses on bullying as a group phenomenon,[127] where bullying is part of group processes and influenced by social concerns such as belonging to a group or achieving a higher group status. Children in a group may participate in bullying by directly bullying the victim, actively assisting the bully, encouraging or cheering the bully on by laughing, being a silent witness to bullying or defending the victim of bullying.[128] Being a silent witness to bullying, does not make someone a bully, as there is no positive duty on the witness to act. In instances of traditional bullying, it can be argued that those who remain to witness the bullying form part of the bullying group. In cyber bullying, the

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124 Huang, Y. and Chou, C. 'An analysis of multiple factors of cyberbullying among junior high school students in Japan' 2010(26) *Computers in human behavior* 1581 at 1585.

125 Garcia (note 122) at 2.

126 Ibid.

127 Swart and Bredekamp (note 115) at 407; Jones, S.E., Manstead, A.S.R. and Livingstone, A.G. 'Ganging up or sticking together? Group processes and children's responses to text message bullying' 2011(102) *British Journal of Psychology* 71 at 71.

128 Sentse, M., Kiuru, N., Veenstra, R. and Salmivalli, C. 'A social network approach to the interplay between adolescents' bullying and likeability over time' 2014(43) *J Youth Adolescence* 1409 at 1409.

victim may not be able to identify who witnesses the bullying, but the mere thought that many people will be able to witness the humiliation might contribute to the element of harm. Group processes in cyber bullying is different because millions of anonymous people can participate in the bullying and encourage each other to further harmful acts of bullying.

Cyber bullying may take the following forms:[129]

- Harassment – Repeatedly sending nasty, mean and insulting messages.
- Flaming – Online fights using electronic messages containing angry or vulgar language.
- Denigration – 'Dissing' or disrespecting someone online; sending or posting gossip or rumours about a person to damage his or her reputation or friendships.
- Impersonation – Pretending to be someone else and sending or posting material to get that person in trouble or damage their reputation.
- Outing – Sharing someone's secrets or embarrassing information or images online.
- Exclusion – Intentionally and cruelly excluding someone.
- Cyber stalking – Involves threats of harm or intimidation through repeated online harassment and threats.[130]
- Sexting – The sending of nude or semi-nude photos or videos and/or sexually suggestive messages via mobile phone texting or instant messaging.[131]

Cyber stalking and sexting have been added to the original list of forms of cyber bullying mentioned in chapter 1 (cf. section 1.2 B). The acts of cyber stalking and sexting can fall in the ambit of cyber bullying. Although sexting may not fall strictly in the definition of cyber bullying, there is definitely an identifiable link between cyber bullying and sexting. Sexting may include activities such as coercion, increased aggression and violence.[132] These may all be linked to cyber bullying.[133] What must be kept in mind is that the sender of nude photographs loses control of the photo once it

129 Hayward (note 30) at 89.
130 Badenhorst (note 31) at 2.
131 Ibid.
132 Stone (note 103) at 6.
133 Ibid.

is sent. This allows the receiver to use the photo in any way he/she chooses. The act of sending naked or sexually suggestive images of a child (even if it is sent by the child or another child) will constitute child pornography.[134] Worryingly, the anonymity of cyber media may lead to a child unwittingly sending such an image to an adult sexual predator who is preying on children. It can also be argued that by participating in instances of sexting, the participants open themselves up to cyber bullying.

Sexual harassment at school may take place verbally or by electronic or written means.[135] Sexual harassment in a school environment can be defined as "unwanted sexual behaviour that interferes with a student's right to receive an equal education."[136] In South Africa, the then Department of Education defined sexual harassment as "unwanted conduct of a sexual nature". The unwanted sexual attention will constitute sexual harassment if the behaviour is persistent, if the recipient has indicated clearly that the behaviour is offensive or if the perpetrator should have known that the behaviour is not acceptable.[137]

Acts of cyber sexual harassment include "cyber-stalking, cyber defamation, hacking, morphing (editing pictures), e-mail spoofing (where the origin is misrepresented), cyber pornography, cyber sexual defamation, cyber flirting, and cyber bullying".[138] There is an overlap in definitions of cyber bullying and cyber sexual harassment. Cyber bullying can be seen as a form of cyber sexual harassment, and cyber sexual harassment can also be seen as a form of cyber bullying. This is troubling, as these are two different forms of misconduct and/or crimes, regulated by different legislation and with different consequences.

It is evident from the definitions of **cyber stalking** and **flaming** discussed above that a form of repetition is required. Repetition can even be regarded as an inherent part of

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134 See the argument in Coetzee, S.A. 'Learner sexual offenders: Cyber child pornography' *Mediterranean Journal of Social Sciences* October 2013(4)(11) 752 at 752–757.

135 Hill, C. and Kearl, H. '*Crossing the line: Sexual harassment at school'* Washington AAUW 2011 at 5.

136 Ibid.

137 Department of Education. 2008. Guidelines for the prevention and management of sexual violence and harassment in public schools. Pretoria: Department of Education at paragraph 7.4.

138 Ritter, B. 'Deviant behavior in computer-mediated communication: Development and validation of a measure of cybersexual harassment' 2014(19) *Journal of computer-mediated communication* 197 at 198.

cyber stalking. However, if one looks at the definition of **outing**, only a single act is required. One post on a Facebook group would be sufficient to "out" a victim's secret. By only pressing the send button on a phone once, an embarrassing image can (perhaps unintentionally) be distributed to an entire school, and possibly even to a wider audience.[139] Walker *et al* argues that only one "event" is necessary for an incidence to qualify as cyber bullying, as that already creates feelings of hurt, anger and fear among the victims.[140] They discuss a case of cyber bullying, where one incident led to a student committing suicide.[141] Thus, it can be argued that repetitiveness should not be included in the definition of cyber bullying, as one comment posted online has the potential to be circulated further and has the potential to be seen by many people.

If repetition is left out of the definition of cyber bullying, it may however have unintentional consequences. A learner, who had a fight with her boyfriend and sends a text message to her friend in which she calls him a nasty name, may also then qualify as a cyber bully. Two reported cases regarding social media in South Africa clearly illustrate this point. In the matter of *H, WS v W, N* the applicant applied for an order to force the respondent not to post any information regarding the applicant on Facebook.[142] In a posting on Facebook on 27 February, 2012, the respondent wrote an open letter to the applicant wherein the applicant was accused of using too much drugs and alcohol. In this case the court pointed out the serious privacy issues relating to Facebook, and that "one can control one's own Facebook profile but there is no method, in the Facebook system itself, by which one can control what other people place on their profiles about oneself and who can look at that".[143]

In *RKM v RLB* the applicant made an urgent application to force the respondent to remove a posting on Facebook and refrain from posting further defamatory comments on Facebook regarding the applicant.[144] The respondent posted a comment on

139 *Le Roux* (note 19).

140 Walker, C.M. 'Twenty-first century cyberbullying defined: An analysis of intent, repetition, and emotional response' www.aect.org/pdf/proceedings13/2013/13_30.pdf (Last accessed on 1 December 2016) at 217.

141 Ibid.

142 *H, WS v W, N* Case No:12/101142.

143 Id at paragraph 15.

144 *RKM v RLB* Case no: 10175/2013.

Facebook in which she accused the father of her child of drinking and of irresponsible behaviour towards his 5-year-old daughter. In this case, even though the respondent removed the post, the remnants of the debate initiated by the post remained on the page for all the friends of the respondent to see.[145]

Another interesting factor of social media such as Facebook is when another party links your name to a derogatory comment, although you were not the creator of the comment. In the case of *Isparta v Richter and Oosthuizen*, the first defendant posted defamatory comments on her own wall regarding the plaintiff.[146] The second defendant was tagged in these comments. The courts found that even though the second defendant was not the author of the defamatory statements, he knew about the statements, and allowed for his name to be coupled with these statements. Thus, third parties, who did not necessarily author defamatory statements, can also be held liable for defamation.[147]

Perhaps the answer to protecting learners against unintentional consequences can be found in specifically including the element of intention in the definition of cyber bullying. There must be intent to harm the victim. Patchin states that every incidence of harmful behaviour among learners cannot be classified as bullying, there needs to be repeated and intentional behaviour.[148] The problem with including intent in a definition of school cyber bullying, is that it requires subjective proof that the cyber bully was aware of the fact that he/she was harming another learner by his/her actions.[149] If a learner was made aware of the fact that his/her actions are unacceptable and cause harm, it is surely intentional if that learner continues with the actions.[150] The problem with proving intent can also be resolved by proving intention in the form of *dolus eventualis*.[151] If there is a clear cyber bullying policy in place that defines cyber bullying and its consequences, a learner should have known that his/her actions might harm another

145 Id at paragraph 12.
146 *Isparta v Richter and Oosthuizen* Case no: 22452/12.
147 Id at paragraph 35.
148 Patchin, J.W. 'The case for including intent in a definition of bullying' Cyber bullying research centre http://cyberbullying.org/intent-define-bullying/ (Last accessed on 1 December 2016).
149 Ibid.
150 Ibid.
151 *Director of Public Prosecutions, Gauteng v Pistorius* (96/2015) [2015] ZASCA 204 (3 December 2015) at paragraph 26.

learner. By continuing with the actions, the learner will have the intent to cyber bully, as he/she foresaw the possibility, and reconciled his/her actions to that possibility.

There is also the possibility of including the concept of fault rather than intent. By including fault as an element, the cyber bully may either have the direct intent (*dolus directus*), or *dolus eventualis* to bully the victim, or he/she may negligently be the cause of cyber bullying the victim. Conscious negligence is where the person accused of negligence foresees the possibility of harm, but unreasonably decides that the harm will not ensue from the action.[152] The test for negligence in South African law is the objective standard of the *reasonable person*. The defendant is negligent if the reasonable person in his position would have acted differently from the defendant in that the reasonable person would have *foreseen* that his conduct would cause damage, *and* would have taken steps to *prevent* the damage but the defendant did not take such steps.[153]

2.2.2 The harm caused by cyber bullying

The extent of the harmful effect of cyber bullying has not yet been determined fully. In the past, the victims of traditional bullying could find a safe place when they are at home away from the bully.[154] Cyber bullying victims cannot escape the bullying, as it follows them home on their cellphones and laptops.[155] This means that the victim of cyber bullying is open to constant torment, without any respite, which may have severe harmful consequences for the victim.

What constitutes harm? Harm can be either physical or psychological harm. From the nature of cyber bullying, it will rarely be physical harm to the body of the victim, even though the possibility cannot be excluded. Harm to the good name or reputation of the victim must also be included in the definition of harm. Much research has been done about the harmful consequences of bullying on the victim.[156] These consequences

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152 Snyman, C.R. *Criminal Law.* 2008 LexisNexis at 218.

153 See *Kruger v Coetzee* 1966 2 SA 428 (A) 430.

154 Lane (note 28) at 1793.

155 Ibid.

156 Vreeman, R.C. and Carrol, A.E. 'A systematic review of school-base interventions to prevent bullying' http://jamanetwork.com/journals/jamapediatrics/fullarticle/569481, (Last accessed on 1

include sleep disturbances, headaches, depression, anxiety, low self-esteem, truancy and in extreme cases, murder or suicide.[157] Similarly, victims of cyber bullying experience lower levels of academic performance, lower family relationship quality, and a number of psychosocial difficulties and affective disorders.[158]

The harm resulting from cyber bullying found in a number of studies includes the following:[159]

- victims of cyber bullying experience lower levels of academic performance
- lower quality family relationships
- and a number of psychosocial difficulties and affective disorders[160]
- anxiety
- depression
- in some instances, suicide
- social anxiety
- social isolation
- self-harm
- low self-confidence

December 2016) at 78; Patchin and Hinduja (note 96) at 151; Fleming and Jacobsen (note 21) at 75.

157 Vreeman and Carrol (note 156) at 78; Patchin and Hinduja (note 96) at 151; Fleming and Jacobsen (note 21) at 75; Badenhorst (note 31) at 3.

158 Sticca, F. and Perren, S. 'Is cyberbullying worse than traditional bullying? Examining the differential roles of medium, publicity, and anonymity for the perceived severity of bullying' 2013(42) *J Youth Adolescence* 739 at 740; Camacho, Hassanein and Head (note 103) at 133.

159 Sticca and Perren (note158) at 740.

160 Sticca and Perren (note158) at 740; Camacho, Hassanein and Head (note 103) at 133.

The following table appears as a summary of the negative effects of cyber bulling in Popovac.[161]

CYBER BULLYING CAN LEAD TO:

- Depression, suicidal ideation and other psychological problems
- Development of somatic complaints such as headaches and stomach aches
- Impaired concentration (affecting school performance)
- Truancy
- Anxiety and fear of being rejected, excluded or humiliated
- Loneliness and isolation
- Substance abuse
- Delinquency and aggression
- Weapon-carrying
- Poor parent-caregiver relationships (as a result of children lashing out at family members who are often unaware of the cyber bullying being experienced)
- Offline victimisation

Sources: Kowalski, R.M., Limber, S.P. & Agatston, P.W., *Cyber bullying: Bullying in the digital age*.UK: Blackwell Publishing Ltd, 2008; De Wet, C., *The voices of victims and witnesses of school bullying*. Department of Comparative Education and Education Management. University of the Free State, 2005.

In discussing the negative consequences of cyber bullying, it is also important to identify who is at risk of being cyber bullied. Youth that are identified as at risk of being cyber bullied include the following:[162]

- vulnerable, immature, or socially naïve teens who may lack sufficient knowledge and skill to engage in effective decision-making
- younger teens who may have overprotective or naïve parents but who likely have healthy peer relations and good values
- youth who have temporarily impaired relations with parents and/or peers and are currently highly emotionally upset

161 Popovac, M. and Leoschut, L. 'Cyber bullying in South Africa: Impact and responses' CJCP Issue Paper No. 13 June 2012 at 5; Badenhorst (note 31) at 3.

162 Feinberg, T. and Robey, N. 'Cyberbullying: Intervention and prevention strategies' 2009(38)(4) *National Association of School Psychologists Communique Handout* 1 at 2.

- youth who face major ongoing challenges related to personal mental health and disruptions in relations with parents, school, and/or peers

2.2.3 The unique nature of cyber bullying

From the review of the literature regarding traditional bullying and cyber bullying above, it is clear that the two forms of bullying have certain elements in common. These elements include the following:

- it is a verbal or psychological attack or intimidation
- an intentional act causing fear and/or harming the victim
- actual harm to the bullied victim. This harm may include psychological and physical harm
- aggression
- power imbalance

The power imbalance in cyber bullying is not necessarily an imbalance with regard to physical strength or social status. Cyber bullying, similarly to traditional bullying, gives the victim a feeling of helplessness, and thus perpetuates the power imbalance.[163] The power imbalance in cyber bullying may depend on how technologically advanced the cyber bully is and how many people he/she is able to reach electronically while still hiding his/her identity. From the many instances of reported suicides due to cyber bullying it is clear that the victims of cyber bullying feel helpless to prevent the bullying.

Schools face a number of challenges in protecting learners against cyber bullying. The means of cyber bullying might nullify the element of physical power imbalance, but there are other ways in which a power imbalance can be created. Factors such as social standing might make it more difficult for a less popular victim to defend himself/herself against a more popular bully.[164] Although the element of anonymity may make the requirement of a power imbalance more difficult to conceptualise, it implies that the fact that the victim can't identify the bully in effect takes away the

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163 Butler, D.A., Kift, S.M. and Campbell, M.A. 'Cyber bullying in schools and the law: is there an effective means of addressing the power imbalance? 2009(16)(1) *Murdoch University Electronic Journal of Law* 84 at 85.

164 Volk, A.A., Dane, A.V. and Marini, Z.A. 'What is bullying? A theoretical redefinition' 2014(34)(4) *Developmental Review* 327 at 13.

power of the victim to defend himself/herself against the bullying, thus the anonymity of the internet creates a power imbalance.[165]

Cyber bullying should, however, be seen as a distinct and extremely harmful form of bullying. Smith identifies several ways in which cyber bullying differs from traditional bullying: [166]

- It depends on some degree of technological expertise.
- It is primarily indirect rather than face to face, and thus may be anonymous.
- The perpetrator does not always see the reaction of the victim.
- The variety of bystander roles in cyber bullying is more complex than in most traditional bullying (the bystander may be with the perpetrator when an act is sent or posted; with the victim when it is received, or with neither when receiving the message).
- A motive for traditional bullying is gaining status by being abusive to others in front of peers, this will often be lacking in cyber bullying.
- Cyber bullying can reach larger audiences than traditional bullying.
- It is difficult to escape from cyberbullying as victims may access the malicious comments or images anywhere on cellphones and or computers.

Boulton *et al* list the differences between cyber bullying and traditional bullying as follows: [167]

- The possibility of remaining anonymous is much higher with cyber bullying.
- There is a relative lack of supervision by adults of cyber bullying compared to traditional bullying.
- The accessibility to victims is much higher for cyber bullying compared to traditional bullying.
- The degree of 'editability' (being able to reflect on words to maximize the impact on the victim) is much higher in cyber bullying.
- There is potentially a much larger audience for cyber bullying than for traditional bullying.

Cyber bullying may even be perceived as more sinister or dangerous than traditional bullying for the following reasons: [168]

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165 Ibid.

166 Smith, P.K. '*Cyberbullying and cyber aggression'* in Jimerson, S., Nickerson, A., Mayer, M., and Furlong, M., *Handbook of school violence and school safety. International research and practice* 2012 Routledge 93–103.

167 Boulton, M.J., Hardcastle, K., Down, J., Fowles, J. and Simmonds, J.A., 'A comparison of preservice teachers' responses to cyber versus traditional bullying scenarios: similarities and differences and implications for practice' 2014(65)(2) *Journal of Teacher Education* 146 at 146.

- Cyberbullies are not restrained by space or time – Because of the medium in which cyber bullying takes place, this form of bullying can happen anytime and anywhere.[169]
- The anonymity of cyberspace makes it possible for bullies to hide and thus to strike at any time and from any place.
- Because of technology, cyber bullying can occur at the speed of thought and in front of a large audience. There is a large audience for the bullying, the comments can be read and reread, over and over again.[170]
- Cyberbullies can be crueller than traditional bullies as they may incorporate different media such as pictures and sound effects.
- In some instances, it is impossible to remove content from online platforms. This means that even though the bully may have changed his/her mind, the act cannot be taken back, and the bullying will continue.

Cyber bullying does take place at school, but most often, it will occur while the child is at home.[171] Because of the anonymous nature of cyber bullying, and the platforms on which cyber bullying takes place, cyber bullying is harder to regulate than traditional bullying. Cyber bullying presents unique challenges for schools in the regulation thereof, and thus school cyber bullying should be addressed separately from traditional bullying.

2.2.4 Proposed definition and elements for school cyber bullying

In order to address all the problematic elements discussed above, and to narrow the focus of the definition to education specific bullying, I propose the following working definition of cyber bullying in schools: cyber school bullying is the intentional or negligent use of electronic media which causes harm to another learner or educator, impacts negatively on the education of that learner, or creates circumstances that are

168 Sabella, R.A., Patchin, J.W. and Hinduja, S. 'Cyberbullying myths and realities' 2013(29) *Computers in Human Behavior* 2703 at 2704.

169 Popovac and Leoschut (note 161) at 4. Keith, S. and Martin, M.E. 'Cyber-bullying: Creating a culture of respect in a cyber world' 2005(13)(4) *Reclaiming children and youth* 224 at 225 http://hermes.webster.edu/brownTim/Cyberbullying%20Project/cyber-bullying_creating_a_culture_of_respect_in_a_cyber_world.pdf (Last accessed on 1 December 2016).

170 Popovac and Leoschut (note 161) at 4.

171 Feinberg and Robey (note 162) at 1.

not conducive to teaching or learning. This definition now includes the elements of an act, fault, actual harm, and the use of information technology. At the same time the definition limits the act to instances of cyber bullying that negatively impact on the education of a learner. In certain instances, harmful acts of sexting and cyber sexual harassment will also fall in the ambit of this definition.

2.3 Challenges to regulate cyber bullying in schools

Due to how cyber bullying has evolved, it presents unique new challenges to schools, educators and parents in preventing and regulating cyber bullying. These challenges are discussed in more detail below.

2.3.1 The anonymous nature of cyber bullying

The anonymity of the internet as well as lack of facing up to the physical reaction of the victim are contributing factors in the prevalence of cyber bullying.[172] This may increase the danger of bullying, as the bully does not have a fear of discovery, and may say or do things that he/she would not normally do.[173] Because the anonymity of the bullies is protected, they may believe that they cannot be caught out and held accountable, and this may impact on the severity of their actions, as they act without fear of any repercussions.[174] If a bully is not held accountable for his/her actions, the fear of being punished grows less and less and the actions can become bolder and bolder.[175] The bully may also succeed in fraudulently implicating someone else for the cyber bullying; this may lead to victimisation of even more children.[176]

In traditional bullying, because there is most often a physical attack on the victim, it is easy to identify and discipline the bully. In cyber bullying, it is not only harder to identify the cyber bully, but also to identify other parties to the bullying. For example, what will happen to a learner who was not involved in creating the hurtful image, but who

172 Manuel (note 28) at 222; Lane (note 28) at 1796.

173 Popovac and Leoschut (note 161) at 4; Keith and Martin (note 169) at 225.

174 Campbell, M., Cross, D., Spears, B. and Slee, P. 'Cyberbullying - Legal implications for schools' (2010, November) Occasional Paper 118, Centre for Strategic Education, Melbourne, Victoria 1 at 8; Kiriakidis, S.P. and Kavoura, A. 'A review of the literature on harassment through the internet and other electronic means' 2010(33)(2) *Fam Community Health* 82 at 84.

175 Beale and Hall (note 24) at 8.

176 Ibid.

passed the image on? Should that learner also be held accountable for cyber bullying? The same will apply to learners who commented on a Facebook posting for example. Did they also contribute to the cyber bullying of the victim? The possibility of not only regulating cyber bullying as a form of misconduct in schools, but creating and regulating other forms of cyber misconduct, such as, (a) participating in, or (b) spreading and distributing cyber bullying should be investigated. For this reason, the opinion of the learners regarding the different ways of participating in cyber bullying, and the accountability for that participation was investigated. (cf. chapter 5) The anonymity of cyber bullying also gives rise to the question of whether schools can regulate cyber bullying that does not happen on the school grounds.

2.3.2 School jurisdiction

Arguably the most problematic issue in regulating cyber bullying in school, is the fact that cyber bullying can be done via the internet at home. Thus, cyber bullying stretches beyond the school playground. The law is unclear on the legal responsibility of schools when cyber bullying is conducted from home.[177] When technology enables the blurring of boundaries between bullying at school and at home, the liability for bullies and the responsibility of schools comes into play.[178] This is especially relevant in determining how far the duty of care of schools stretch when bullying takes place outside the school environment.[179]

Coetzee emphasises the fact that schools have the authority and responsibility to act in instances of cyber misconduct that occur on the school ground. She, however, questions whether schools' jurisdiction will be affected in instances where cyber misconduct does not take place on the school premises.[180] She offered some guidelines which she deduced from American case law. These guidelines are:[181]

- It depends on whether the learner's posting caused or is reasonably likely to cause "substantial disruption" at school or interfere with the rights of other

177 Campbell, Cross, Spears and Slee (note 174) at 4.
178 Kift, Campbell and Butler (note 3) at 67.
179 Ibid.
180 Coetzee (note 134) at 754.
181 Ibid.

learners to be secure and safe (e.g. create a hostile school environment). This "disruption" could include "violent physical or verbal altercations between students, significant interference with the right of a student to receive an education and feel safe at school, or significant interference with instruction or school operations".

- Learners' right to freedom of expression may be limited in certain instances. This includes lewd speech, and speech that is not consistent with the school's educational mission.
- Schools always have a responsibility to discipline learners who watch, produce or distribute child pornography on the school premises. However, if it is not produced or distributed on the school premises the need to establish a nexus between posting and disruption of school environment before it can act against the offender.[182]
- Where the dissemination of images is part of conduct that constitutes bullying or harassment directed at harming a co-learner's reputation or causing a hostile environment at school for that learner, school officials should have the authority to impose discipline for such conduct irrespective of whether it was committed on or of school grounds.

Another question relating to this factor is against whom a complaint can be laid in instances of cyber bullying. Will it be the bully, the school, the educators or the internet service provider? [183] This is a question for future research, as this dissertation focuses on the responsibility of the school.

2.3.3 The nature of technology

Cyber bullying is hard to contain, as comments or photos can be spread on the internet quickly and widely.[184] This increases the perceived severity of the bullying by

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182 This relates to the school's authority to take disciplinary action and will not affect the school's obligations to report child sexual abuse in terms of section 110(1) of the Children's Act 38 of 2005; the commission of a sexual offence against a child in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act (RSA 2007 s 54(1)) and child pornography in terms of the Films and Publications Act (RSA 1996(a) s 24B(2)).

183 Manuel (note 28) at 229.

184 Lane (note 28) at 1796.

the victim, as millions of people can witness the humiliation of the victim.[185] The cyber bully may have originally intended a harmful image to be just between the bully and the person he/she sent the image to. Without the permission of the bully, the second party may spread the image further. This will raise the question of intent. Who intended to bully the victim, the person sending the image in private or the person spreading the image? The South African Constitutional Court case of *Le Roux and Others v Dey*,[186] is a good example of where different learners played different roles in the spreading of a derogatory image (cf. section 3.3.3 Freedom of expression). In this case, all the learners who took part in the cyber bullying where disciplined by the school in the same manner.

2.3.4 Learners technologically more savvy than educators

In recent years, children's playgrounds have moved to social networks such as Facebook and Myspace. Research suggests that although parents are concerned that having internet at home will expose their children to dangers such as sexual predators, they are also well aware of the advantages that the internet have for their children.[187]

Due to the differences in generations, educators and parents do not always understand this new cyber world.[188] The language that the youth use on the internet has evolved and this can create a generation gap between learners and their parents.[189] It is realistic to accept that in most cases, teenagers know more about technology than their parents and educators.[190] This enables them to participate in cyber bullying without the fear of being discovered by an adult.[191]

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185 Manuel (note 28) at 222.

186 *Le Roux* (note 19).

187 Livingstone, S. and Bober, M. 'Regulating the internet at home: Contrasting the perspectives of children and parents' in Buckingham, D. and Willet, L. *Digital Generations: Children, young people and new generations* 2013 Routledge Taylor and Francis 93 at 93–94.

188 Lane (note 28) at 1796; Stacey, E. 'Research into cyberbullying: Student perspectives on cybersafe learning environments' 2009(8)(1) *Informatics in Education* 115 at 115.

189 Brown, K., Jackson, M. and Cassidy, W. 'Cyber-bullying: Developing policy to direct responses that are equitable and effective in addressing this special form of bullying' 2006(57) *Canadian Journal of Educational Administration and Policy* 1 at 13.

190 Patchin and Hinduja (note 96) at 154.

191 Ibid.

2.3.6 Bully profiles changed

The emergence of cyber bullying has somewhat changed the profile of children who have traditionally participated in bullying.[192] Shariff states that: [193]

> cyberspace creates an environment where learners who would not normally participate in traditional bullying can hide behind technology to inflict abuse. Hundreds of perpetrators can get involved with cyber bullying.

The STOP Cyberbullying program have identified and listed four main types of cyber bullies. The **vengeful angel bully** is a person that perceives himself/herself as correcting wrongs or protecting himself/herself. The **power-hungry** bully wants to exert power by controlling others. The **mean girls** bully operates in a group for entertainment purposes and the **inadvertent cyber bully** does not have the intention to bully, but may respond to messages in anger, without having regards to the consequences.[194] There is no one profile to identify learners who cyber bully other learners, and similarly, there is also not one profile that fits all victims of cyber bullying.[195] As the types of bullies and the reasons for bullying differ, it is imperative to consider these differences when adopting policy and sanctions for cyber bullying.[196]

2.3.7 Cyber bullying goes unreported

It can be argued that cyber bullying can be stopped by simply switching of the technology used by learners.[197] However, this argument is unrealistic as it may prevent victims of cyber bullying from reporting the problem for fear of being deprived of their electronic communication devices.[198] Even though it will not address the problem of victims not reporting cyber bullying due to fear of losing the use of their technology

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192 Kiriakidis and Kavoura (note 174) at 84.

193 Shariff, S. 'Cyber-dilemmas in the new millennium: School obligations to provide student safety in a virtual school environment' 2005(40)(3) *McGill Journal of Education* 457 at 460.

194 http://stopcyberbullying.org/parents/howdoyouhandleacyberbully.html (Last accessed on 1 December 2016).

195 Canada Standing Senate Committee on Human Rights 'Cyberbullying Hurts: Respect for Rights in the Digital Age' December 2012 http://www.parl.gc.ca/Content/SEN/Committee/411/ridr/rep/rep09dec12-e.pdf (Last accessed on 1 December 2016).

196 Ibid.

197 Sabella, Patchin and Hinduja (note 168) at 2707.

198 Kiriakidis and Kavoura (note 174) at 84; Campbell, Cross, Spears and Slee (note 174) at 8.

devices, this may provide an opportunity to devise a good sanction. A learner found guilty of cyber bullying may be required to attend a sensitising training session or two before he or she may bring or use any electronic devise on school premises again.

Technology forms part of all aspects of learners' lives, be it socially and educationally, and denying them the use of these devices will most probably not be perceived as "protecting" them from being cyber bullied, but rather as "punishing" them for being cyber bullied.[199] This will discourage victims from reporting it when they are cyber bullied.

2.3.8 Human rights challenges

In regulating cyber bullying and protecting learners, schools should be careful not to infringe on human rights. Cyber bullying can affect several human rights, for example the right not to be discriminated against unfairly.[200] These rights are discussed in detail in chapter 3 of the research.

To regulate cyber bullying successfully, clear parameters and guidelines should be set for schools to address this phenomenon lawfully.[201]

Schools should guard against infringing freedom of expression, the right to privacy and right to property of the cyber bully. These rights must be balanced with the human rights of the victim of cyber bullying and the other learners at school (cf. section 3.3 C).

2.3.9 Identifying new stakeholders

It has already been pointed out that there is a lack of supervision in cyber space, and parents and educators often lack knowledge regarding the ways learners

199 Sabella, Patchin and Hinduja (note 168) at 2707.

200 Brown, Jackson and Cassidy (note 189) at 27.

201 Lorrilard, C.M. 'When children's rights "collide": free speech vs. the right to be let alone in the context of off-campus "cyber-bullying' 2011(81)(2) *Miss. L.J.* 189.

communicate via electronic devices.[202] Another problematic factor is that it is easy to conceal one's identity while taking part in cyber bullying, and thus it is more difficult to identify the bully.[203] Although the location of a computer or cellphone can be traced, it is not always possible to identify the user.[204]

Social platform providers such as Facebook can play an important role in combatting cyber bullying. Although they cannot monitor all the users on the platform, they can create tools to report cyber bullying. They not only have a system in place to report bullying, they also give tips on how to avoid bullying, and how to deal with a cyber bully.[205] They likewise provide for contacting the cyber bully, and for including a trusted person, such as an educator, parent or friend, in the communication.[206] This is an example of how the community can be involved in preventing and addressing cyber bullying.

It is evident that cyber bullying creates new challenges for education stakeholders to protect learners successfully against cyber bullying. This means that cyber bullying in schools should be managed differently than traditional bullying in schools.

2.4 Literature review on management of cyber bullying in schools

Research has shown that anti-bullying programmes are not always as effective as previously thought.[207] Certain general features are shared by successful anti-bullying programmes, these features include the following:[208]

(1) The program's central values and philosophy emphasize a positive school climate and strategies founded on social-emotional and character development;

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202 Patchin and Hinduja (note 96) at 154; Vandebosch, H., Poels, K. and Deboutte, G. 'Schools and cyberbullying: Problem perception, current actions and future needs' 2014(7)(1) *International Journal of Cyber Society and Education* 29 at 31–32.

203 Manuel (note 28) at 224.

204 Ibid.

205 Ibid.

206 Ibid.

207 Ansary, N.S., Elias, M.J., Greene, M. and Green, S. 'Best practices to address (or reduce) Bullying in schools.' 2015(97)(2) *Phi Delta Kappan* http://pdk.sagepub.com/content/97/2/30.full.pdf+html (Last accessed on 1 December 2016) 30 at 31.

208 Ibid.

(2) A long-term commitment to effective program implementation, assessment of program effectiveness, and sustainability; and
(3) Clear and consistent strategies outlining what to do when bullying occurs.

A positive school environment as mentioned above means that in a whole-school context, the policies of the school must be of such a nature, and implemented so consistently, that a school is made virtually bulletproof.[209]

The whole-school approach to the management of bullying is based on an assumption that bullying is a systemic problem and must thus not be directed at bullies and victims individually, but must be directed at the whole-school context.[210] Swart and Bredekamp support Olweus in arguing that the only way to reduce bullying in schools is to have interventions at individual, class and whole-school levels.[211] Intervention should thus not only focus on punishment and rehabilitation of the bully and victim, but also on other stakeholders and role-players in the prevention strategy. This is in line with the focus on the group dimensions of bullying. Protogerou and Fisher identify five types of bullying interventions namely: curriculum, multi-disciplinary or whole school, social skills training, mentoring and social worker support.[212]

Popovac *et al* advocate a whole-school approach for the prevention of cyber bullying, and summarise the elements of a successful whole-school approach to the prevention of cyber bullying in South African schools as awareness, policy and monitoring and accountability.[213] Thus, any law and policy regulating cyber bullying in schools should contain these elements.

2.4.1 Awareness

Awareness of cyber bullying includes educating learners, parents and other stakeholders such as educators and school counsellors about the nature as well as

209 Richard, F.J., Schneider, B.H. and Mallet, P. 'Revisiting the whole-school approach to bullying: Really looking at the whole school' 2011(33)(3*) School Psychology International* 263 at 266.
210 Id at 265.
211 Swart and Bredekamp (note 115) at 420.
212 Protogerou, C. and Flisher, A. 'Bullying in schools' http://www.mrc.ac.za/crime/Chapter9.pdf (Last accessed on 1 December, 2016) at 123.
213 Popovac and Leoschut (note 161) at 11.

the dangers of cyber bullying.[214] Awareness can include aspects such as the nature and definition of cyber bullying,[215] education in the safe use of IT, the negative influences of online behaviour, preventative action against cyber bullying, how to report cyber bullying and online morals and ethics.[216]

Learners often do not know how to identify and deal with being cyber bullies, and thus do not report instances of cyber bullying.[217] Once learners have more information on cyber bullying, they might be more willing to report instances of cyber bullying. Aspects that should be included in this information are indicators for cyber bullying and support available for victims of cyber bullying.[218] By creating awareness among cyber bullies about the consequences of their actions, and by involving learners in program planning and evaluation,[219] social skills and character traits such as kindness, respect for others and empathy can be fostered in learners.[220]

2.4.2 Policy

In a whole-school approach to combatting cyber bullying, there is a need for a well-designed policy on cyber bullying. A clear policy on cyber bullying can guide schools on how to regulate cyber bullying,[221] and create certainty regarding the definition of cyber bullying. School policy and procedures are essential to assist schools to make good decisions and ensure the well-being of learners and staff members. Ideally all schools should have a policy in place to deal with cyber bullying,[222] which should describe the disciplinary measures for cyber bullying that is consistently implemented.[223]

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214 Bhat, C.S. 'Cyber bullying: Overview and strategies for school counsellors, guidance officers and all school personnel' 2008(18)(1) *Australian Journal of Guidance and Counselling* 53 at 61.

215 Ansary, Elias, Greene and Green (note 207) at 31.

216 Cross, D., Monks, H., Campbell, M., Spears, B. and Slee, P. 'School-based strategies to address cyber bullying' Occasional Paper: Centre for strategic education February 2011 at 4.

217 Notar, C.E., Padgett, S. and Roden, J. 'Cyberbullying: Resources for intervention and prevention 2013(1)(3) *Universal Journal of Educational Research* 133 at 134.

218 Id at 137.

219 Ansary, Elias, Greene and Green (note 207) at 32.

220 Bhat (note 214) at 62.

221 Notar, Padgett and Roden (note 217) at 138.

222 Ibid.

223 Popovac and Leoschut (note 161) at 11.

2.4.3 Monitoring and accountability

Responsibility for the implementation of cyber bullying prevention strategies are shared between all stakeholders.[224] Not only do parents have an obligation to monitor their children's online activities,[225] but learners, and educators also have responsibilities, rights and duties towards the prevention of cyber bullying.[226]

Research has shown that peers are witnesses in 85% of instances of bullying, and that intervention by peers is effective in stopping bullying.[227] An argument can be made that there is a moral responsibility on peers to prevent the cyber bullying, and learners should be encouraged to speak up against cyber bullying.

As cyber bullying is a relatively new phenomenon and South Africa has no education specific law and policy relating to cyber bullying, the existing cyber bullying legal framework in the United States of America was studied to identify guidelines to address the unique problems that schools face with relation to cyber bullying.

2.5 The regulation of school cyber bullying in the United States of America

The USA is a federal state. This means that the different states in America may have different laws on cyber bullying. This fact complicates a review of the different cyber bullying laws in America. Despite this, America was chosen as subject for a review of cyber bullying laws and policies because of the extent to which cyber bullying is regulated, and the rich data on laws and policies that can be gathered when researching law and policy on cyber bullying in America.

There are however a few differences between South African and American law that may affect how cyber bullying is regulated in the different legal systems. The right to freedom of speech is protected strongly by the United States Constitution and by the courts. In the American case of *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87, it was stated that symbols are "a short cut from mind

224 Ibid.
225 Bhat (note 214) at 62.
226 Brown, Jackson and Cassidy (note 189) at 25.
227 Note 195 at 15–16.

to mind." This means that acts such as wearing armbands will also qualify as freedom of speech.[228] The South African Constitution refers to freedom of expression; this includes speech as well as other acts of expression (cf. section 3.3.3 Freedom of expression). Thus, where the United States Constitution needs to be interpreted so as to include or exclude forms of expression other than speech, the South African Constitution already provides protection for all forms of expression.

America does not have an explicit right to human dignity, as included in section 10 of the South African Constitution. The paramountcy of the best interests of the child is also not a constitutionally protected right in America.

Another difference between America and South Africa is that American legislation refers to students, and South African legislation refers to learners. These concepts are used interchangeably. When I discuss American law, I refer to students, and when I discuss South African law, I refer to learners.

Most of the American states have implemented laws on cyber bullying, some of the laws were investigated to determine best practice, and gaps in the law regarding cyber bullying in schools. School leaders in America are expected to implement cyber bullying laws, while at the same time protect the free speech rights of students at school.[229] Balancing these rights is difficult, as is evident from the discussion of the case law below.

2.5.1 American case law regarding freedom of speech in schools

The first amendment to the United States Constitution states that:[230]

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

228 *Tinker v Des Moines Independent Community School District* 393 U.S. 503, 508-9 (1969).

229 McCarthy, M. 'Cyberbullying laws and first amendment rulings: Can they be reconciled?' 2014(83)(4) *Miss. L.J.* at 805 at 806.

230 U.S. Const. amend I.

Thus, the first Amendment guarantees the right to freedom of speech by not allowing the American Congress to restrict the press or individuals to speak freely.[231] There are four Supreme Court decisions that lay down the legal principles for freedom of speech in public schools.[232] In the first case, *Tinker v Des Moines Independent Community School District*, [233] a group of high school students wore black armbands to school in protest against the Vietnam War. The school responded by implementing a policy stating that any student found wearing a black armband at school would be suspended, and three students were suspended for violating the policy. The majority of the Supreme Court held that the petitioners weren't disruptive but protested quietly and passively. They did not infringe on the rights of others. Thus, their conduct was protected by the first amendment (freedom of speech).[234] Teachers and students have a right to freedom of speech with cognizance of the special characteristics of the school environment.[235] Freedom of speech in a school environment may only be limited where there will be a substantial and material disruption of school activities or interfere with the rights of others.[236]

The second case that dealt with freedom of speech in schools was *Bethel School District No 403 v Fraser*.[237] Fraser delivered a speech at a school assembly in which he used lewd language. He was subsequently suspended and removed from a list of candidates that might possibly speak at graduation. The majority of the Supreme Court held that the right to freedom of speech did not prevent the School District from disciplining the respondent for giving the offensively lewd and indecent speech at the assembly.[238] American jurisprudence recognizes the importance of protecting minors against vulgar and offensive language, and it is up to the school board to decide what language is permissible and to impose sanctions on students for the use of unacceptable language.[239]

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231 Cornell University Legal Information Institute https://www.law.cornell.edu/constitution/first_amendment (Last accessed on 1 December 2016).
232 McCarthy (note 229) at 813.
233 393 U.S. 503, 508–9 (1969).
234 Id at 505 - 506.
235 Id at 506 - 507.
236 Id at 507 - 514.
237 478 US 675 (1986).
238 393 U. S. 503.
239 478 U. S. 680 - 686.

In *Hazelwood School District v Kuhlmeier* the court dealt with the right of a school to limit the right of students to express their ideas in a "school-sponsored setting".[240] The school newspaper aimed to publish a series of articles based on serious social problems, such as pregnancy. In these articles, the anonymity of students involved was not protected. In order to protect the anonymity of students, the school principal withdrew certain pages from the school paper. The court held that a school need not tolerate speech from students that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school.[241] Teachers do not offend the right to freedom of speech by exercising editorial control over the style and content of student speech in school-sponsored expressive activities, so long as their actions are reasonably related to legitimate pedagogical concerns.[242]

In *Morse v Frederick*, the principal of the school prohibited students from displaying a poster that was promoting the use of illegal drugs.[243] In this case, as part of an approved social trip, students were allowed to leave class to watch the Olympic torch relay. When the relay passed the student and his friends, exhibited a banner that stated "BONG HiTS 4 JESUS". The principal of the school immediately confiscated the banner, and afterwards suspended the student for encouraging illegal drug use. The court held that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.[244] A principal may thus, in terms of the First Amendment, restrict student speech at a school event, when that speech is viewed reasonably as promoting illegal drug use. The "special characteristics of the school environment," and the governmental interest in stopping student drug abuse allow schools to restrict student expression that they reasonably regard as promoting such abuse.[245]

Although, unlike South Africa, America does not have a limitation clause, the right to freedom of speech of learners in schools may be limited under certain circumstances.

240 484 U.S. 260 (1988).
241 Id at 261.
242 Id at 277.
243 551 U.S. 393, 406 (2007).
244 Id at 5–15.
245 Id at 8–15.

This is true irrespective of whether such freedom of speech is exercised by means of information and communication technologies or not. The following guidelines can be taken from the four cases discussed above:

- Freedom of speech may be limited when it leads to substantial and material disruption of school activities, or where it interferes with the rights of others.
- Freedom of speech may be limited when language is so lewd that it undermines the educational responsibilities of the school.
- Freedom of speech may be limited where the restriction is "reasonably related to pedagogical concerns".
- Freedom of speech of students must be applied with the consideration of the special characteristics of the school environment, and in light of what is appropriate for students at school.
- The courts weigh the importance of protecting speech that is unpopular and controversial against the responsibility of schools to educate students about socially acceptable behaviour and enable them to take their place in society.

Questions that remain unanswered are: What happens when the free speech takes place off campus? What is seen as substantial and material disruption? Most scholars argue that the case of *Tinker* does not apply to off-campus speech.[246] How strict is the test? Can freedom of speech and the responsibility of fostering the growth of learners' independent thinking be limited when it disrupts the quality of education of one learner? Furthermore, the effect of cyber bullying through off-campus speech can very well have detrimental effects on the realisation of the right to education of the learner victim. The medium does not keep the bullying off the school yard. Thus, this case does not provide answers to the new problems created by cyber bulling in schools as discussed in section 2.5 of this chapter.

Fenn argues that lower courts in America are unclear as to which standards set by the federal courts about free speech must be applied.[247] There are four different standards

246 Varel, S. 'Limits on school disciplinary authority over online student speech' 2013(33) *Northern Illinois University Law Review* 1 at 5.

247 Fenn, M. 'A web of liability: Does new cyberbullying legislation put public schools in a sticky situation?' 2013(81)(5) *Fordham Law Review* 2729 at 2758.

to apply, and none of them relate to off-campus cyber bullying.[248] These standards set by the Federal Court of the USA were applied in subsequent cases. In *JC v Beverly Hills Unified School District,* [249] a student posted a YouTube video in which she and her friends ridiculed another student. The court found that the action did not cause "substantial disruption" and that a student should not be disciplined by the court for speech "simply because young persons are unpredictable or immature, or because, in general, teenagers are emotionally fragile and may often fight over hurtful comments." This decision can be questioned on the grounds that it presents school cyber bullying as a normal part of teenagers' nature and that it fails to recognise the severe impact of cyber bullying on the victim and the victim's education. Perhaps the court has a point in that the court should not be approached unless the matter could not be solved by the school.

In *Doe v Pulaski County Special School District*,[250] a boy wrote two violent and obscene letters to an ex-girlfriend. Although he did not give the letters to her, he spoke about the contents of the letters to the ex-girlfriend as well as some friends. Later one of his friends delivered the letters to the ex-girlfriend at school. He was expelled for a year. The Court held that "most, if not all, normal 13-year-old girls (and probably most reasonable adults) would be frightened by the message and tone" of the communication, and would be afraid for their well-being. Thus, the letter constituted a true threat, and the student's freedom of speech was not protected. In this case the freedom of speech of the student was correctly limited.

In *Beussink v Woodland R-IV School District*, a student created a website for criticising the school and the principal.[251] This website was created at home and later accessed by students on the school premises via school computers.[252] The creator of the website was suspended. The court found that there was no material and substantial interference with school operation and that freedom of speech must be protected especially when it is controversial, as popular speech will likely not even be

248 Ibid.
249 *JC. Ex rel. R.C. v Beverly Hills Unified Sch. District*., 711F. Supp. 2d 1094 (C.D. Cal. 2010).
250 306 F. 3d 616 (2002).
251 Manuel (note 28) at 239.
252 30 F. Supp. 2d 1175 (1998).

challenged.[253] From this case the reluctance of courts to limit unpopular or controversial speech is once again evident. The question about when exactly the criticism of a teacher will become cyber bullying and will interfere with his/her duties is left unanswered.

In *Layshock ex rel. Layshock v Hermitage School District* the student created a MySpace page on his grandmother's computer that insulted the school principal.[254] The court once again found that the website did not create a substantial disruption in the school environment, and did not lead to cancellation of classes, widespread disorder or school violence.[255] The court applied the Tinker test and found that whatever disorder took place was not sufficient to justify the disciplinary action against the student.[256] In South Africa, being disrespectful towards an educator is seen as a form of serious misconduct for which a learner may be suspended.[257] The educator can also institute a claim for defamation, as happened in the case of *Le Roux and Others v Dey* (cf. section 3.3.3 Freedom of expression).[258]

In 2010 the U.S. Department of Education issued a directive that states "Bullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential".[259]

From this directive, it is clear that addressing bullying and cyber bullying in schools is a priority for the U.S. Department of Education. Subsequently, anti-bullying laws were adopted by the different American states.

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253 Auerbach, S. 'Screening out cyberbullies: remedies for victims on the internet playground' 2008-2009(30) *Cardozo L. Rev.* 1641 at 1653.

254 Erb, T.D 'A case for strengthening school district jurisdiction to punish off-campus incidents of cyber bullying' 2008(40) *Ariz. St. L.J.* 257 at 268 at 270.

255 Auerbach (note 253) at 1653.

256 Manuel (note 28) at 240.

257 Note 42 item 11(j).

258 *Le Roux* (note 19).

259 http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html (Last accessed on 1 December 2016).

2.5.2 Cyber bullying legislation and policy in the United States of America

This section draws a distinction between American legislation at state level and school policy in selected American school districts. These laws and policies give guidelines on what should be covered in school policy on cyber bullying. As this section contains a literature study that is aimed at merely identifying and studying relevant provisions, no in-depth analysis was done.

2.5.2.1 American State legislation on cyber bullying

In the USA 49 states have passed anti-bullying laws.[260] Some of these states refer to cyber bullying specifically, and some of these states only have anti-bullying legislation and policies in place.[261] Authors have discussed and rated the legislation of different states and used common measures to determine the quality of the legislation. Those include factors such as the regulation of instances of cyber bullying away from school, the protection of school personnel, the compulsory adoption of cyber bullying policy reporting systems and the prohibition of retaliation.[262]

As the focus of the research was on cyber bullying, I discuss two of the more comprehensive anti-bullying and cyber bullying state legislations.

Connecticut, Public Act no 11-232 effective July 1, 2012, defines bullying as:

> Bullying means the repeated use by one or more students of a written, oral or electronic communication, such as cyberbullying, directed at or referring to another student attending school in the same school district, or a physical act or gesture by one or more students repeatedly directed at another student attending school in the same school district, that: (i) Causes physical

260 Sacco, D.T., Silbaugh, K., Corredor, F., Casey, J. and Davis, D. 'An overview of state anti-bullying legislation and other related laws' http://cyber.law.harvard.edu/publications/2012/state_anti_bullying_legislation_overview (Last accessed on 1 December 2016) at 5.

261 Ibid.

262 For more information on the rating of the different state legislation on cyber bullying please see Hayward (note 30) at 85, Sacco, Silbaugh, Corredor, Casey and Davis (note 263), Beckstrom, D.C. 'State legislation mandating school cyberbullying policies and the potential threat to student's free speech rights' (2008)(33) *Vermont Law Review* 283 at 283, Goodno, N.H. 'How public schools can constitutionally halt cyberbullying: A model cyberbullying policy that considers first amendment, due process and fourth amendment challenges' 2011(10)(21) *Wake Forrest Law Review* 641 at 641 and Hinduja and Patchin at http://www.bullypolice.org/ (Last accessed on 1 December 2016).

> or emotional harm to such student or damage to such student's property, (ii) places such student in reasonable fear of harm to himself or herself, or of damage to his or her property, (iii) creates a hostile environment at school for such student, (iv) infringes on the rights of such student at school, or (v) substantially disrupts the education process or the orderly operation of a school.

The definition of bullying in this Act not only addresses cyber bullying but also some of the aspects previously touched on in American case law. By stipulating the effects of bullying, such as creating a hostile school environment or substantially disrupting school activities, the Act ensures that it is in line with American Supreme Court judgments on instances when freedom of speech may be limited. A concerning factor in this definition is that receptiveness is required to constitute an act of cyber bullying. The Act also stipulates causal effects of the bullying, but what happens when the causal effect is not listed in the Act? Will acts that, for example, cause fear that a loved one will be hurt not be seen as cyber bullying? Although this definition of cyber bullying may be informative for South African law and policy, it does not address the severe nature of cyber bullying adequately, as argued in this paragraph.

Public Act no 11-232 effective July 1, 2012 defines the following terms:

> ‘Cyberbullying’ means any act of bullying through the use of the Internet, interactive and digital technologies, cellular mobile telephone or other mobile electronic devices or any electronic communications;
>
> ‘Mobile electronic device’ means any hand-held or other portable electronic equipment capable of providing data communication between two or more individuals, including, but not limited to, a text messaging device, a paging device, a personal digital assistant, a laptop computer, equipment that is capable of playing a video game or a digital video disk, or equipment on which digital images are taken or transmitted;
>
> ‘Electronic communication’ means any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo electronic or photo-optical system;
>
> ‘Hostile environment’ means a situation in which bullying among students is sufficiently severe or pervasive to alter the conditions of the school climate;

> ‘Outside of the school setting’ means at a location, activity or program that is not school related, or through the use of an electronic device or a mobile electronic device that is not owned, leased or used by a local or regional board of education;
>
> ‘School climate’ means the quality and character of school life with a particular focus on the quality of the relationships within the school community between and among students and adults.

By including these definitions, the Act is clear on circumstances relating to cyber bullying and tools used to commit cyber bullying. The definitions of “electronic communication” and “mobile electronic device” are wide enough to include the possible ways and means of committing cyber bullying in schools.

This Act further requires that each regional and local board of education develop and implement a policy to address the existence of bullying in schools.[263] Requirements set for such a policy include that it:

- provide for anonymous bullying reporting procedures
- include a prevention and intervention strategy for dealing with bullying
- prohibit discrimination and retaliation against an individual who reports or assists in the investigation of an act of bullying
- require that parents of bullies and victims be informed about the bullying and be invited to a meeting

Connecticut legislation further requires that bullying be addressed in student codes of conduct and that appropriate school personnel be identified to deal with instances of bullying.[264]

The responsibilities placed on schools and school districts are helpful and encouraging. By stipulating that parents be informed and called to a meeting, the requirements of restorative justice can be met partially. By prohibiting cyber bullies to retaliate against learners who report them for cyber bullying, learners are encouraged to report instances of cyber bullying. The policy also provides for criminal action in severe cases of cyber bullying.

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263 Public Act no 11-232 (b).

264 Public Act no 11–232.

The state of Massachusetts provides an anti-cyber bullying plan that includes a comprehensive definition of cyber bullying in Section 37O of General Laws Chapter 71.

Cyber bullying is defined as:

> bullying through the use of technology or any electronic communication, which shall include, but shall not be limited to, any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo electronic or photo optical system, including, but not limited to, electronic mail, internet communications, instant messages or facsimile communications. Cyber-bullying shall also include (i) the creation of a web page or blog in which the creator assumes the identity of another person or (ii) the knowing impersonation of another person as the author of posted content or messages, if the creation or impersonation creates any of the conditions enumerated in clauses (i) to (v), inclusive, of the definition of bullying. Cyber-bullying shall also include the distribution by electronic means of a communication to more than one person or the posting of material on an electronic medium that may be accessed by one or more persons, if the distribution or posting creates any of the conditions enumerated in clauses (i) to (v), inclusive, of the definition of bullying.

Once again cyber bullying is widely defined to include all possible means or tools of cyber bullying. The terminology on the necessary effects of cyber bullying in order to limit free speech rights of the bully as used by the Supreme Court is also included in the definition.

Massachusetts General Laws Chapter 71, section 370 prohibits bullying (including cyber bullying) under the following circumstances:

(i) on school grounds, property immediately adjacent to school grounds, at a school-sponsored or school-related activity, function or program whether on or off school grounds, at a school bus stop, on a school bus or other vehicle owned, leased or used by a school district or school, or through the use of technology or an electronic device owned, leased or used by a school district or school and

(ii) at a location, activity, function or program that is not school-related, or through the use of technology or an electronic device that is not owned, leased or used by a school district or school, if the bullying creates a hostile environment at school for the victim, infringes on the rights of the victim at school or materially and substantially disrupts the education process or the orderly operation of a school. Nothing contained herein shall require schools to staff any non-school related activities, functions, or programs.

Point (ii) above makes comprehensive provision for off-campus cyber bullying. This provides for any form of cyber bullying, whether at a school-controlled function or on a school device or not, may be regulated if it impacts negatively on the school environment.

Furthermore, the Act provides for provisions that must be included in any policy on cyber bullying. Schools are mandated to provide age-appropriate instruction on bullying prevention. Such instruction should be incorporated into the curricula for each grade of either the school district or school.[265]

Schools are also mandated to develop a plan to address bullying including prevention and intervention.[266] This plan applies to learners and school staff and must include the following main issues:

- prohibition clause
- reporting procedures
- requirements or rules for reporting (report itself, reporter protection)
- procedures for investigation
- possible sanctions on a guilty verdict
- dealing with the victim

The Act also provides for the following provisions that must be included in the anti-cyber bullying plan. The plan must provide for ongoing professional development for school personnel aimed at strategies of prevention, intervention, information and internet safety issues.

Provisions should be made for informing parents and guardians of the bullying prevention curriculum. They should be informed of the curriculum that can be supported at home, the dynamics of bullying and online safety regarding bullying.[267]

Each plan must recognise that certain students may be more vulnerable to becoming a target of bullying or harassment based on actual or perceived differentiating

265 Massachusetts General Laws Chapter 71, section 370(c).
266 Id at section 370(d)(2).
267 Id at section 370(d)(5).

characteristics, including race, colour, religion, ancestry, national origin, sex, socioeconomic status, homelessness, academic status, gender identity or expression, physical appearance, pregnant or parenting status, sexual orientation, mental, physical, developmental or sensory disability or by association with a person who has or is perceived to have one or more of these characteristics. The plan shall include specific steps that schools must take to support vulnerable students and to provide all students with the skills, knowledge and strategies needed to prevent or respond to bullying or harassment.[268]

A member of staff must report any instance of bullying or retaliation. Massachusetts General Laws Chapter 71, section 370(g) provides that if the school principal or a designee determines that bullying or retaliation has occurred, they must notify the law enforcement agency if they believe criminal charges should be brought against the bully, take the necessary disciplinary action and notify the parents/guardians of the bully and victim.

The paragraphs above investigated and identified good practices in model legislative regulations for the regulation of cyber bullying in schools. In the paragraphs below I looked at how these legislative measures were included in policies at school level.

2.5.2.2 American policies regarding cyber bullying in schools

Birk *et al* conducted a thorough policy analysis on cyber bullying in American schools.[269] They identified key components that need to be addressed in all successful anti-cyber bullying policies. These key components have also been identified by anti-bullying websites.[270] In this section I briefly discuss the key components and examples of best practice in some of the states as identified by Birk *et al.* These components and examples will act as a guideline in compiling a South African school policy for the regulation of cyber bullying in chapter 6.

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268 Id at section 370(d)(3).

269 Birk, S.L., Meisenheimer, J.W. and Price, J.A. *A policy analysis examining cyber bullying at the national, state and local level* Proquest LLC:Ann Harbor MI 2014.

270 See U..S Department of Health and Human Services, http://www.stopbullying.gov/laws/key-components/ and http://www.meganmeierfoundation.org/cmss_files/attachmentlibrary/State-Anti-Bullying-Laws--Policies.pdf (Last accessed on 1 December 2016).

2.5.2.2.1 Purpose

Birk *et al* state that any anti-cyber bullying policy must be clear on the issues that need to be addressed and what the aim of the policy is.[271] Important components of a purpose statement include outlining the negative effects of bullying and declaring that no form of bullying is acceptable.[272]

Example 1: State of Michigan Model Policy

> The (fill in district name) board of education recognizes that a school that is physically and emotionally safe and secure for all students promotes good citizenship, increases student attendance and engagement, and supports academic achievement. To protect the rights of all students and groups for a safe and secure learning environment, the board of education prohibits acts of bullying, harassment, and other forms of aggression and violence.[273]

Example 2: Oklahoma State Policy

> The Legislature finds that bullying has a negative effect on the social environment of schools, creates a climate of fear among students, inhibits their ability to learn, and leads to other antisocial behavior. Bullying behavior has been linked to other forms of antisocial behavior, such as vandalism, shoplifting, skipping and dropping out of school, fighting, and the use of drugs and alcohol ... Successful programs to recognize, prevent, and effectively intervene in bullying behavior have been developed and replicated in schools across the country. These schools send the message that bullying behavior is not tolerated and, as a result, have improved safety and created a more inclusive learning environment.[274]

2.5.2.2.2 Scope

By determining the scope in the policy, it provides an understanding of how far the jurisdiction of the school will stretch in the regulation of cyber bullying.[275] This may include the school grounds, school transportation, school activities, via technology that belongs to the school, or behaviour that creates a significant disruption to the school environment.[276] Possible human rights infringements on the privacy and freedom of expression of the bully must be considered carefully and be addressed in the scope.

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271 Birk, Meisenheimer and Price (note 269) at 23.

272 http://www.stopbullying.gov/laws/key-components/ (Last accessed on 1 December 2016).

273 Michigan Department of Education, n.d.

274 Okla. Stat. Ann. Tit. 70, § 24-100.3 (2009).

275 Birk, Meisenheimer and Price (note 269) at 24.

276 http://www.stopbullying.gov/laws/key-components/ (Last accessed on 1 December 2016).

Example Statement of Scope in Indiana Policy

> The discipline rules [related to bullying] ... must apply when a student is: (1) on school grounds immediately before or during school hours, immediately after school hours, or at any other time when the school is being used by a school group; (2) off school grounds at a school activity, function, or event; (3) traveling to or from school or a school activity, function or event; or (4) using property or equipment provided by the school.[277]

State of Tennessee Model Policy

> This policy is in effect while students are on school property, at any school-sponsored activity, on school-provided equipment or transportation, or at any official school bus stop. If the act takes place off school property or outside of a school-sponsored activity, this policy is in effect if the conduct is directed specifically at a student or students and has the effect of creating a hostile educational environment or otherwise creating a substantial disruption to the education environment or learning process.[278]

The scope in the Tennessee model policy and the Indiana model policy is defined clearly. Off-campus cyber bullying will only be regulated if it negatively impacts on the school environment.

2.5.2.2.3 Descriptions and definitions of prohibited behaviour

Cyber bullying can only be regulated effectively when it is defined clearly.[279] This must include definitions of the behaviour that is prohibited.[280] The specification of the prohibited behaviour must include a definition of cyber bullying that includes a list of specific behaviour that constitutes cyber bullying, but must not be an exclusive list.[281] The definition must also specify that the cyber bullying is intentionally aimed at harming others, is not limited to physical harm and may be verbal or non-verbal and direct or indirect.[282] Prohibited behaviour can also include retaliation against cyber bullying, or perpetuate the cyber bullying.[283] This will then include acts of spreading malicious e-mails or texts.

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277 Ind. Code Ann. § 20-33-8-13.5 (b) (2010).
278 Tennessee Code 283, 2012.
279 Birk, Meisenheimer and Price (note 269) at 26.
280 Ibid.
281 http://www.stopbullying.gov/laws/key-components/ (Last accessed on 1 December 2016).
282 Ibid.
283 Ibid.

The definition of cyber bullying found in Massachusetts section 37O of General Laws Chapter 71, not only gives a clear and wide definition of cyber bullying, but also includes different ways to commit cyber bullying.[284] This definition further includes the creation of a webpage where a person assumes the identity of another person as a form of cyber bullying. The Kentucky policy on bullying is wide enough to include all forms of cyber bullying identified in the Literature study.

In the Kentucky model policy the actions that are prohibited are identified clearly.[285]

> The use of lewd, profane or vulgar language is prohibited. In addition, students shall not engage in behaviors such as hazing, bullying, menacing, taunting, intimidating, verbal or physical abuse of others, or other threatening behavior. This policy extends to any/all student language or behavior including, but not limited to, the use of electronic or online methods. Such behavior is disruptive of the educational process and interferes with the ability of other students to take advantage of the educational opportunities offered.

One should be mindful that technology develops at a rapid pace, and although the prohibited actions must be clear, any policy should be open ended enough to provide for these developments. This policy is a good example of clearly stating prohibited actions, but not including a closed list of actions.

2.5.2.2.4 Enumeration of groups

This element is also extremely important for South Africa. As unfair discrimination is prohibited, it is important to make the prohibition of unfair discrimination concrete.[286] Any policy on cyber bullying should have a section where it is stated clearly that cyber

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284 Bullying through the use of technology or any electronic communication, which shall include, but shall not be limited to, any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo electronic or photo optical system, including, but not limited to, electronic mail, internet communications, instant messages or facsimile communications. Cyber-bullying shall also include (i) the creation of a web page or blog in which the creator assumes the identity of another person or (ii) the knowing impersonation of another person as the author of posted content or messages, if the creation or impersonation creates any of the conditions enumerated in clauses (i) to (v), inclusive, of the definition of bullying. Cyber-bullying shall also include the distribution by electronic means of a communication to more than one person or the posting of material on an electronic medium that may be accessed by one or more persons, if the distribution or posting creates any of the conditions enumerated in clauses (i) to (v), inclusive, of the definition of bullying.

285 Kentucky Department of Education, 2013.

286 Birk, Meisenheimer and Price (note 269) at 30.

bullying based on race, colour, national origin, gender, religion, disability and sexual orientation is prohibited.

State of New Jersey Model Policy

> Harassment, intimidation or bullying means any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L. 2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.[287]

2.5.2.2.5 District policy development

Local education agencies should be directed to develop and implement their own anti-bullying policies.[288] The process of creating the policy must be collaborative and include feedback from all stakeholders such as educators, learners, parents and the community.[289] This policy must be based on legislation.[290] Examples of legislation prescribing such policy are given below.

Oregon State Statute

> 339.356 District policy required**.** (1) Each school district shall adopt a policy prohibiting harassment, intimidation or bullying and prohibiting cyberbullying. School districts are encouraged to develop the policy after consultation with parents, guardians, school employees, volunteers, students, administrators and community representatives.[291]

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287 State of New Jersey Department of Education, 2011.

288 Birk, Meisenheimer and Price (note 269) at 32. http://www.stopbullying.gov/laws/key-components/ (Last accessed on 1 December 2016).

289 Ibid.

290 Ibid.

291 Oregon House Bill No. 2599, 2009.

Maryland State Statute

> [1] Each county board shall establish a policy prohibiting bullying, harassment, or intimidation. ...
> [3] A county board shall develop the policy in consultation with representatives of the following groups: (i) Parents or guardians of students; (ii) School employees and administrators; (iii) School volunteers; (iv) Students; and (v) Members of the community.[292]

2.5.2.2.6 Policy review

To determine whether the policy and/or program are successful, regular review is required.[293]

State of Illinois Model Policy

> The Superintendent or designee shall review disciplinary incidences involving bullying or school violence annually for purposes of monitoring:
> • the effectiveness of the [DISTRICT'S] programs and interventions in creating effective conditions for learning and development; and
> • the application of this policy in an equitable, effective and non-discriminatory manner. A report of the Superintendent's findings shall be made to the [Board of Education] at least once a year.
> This [DISTRICT] shall maintain written records of reports of bullying and school violence and their resolution for two (2) years or a period of time that complies with other [DISTRICT] policy, whichever is longer.[294]

Thus, policy relating to cyber bullying should provide for annual review procedures. In a South African context, it is advisable that the Department of Education reviews the policy on an annual basis, as per the example.

2.5.2.2.7 Written records

The inclusion of a component on how to keep record of instances of cyber bullying will assist in tracking patterns in cyber bullying.[295] Aspects to include in these records are all incidents of cyber bullying and the resolution or outcome to each incident.[296] This will also assist in providing proper evidence should the cyber bullying end up in

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292 Md. Code Ann., Educ. § 7-424.1(c) (2010).
293 Birk, Meisenheimer and Price (note 269) at 33. http://www.stopbullying.gov/laws/key-components/ (Last accessed on 1 December 2016).
294 Illinois Department of Education, 2010.
295 Birk, Meisenheimer and Price (note 269) at 38.
296 http://www.stopbullying.gov/laws/key-components/ (Last accessed on 1 December 2016).

court,[297] or where the school is sued for negligence in terms of the manner in which they handled an incident or incidents.

State of Maryland Model Policy

> *Bullying, Harassment, or Intimidation Reporting Forms* may be obtained in the school's main (front) office, counselor's office, and other locations determined by the local school system. The forms may be submitted by a student, parent, close adult relative, or staff member to school administration. A student may request assistance from a staff member to complete the form if the student wishes.[298]

California Model Policy

> The department shall assess whether local educational agencies have done all of the following: .. (e) Maintained documentation of complaints and their resolution for a minimum of one review cycle.[299]

These records can be used to inform regular policy amendments and/or updates.

2.5.2.2.8 Disciplinary measures

A cyber bullying policy must contain a section on sanctions for confirmed instances of cyber bullying.[300] The sanctions must include a range of different sanctions depending on the severity and form of the cyber bullying. These sanctions could be remedial, supportive or punitive.[301] As the types of cyber bullying differ, the sanctions should be adapted to fit the specific situation.

The State of Tennessee Model Policy states that consequences for bullying may include positive behaviour bases interventions, as well as suspension and expulsion. The policy further states that:

> School administrators shall consider the nature and circumstances of the incident, the age and maturity of the student, the degree of harm, previous incidences or patterns of behavior, or any

297 Birk, Meisenheimer and Price (note 269) at 38.
298 Maryland Department of Education, 2010.
299 Cal. Educ. Code § 234.1 (2010). http://www.stopbullying.gov/laws/key-components/ (Last accessed on 1 December 2016).
300 Birk, Meisenheimer and Price (note 269) at 39. http://www.stopbullying.gov/laws/key-components/ (Last accessed on 1 December 2016).
301 Ibid.

other factors, as appropriate to properly respond to each situation. Consequences for a student who commits an act of harassment, bullying, or other act of violent behavior shall be unique to the individual incident and will vary in method and severity according to the nature of the behavior, the developmental age of the student, and the student's history of problem behaviors and performance, and must be consistent with the Board of Education's approved code of student conduct.[302]

The remedial measures in this policy should correct the problematic behaviour, prevent the behaviour from occurring again, and protect the victim.

Alabama Model Policy

> The model policy, at a minimum, shall contain all of the following components: ... [4] A series of graduated consequences for any student who commits an act of intimidation, harassment, violence or threats of violence. Punishment shall conform with applicable federal and state disability, antidiscrimination, and education laws and school discipline policies.[303]

2.5.2.2.9 Mental health

Provision must be made for the care and counselling of both the victim and the cyber bully in the aftermath of a cyber bullying incident.[304]

State of Illinois Model Policy

> The DISTRICT and its schools shall have a procedure for referring students targeted by bullying or school violence, engaged in bullying or violent behaviour and others to counseling, mental health and other services, as appropriate. Such procedure shall include information about the types of services and supports available.[305]

The remedial and disciplinary actions have been discussed above. It is imperative that schools, educators, learners and parents are informed about the services available to assist the parties involved with cyber bullying.

America has implemented cyber bullying specific policies and legislation in schools. These laws and policies are broad enough to include many different forms of cyber

302 Tennessee Department of Education, 2012.
303 Ala. Code § 16.28B.5 (2010). http://www.stopbullying.gov/laws/key-components/ (Last accessed on 1 December 2016).
304 Birk, Meisenheimer and Price (note 269) at 41.
305 Illinois Department of Education, 2012.

bullying, but also specific enough to provide clear guidelines on what constitutes cyber bullying, and how it should be dealt with. It is in line with the American Supreme Court rulings of how freedom of speech may be limited in schools (cf. section 2.5.1 American case law regarding freedom of speech in schools). Learners also have a right to institute criminal or civil actions against the cyber bully. In doing so, the learner will have to rely on the civil and criminal laws of the country.

2.5.3 Civil and criminal liability of cyber bullies in terms of American law

Under American civil law, a victim of cyber bullying can obtain relief against cyber bullying from the school, or the bully.[306] To claim for negligence against a school successfully, a victim of cyber bullying must prove that there was a duty of care, tangible harm which was foreseeable, and that the school's action or lack of action caused the injury.[307] Thus, though it is clear that victims of cyber bullying can claim redress from the school for on-campus cyber bullying, the requirement that the school's action or inaction should have caused the harm raise the question whether[308] that does not then largely exclude off-campus cyber bullying. This requirement in effect limits redress to instances where the school had some awareness of a cyber bullying threat and either failed to act or acted in a manner that fostered off-campus cyber bullying. The sovereign immunity defence may also influence the difficulty of holding a school responsible for cyber bullying. In essence, this doctrine means that school districts, public school officers, administrators, and employees of the school are immune from personal liability for discretionary acts or failure to act when performing their duties.[309] This will only apply when the conduct was not wilful or malicious.

Victims of cyber bullying have a better chance of succeeding in filing for private relief against the cyber bully.[310] They may file for relief according to the laws of defamation, and intentional infliction of emotional distress.[311] In order to hold someone accountable for defamation in American law, four elements need to be present.[312] There must be a

306 Manuel (note 28) at 229.
307 Sharrif and Hoff (note 26) at 103.
308 Fenn (note 247) at 2742.
309 Ibid.
310 Manuel (note 28) at 231.
311 Ibid.
312 Auerbach (note 253) at 1667.

false and defamatory statement concerning another, there must be an unprivileged publication to a third party, there must be fault on the side of the publisher, and someone must be accountable for the statement.[313]

Defamation does not provide a watertight remedy for victims of cyber bullying, as the cyber bully can merely claim that their online statements are statements of opinion and not of fact.[314] This means that the statements will be protected under the right to freedom of speech.[315] Another problematic element of defamation is that it requires a publication to a third party.[316] Thus, instances where cyber bullying only takes place privately between the bully and the victim will not qualify as defamation.[317] A good example of the failure of using a claim of defamation against cyber bullies is the case of *Finkel v Dauber*.[318] In this case, teenagers created an anonymous Facebook group on which they asserted that another teenager was HIV positive as she had sex with animals, shared heroin needles and had sex with a male prostitute.[319] The Facebook group alluded to the identity of the teenager by referring to her nickname, and not her full name.[320] The court stated that this was not defamation, as the statements made on the group were clearly unbelievable,[321] thus, the requirement of fact is not met.

In order to succeed with a claim for intentional infliction of emotional distress, the victim of cyber bullying must prove that the cyber bully intended to cause emotional distress, the cyber bully knew or should have known that his/her action will cause emotional distress, the actions of the cyber bully were extreme/outrageous, the actions of the cyber bully caused the psychological injury of the victim, and that no reasonable man could be expected to endure the serious nature of the emotional harm caused by the cyber bullying.[322] Courts follow a strict approach to intentional infliction of

313 Kaufman, A.S. and Baydala, B.S. 'Cyber bullying and intentional infliction of emotional distress' 2011(245)(27) *New York Law Journal* http://www.kbrlaw.com/kaufman7.pdf (Last accessed on 1 December 2016); Auerbach (note 253) at 1667.
314 Manuel (note 28) at 232.
315 Auerbach (note 253) at 1667; Manuel (note 28) at 232.
316 Manuel (note 28) at 232.
317 Auerbach (note 253) at 1667.
318 29 Misc.3d 325, 325 (10).
319 Manuel (note 28) at 233.
320 Ibid.
321 Ibid.
322 Kaufman and Baydala (note 313) at 234.

emotional distress, as they fear that defendants will claim for compensation every time someone hurt their feelings.[323] Courts mainly focus on the element of outrageousness, and for victims of cyber bullying to claim successfully for intentional infliction of emotional distress, the reasonable man, upon hearing the facts of the case, must be driven to resentment.[324]

Whilst American courts have not typically recognised bullying as actionable, cyber bullies can be held criminally liable for criminal harassment.[325] Harassment will be actionable in instances of cyber bullying if the harassment is based on "race, ethnicity, religion, disability, or gender".[326] Harassment is generally defined as: "Communicating with another for the purpose of harassing, meaning to insult or challenge another, or engage in a course of 'alarming conduct serving no legitimate purpose."[327] A charge of criminal harassment is hard to prove, as the bully can easily claim that he/she had no intent to harm or threaten the victim and thus they can rely on their right to freedom of speech.[328] Manuel points out that there needs to be a serious threat before courts will establish that a reasonable person would have found the actions alarming. Furthermore, establishing a pattern of cyber bullying might be difficult as there may only be one instance of cyber bullying.[329]

It is also difficult to succeed in holding a school liable for criminal harassment between learners. In *Davis v. Monroe County Board of Education*, it was established that the victim must prove the following:[330]

- An official with authority in the district had actual knowledge of the harassment;
- The district was deliberately indifferent to the harassment; and
- The harassment was "so severe, pervasive, and objectively offensive" that it effectively deprived the plaintiff of access to an education.

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323 Auerbach (note 253) at 1669.
324 Kaufman and Baydala (note 313) 315.
325 Auerbach (note 253) at 1663.
326 Conn, K. 'Bullying in K-12 public schools: Searching for solutions' www.cepi.vcu.edu/media/university-relations/cepi/pdfs/**bullying**.pdf (Last accessed on 1 December 2016) at 4, Manuel (note 28) 235.
327 Auerbach (note 253) at 1669; Manuel (note 28) at 235; Conn (note 326) at 4.
328 Manuel (note 28) at 235.
329 Ibid.
330 Conn (note 326) at 4.

The USA has made comprehensive provision for cyber bullying in schools, and a number of guidelines can be taken from these provisions. Although there are civil and criminal remedies available to learners who are being cyber bullied, these remedies are not ideal, and does not take into account firstly, the unique circumstances and rights of the child, and secondly, the complex nature of cyber bullying.

Neither schools, nor courts know how to deal with cyber bullying legally, as cyber bullying differs from traditional bullying in such a way that current laws and policies in schools are not sufficient.[331] A distinction needs to be made on what exactly constitutes "off campus speech" and "on campus speech", and what type of action constitutes a "true threat" to a learner or educator. Varel suggests that a learner should only be disciplined by a school for off-campus speech if there is "true threat" that has a link to the school.[332] The difference between off-campus and on-campus speech, and the test of a "true threat" is a recurring argument in American case law (cf. section 2.5.1 American case law regarding freedom of speech in schools).

The analysis of American state legislation and policy on cyber bullying in schools in paragraph 2.5.2 provides elements that need to be included in South African policy on cyber bullying in schools.

2.6 Conclusion

In this chapter I conducted a literature review on the nature of cyber bullying in comparison to traditional bullying. It was established that cyber bullying distinctly differs from traditional bullying, and offers unique new challenges to schools. Ways of managing cyber bullying in schools was investigated, and it was determined that the creation of awareness, a clear policy on cyber bullying, accountability and monitoring were important for the successful management of cyber bullying in schools. I further identified the constituting elements for the definition of cyber bullying and use those to develop a working definition for cyber bullying in schools.

331 Goodno (note 262) at 650.

332 Varel (note 246) at 7.

In the second part of this chapter I looked at American law and policy relevant to cyber bullying. I identified examples of how American law and policy incorporated the elements of awareness, accountability and monitoring in policy regulating cyber bullying in schools that may act as examples of good practice in cyber bullying law and policy in South African schools. The USA has implemented law and policy on cyber bullying, but these laws and policies do not always address the challenges of cyber bullying, and several gaps in the legislation and the American court's interpretation of the right to freedom of speech was identified.

Chapter 3 contains a literature study on current South African law relating to cyber bullying. This will include the human rights obligations imposed on the South African government by the South African Constitution and IHRL, as well as a study of current South African legislation to see if it complies with the standards of protection set by these human rights documents.

CHAPTER 3

SOUTH AFRICAN LAW AND POLICY FRAMEWORK ON CYBER BULLYING

3.1 Introduction

In chapter 2 it was established that cyber bullying has harmful consequences for the victims thereof, and affects several human rights. The effective protection of human rights must ultimately come from within the state.[333] The IHRL principle of subsidiarity ensures that decisions are taken as closely as possible to the citizen.[334] This means that the protection of the rights of learners who are victims of cyber bullying should take place at national (legislation) level and local level (school policy). In line with this principle, cyber bullying is researched in this dissertation as a form of misconduct that should be dealt with at school level.

In order to successfully institute measures to protect learners against cyber bullying, the state's human rights obligations in terms of the South African Constitution and IHRL should be considered. Secondly, one has to look at the current South African legal framework for the regulation of cyber bullying to determine which measures are in place to protect these rights.

In the first part of the chapter I discuss the South African Constitution and the human rights contained in the Bill of Rights relevant to cyber bullying. Lastly, I discuss existing South African law and policy available for the protection of learners against cyber bullying.

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333 Alston, P. and Goodman, R. *International Human Rights Text and Materials the successor to International Human Rights in Context: Law, Politics and Morals.* 2013 Oxford University Press at 1047.

334 Carozza, P.G. 'Subsidiarity as a structural principle of international human rights law' 2003(97)(38) *The American Journal of International Law* 38 at 38.

3.2 The South African Constitution

The South African Constitution is the supreme law of the country, any law inconsistent with the South African Constitution is invalid.[335] The South African Constitution creates a system of co-operative government where government functions are decentralised to ground level. Section 104 of the South African Constitution, read with Schedule 4 determines that education is shared between the national and provincial spheres of government. This means that they have concurrent legislative powers with regard to school education in South Africa. The National as well as the Provincial departments of basic education may enact cyber bullying legislation.

As already mentioned, public schools are organs of state.[336] However, this does not mean that the public school forms part of a specific sphere of government, but that the public school renders a public service, education, and is thus part of public administration and subject to the South African Constitution.[337] A public school is also a "juristic person".[338] This means that the school is recognised as a legal entity, and has the capacity to perform public functions. The governing body of a school acts as functionary of the school and is responsible for the governance of the school.[339] This means that a governing body acts on behalf of the school, and must have the best interests of the school at heart.[340] Schools, as organs of state, must comply with the South African Constitution and the obligations placed on them by the South African Constitution.[341] All legislation and policy governing education in South Africa must be in line with the South African Constitution.[342] The South African Constitution contains a Bill of Rights with fundamental human rights and the South African Constitution has bestowed a sacred trust on South African courts to protect human rights.[343] Furthermore, section 7(2) of the South African Constitution contains a mandate that the State must respect, protect, promote, and fulfil the rights in the Bill of Rights.

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335 South African Constitution (note 10) at section 2.
336 South African Constitution (note 10) at section 239(b)(ii).
337 *Mikro Primary School* (note 35).
338 Schools Act (note 1) at section 15.
339 Schools Act (note 1) at section 16.
340 Barry, B. *Schools and the Law: A participant's guide.* 2006 Juta at 71.
341 Id at 8.
342 Ibid.
343 *S v A Juvenile* 1990 (4) SA 151 (ZSC) 176B.

IHRL also forms part of South African national or domestic law, and informs the interpretation of the rights in the Bill of Rights. In terms of section 39(1) of the "Interpretation clause":

> When interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; must consider international law; and may consider foreign law.

This section provides for the interpreters of human rights to include the values of the South African Constitution in interpretation of the Bill of Rights and to consider international law. It further provides that foreign law may be considered. International law will include both binding and non-binding international law.[344] Section 233 of the South African Constitution provides that a court interpreting any legislation is to prefer an interpretation which is in accordance with international law over any interpretation which is not in accordance with international law.

Section 231 of the South African Constitution determines the following with regard to international agreements.

1. The negotiating and signing of all international agreements is the responsibility of the national executive.
2. An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
3. An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
4. Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by parliament is law in the Republic unless it is inconsistent with the South African Constitution or an Act of Parliament.
5. The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

344 Dugard, J. *International Law: A South African Perspective.* 2011 Juta at 63.

According to section 232 of the South African Constitution, customary international law is part of the South African law if it is not inconsistent with the South African Constitution.

When international human rights treaties are ratified, governments must put into place measures and legislation to fulfil their obligations. South Africa is bound by international law, which implies that schools as organs of state are also bound by IHRL and are thus mandated to protect and promote human rights in schools.[345] Thus, all the human rights discussed in this chapter are informed by IHRL.

3.3 Cyber bullying as a violation of human rights

It is important to note that human rights are not absolute. Some rights contain internal limitations, such as the right to an education in that it states that mother tongue language education should be provided where reasonably possible.[346] All rights may justifiably be limited in terms of the general limitation clause contained in section 36 of the South African Constitution. It reads:

> (1) The rights in the Bill of Rights may be limited only in terms of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

What makes cyber bullying complex to regulate is that a number of different human rights will come into play all at once. For example, the cyber bully has freedom of expression. That freedom of expression may infringe on the rights to privacy and human dignity of the victim. Thus, there will have to be a balancing act between the rights of the bully and the bullied to determine whether the limitation of right of the bully

345 Coetzee and Mienie (note 36) at 88.
346 South African Constitution (note 10) at section 29.

or victim was justifiable. In the following section the different human rights that are affected by cyber bullying are discussed in more detail.

3.3.1 Children's rights and the best interests of the child principle

Section 28 of the South African Constitution gives expression to South Africa's international obligations in terms of the Convention on the Rights of the Child (CRC),[347] and protects a range of different children's rights.[348] Specifically relevant to cyber bullying is section 28(1)(d) of the South African Constitution which states that "every child has the right to be protected from maltreatment, abuse or degradation". When one looks at the definition of and harm that can be caused by cyber bullying, it can be classified as a form of abuse or degradation. Thus, there is a duty on the state to protect learners at school against cyber bullying.

This is in line with the core principal of the CRC that determines that children have a right to be free from all forms of violence. The CRC is based on four core principles regarding children's rights. These principles are non-discrimination, the best interests of the child, the right to life, survival and development of the child to the maximum extent, and the right of children to be heard in matters concerning them.[349]

Cyber bullying is recognised as a form of violence. The definition of violence includes "non-physical and/or non-intentional forms of harm (such as, *inter alia*, neglect and psychological maltreatment)".[350] The term "mental violence" includes "psychological bullying and hazing by adults or other children, including via information and communication technologies (ICTs) such as mobile phones and the Internet (known as "cyber bullying")".[351] Paragraph 21 obliges state parties to protect children against cyber bullying.

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347 Convention on the Rights of the Child 28 ILM 1448, 1577 UNTS 3 (20 November 1989).

348 *S v M* [2008] (3) SA 232 (CC), 2007 (2) SACR 539 (CC) at paragraph16.

349 Unicef, A Human rights-based approach to education for all http://www.unicef.org/publications/files/A_Human_Rights_Based_Approach_to_Education_for_All.pdf (Last accessed on 1 December 2016) at 7–8.

350 General Comment No.13 (2011) (note 49).

351 General Comment No.13 (2011) (note 49) at paragraph 21.

General Comment 13 by the Committee on the rights of the child goes even further in identifying specific risks of violence through information and communications technologies.

> 31. Child protection risks in relation to ICT comprise the following overlapping areas:
> (a) Sexual abuse of children to produce both visual and audio child abuse images facilitated by the Internet and other ICT;
> (b) The process of taking, making, permitting to take, distributing, showing, possessing or advertising indecent photographs or pseudophotographs ("morphing") and videos of children and those making a mockery of an individual child or categories of children;
> (c) Children as users of ICT:
> (i) As recipients of information, children may be exposed to actually or potentially harmful advertisements, spam, sponsorship, personal information and content which is aggressive, violent, hateful, biased, racist, pornographic, unwelcome and/or misleading;
> (ii) As children in contact with others through ICT, children may be bullied, harassed or stalked (child "luring") and/or coerced, tricked or persuaded into meeting strangers off-line, being "groomed" for involvement in sexual activities and/or providing personal information;
> (iii) As actors, children may become involved in bullying or harassing others, playing games that negatively influence their psychological development, creating and uploading inappropriate sexual material, providing misleading information or advice, and/or illegal downloading, hacking, gambling, financial scams and/or terrorism.

Child pornography as well as cyber bullying are mentioned in these specific risks. The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography defines child pornography as "any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes".[352] Article 3 of the Optional Protocol obliges state to, at the least, provide for child pornography as a crime under the criminal and penal law of the country.

Section 28(1)(g) of the South African Constitution protects the rights of the cyber bully. In punishing or disciplining a cyber bully at school, it should be kept in mind that the bully must be treated in a manner that takes account of his/her age, must not be detained except as measure of last resort, and then only for the shortest period. Article 17 of the African Charter on the Rights and Welfare of the Child speaks to the rights of

352 Article 2(c) of General Assembly Resolution A/RES/54/263 of 25 May 2000entered into force on 18 January 2002.

children in conflict with the law.[353] The aim of justice for these children should be "his or her reformation, reintegration into his or her family and social rehabilitation". This must be taken into account when dealing with a cyber bully, who is also a child. In fact, dealing with juvenile delinquency and children in conflict with the law was deemed so important by the international community that separate guidelines have been drawn up for children in conflict with the law.

The preamble of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), 1985[354] states that:

> 1.2 Member States shall endeavour to develop conditions that will ensure for the juvenile a meaningful life in the community, which, during that period in life when she or he is most susceptible to deviant behaviour, will foster a process of personal development and education that is as free from crime and delinquency as possible.
>
> 1.3 Sufficient attention shall be given to positive measures that involve the full mobilization of all possible resources, including the family, volunteers and other community groups, as well as schools and other community institutions, for the purpose of promoting the well-being of the juvenile, with a view to reducing the need for intervention under the law, and of effectively, fairly and humanely dealing with the juvenile in conflict with the law.

If one applies this to cyber bullying, it will mean that the goal of any law and policy regulating cyber bullying must be to avoid legal intervention and to deal with cyber bullies and cyber bullying victims humanely.

Rule 5 states the aims of juvenile justice. Firstly, the well-being of the juvenile is emphasised and secondly, there must be proportionality between the circumstances and offence of the juvenile.[355] This principle is well-known as an instrument for curbing punitive sanctions, mostly expressed in terms of the legal requirement that the punishment (sanction) should fit the gravity of the offence. The response to young offenders should be based on the consideration not only of the gravity of the offence but also of personal circumstances. The individual circumstances of the offender (for

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353 African Charter on the Rights and Welfare of the Child OAU Doc CAB/LEG/24.9/49/ (1990).

354 A/RES/40/33 29 November 1985.

355 5.1 The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.

example social status, family situation, the harm caused by the offence or other factors affecting personal circumstances) should influence the proportionality of the reaction (for example by having regard to the offender's endeavour to indemnify the victim or to her or his willingness to turn to a wholesome and useful life).

Rules 7 and 8 protect the rights of the juvenile offender. Rule 7 guarantees basic procedural safeguards such as the presumption of innocence, the right to notification, and the right to the presence of a parent or guardian. All these safeguards must be included in law and policy regulating cyber bullying.[356] Rule 8 protects the right to privacy of the juvenile offender. Personal information that will make the offender identifiable may thus not be made public. Rule 8.1 guarantees the juvenile's right to privacy by determining that it should "be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling".

Rule 11 provides for the process of diversion. Where it is appropriate, a formal trial should be avoided, and other agencies dealing with juvenile cases are empowered to use their discretion to refer the offender to community programmes, such as temporary supervision and guidance, restitution, and compensation of victims. Thus, the law and policy regulating cyber bully, should aim at resolving the process without making use of the criminal justice system, or civil procedures. Rule 19 states that institutionalisation of a juvenile must only be a last resort.

Rule 17 of the rules clearly states the guiding principles that should be included in the law and policy regulating cyber bullying.

17.1 The disposition of the competent authority shall be guided by the following principles:

(a) The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society;

(b) Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum;

356 7.1 Basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings.

(c) Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response;

(d) The well-being of the juvenile shall be the guiding factor in the consideration of her or his case.

17.2 Capital punishment shall not be imposed for any crime committed by juveniles.

17.3 Juveniles shall not be subject to corporal punishment.

17.4 The competent authority shall have the power to discontinue the proceedings at any time.

In these rules, the United Nations have deemed it important to make provision and set guidelines for the administration of juvenile justice, the United Nations have also provided for the prevention of juvenile delinquency. The United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), 1990[357] place obligations on governments with regard to education. These aims include making public education accessible to all young persons, and attention must be paid to the following:

21.(a) Teaching of basic values and developing respect for the child's own cultural identity and patterns, for the social values of the country in which the child is living, for civilizations different from the child's own and for human rights and fundamental freedoms;

(b) Promotion and development of the personality, talents and mental and physical abilities of young people to their fullest potential;

(c) Involvement of young persons as active and effective participants in, rather than mere objects of, the educational process;

(d) Undertaking activities that foster a sense of identity with and of belonging to the school and the community;

(e) Encouragement of young persons to understand and respect diverse views and opinions, as well as cultural and other differences;

(f) Provision of information and guidance regarding vocational training, employment opportunities and career development;

(g) Provision of positive emotional support to young persons and the avoidance of psychological maltreatment;

(h) Avoidance of harsh disciplinary measures, particularly corporal punishment.

These obligations impact on law and policy regulating cyber bullying in schools. Learners must be protected against psychological maltreatment. This means that they should be protected against cyber bullying, and the bully should be protected against

357 United Nations Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines"): resolution / adopted by the General Assembly, 14 December 1990, A/RES/45/112.

harsh disciplinary measures. Learners should also be involved in the educational process, and thus in the regulation of cyber bullying as well.

Guideline 24 places an express duty on the education system to give particular care to young persons that are at social risk, and to develop and utilise special prevention programmes and education materials for these young people. Both the cyber bully and the victim are at social risk. Thus, there is a positive duty on schools to implement a cyber bullying programme.

Similarly, guideline 45 places a positive duty on government agencies to give a high priority to plans, funds and resources for young people, including the delivery of services for their mental health care. Guideline 52 states that governments must enact laws to protect and promote the well-being of young persons. Guideline 54 states that no child must be subjected to harsh or degrading corrective measures at home or at school. Thus, the South African government is obliged to prioritise enacting legislation and policy to protect learners against cyber bullying.

The best interests of the child principle is contained in section 28(2) of the South African Constitution and states that "A child's best interests are of paramount importance in every matter concerning the child". The wording of this principle as "paramount" importance places a stringent obligation on the state. Any law and policy regulating cyber bullying must give due importance to the paramountcy of the best interests of the child principle. The question that arises is how the best interests of the child should be interpreted.

The best interests of the child principle developed from an international aspiration mentioned in the 1924 Geneva Declaration to an "internationally acknowledged principle".[358] Article 3 of the Convention on the Rights of the Child states that:

> (1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. (2) States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and

358 Reyneke, M. *The best interests of the child in school discipline in South Africa* LLD Tilburg University (Tilburg) (2013) at 214.

duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. (3) States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

The Committee on the Rights of the Child identified article 3(1) as one of the four general principles of the Convention for interpreting and implementing children's rights.[359] The committee also stresses the fact that the principle is dynamic and any assessment of the best interests of a child must relate to the specific context of the child.[360]

Although the importance of the principle has been established well, it is unclear how this principle should be applied. In General Comment 14 this concept is clarified, the best interests of the child standard will be applied:[361]

(a) Substantively: The right of the child to have his or her best interests will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general.

(b) As a fundamental interpretive legal principle: If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen. The rights enshrined in the Convention and its Optional Protocols provide the framework for interpretation.

(c) Procedural: Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account.

General Comment 14 thus expressly requires any law and policy on cyber bullying to not only apply the best-interests principle in any decisions regarding children, but to interpret legal principles in favour of the best interests of the child if two opposing

359 Paragraph 1 of General Comment No.14 (2013) the right of the child to have his or her best interests taken as a primary consideration CRC/C/GC14.

360 Ibid.

361 Id at paragraph 6.

interpretations are possible, and to expressly justify legal decisions by explicitly applying the best interests standard.

The Committee further gives guidelines on how to give content to the best interests of the child principle.[362] The flexibility and adaptability of the principle is emphasised.[363] The best interests of the child should be assessed in light of the specific circumstances and with special regard to the rights contained in the CRC.[364]

The following steps are set out for determining the best interests of the child:[365]

- First, within the specific factual context of the case, find out what are the relevant elements in a best-interests assessment, give them concrete content, and assign a weight to each in relation to one another;
- Secondly, to do so, follow a procedure that ensures legal guarantees and proper application of the right.

Elements to be taken into account when assessing the child's best interests:[366]

- the child's views
- the child's identity
- preservation of the family environment and maintaining relations
- care, protection and safety of the child
- situation of vulnerability
- the child's right to health
- the child's right to education

Section 7 of the Children's Act 38 of 2005 also contains a number of factors to be taken into account when determining the best interests of the child. Some of the relevant factors include:

- The age, maturity, state of development, gender and background of the child.
- The physical and emotional security of the child, as well as the intellectual, emotional, social and cultural development of the child.

362 Id at paragraph 32.
363 Ibid.
364 Ibid.
365 Id at paragraph 46.
366 Id at paragraph 52–79.

- Any disability or chronic illness the child may have.
- The child must be protected against physical and psychological harm.
- Actions or decisions that will avoid exposing the child to further legal or administrative proceedings must be taken.

The factors will impact on decisions made regarding the victim as well as the bully.

There are numerous cases decided in the South African Constitutional Court referring to the best interests of the child standard, and how it should be applied.[367] From this case law, Coetzee and Mienie identified eight guidelines for using the best interest of the child standard in deciding education cases. These guidelines are as follows:

- The autonomy of children should be kept in mind, "stakeholders should weigh up the need to protect and care for them against their status as autonomous human beings and rights-holders".
- "The paramountcy of learners' rights as individuals, as groups and as children in general should be respected." This means that when law and policy regarding cyber bullying is adopted, the best interests of "the learners as children, the interests of specific groups of learners such as learners with special needs and interests, as well as the interests of individual learners (for example, when dealing with misconduct)", must be taken into consideration.
- Section 28(2) is not only an interpretative tool used when interpreting other human rights, but a positive right for all children.
- "The principle that the 'best interests of the child' standard is a right with vertical and horizontal application". This means that the principle will apply between the school and the child, as well as between individual learners.
- "The 'best interests of the child' may be limited like any other right." In a school environment, the educators and other learners also have protected rights.
- "If a legal interpretation is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen."
- Section 28(2) is used to develop and interpret other rights in the Bill of Rights. This means that the best interests of the children involved in cyber bullying must be considered when interpreting the right to freedom of expression of the cyber bully.
- In education law cases, the courts will consider factors "related to the learner or learners that are party to the case, the interests and impact of the decision on the rest of the learners, as well as situational and institutional factors related to the school as institution".

367 For an explanation on how the best interests of the child standard was applied in education law court cases, please read Coetzee and Mienie (note 11).

In summary, although section 28(2) does not mean that the best interests of the child will always prevail,[368] any legal framework regarding the regulation of cyber bullying must have the best interests of the child as a primary concern. As the best interests of the child standard is also an interpretative principle, this principle must be used to give content to all other human rights involved in regulating cyber bullying at school. [369]

The CRC not only protects the best interests of children, but it also protects the right of the child to be heard. [370] The right of the child to be heard implies that the child actively plays a role in promoting and protecting his/her own rights.[371] The Committee on the rights of the child has issued education directives regarding the implementation of this right.[372] The Committee states that opportunities should be created for children to express their views, and that regard must be given to these views.[373] Listening and valuing the view of the learner is seen as of particular importance for the elimination of "discrimination, prevention of bullying and disciplinary measures".[374] The committee states that children should be consulted on education policy.[375] The concept of the right of the child to be heard has close links with the consideration of the evolving capacities of the child as expressed in article 5 of the CRC. This article declares that those persons legally responsible for children must take the evolving capacity of children to exercise their rights into account. This means that learners should have the opportunity to present solutions to cyber bullying, and be involved in school programmes aimed at regulating cyber bullying in schools.

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368 Moodley (note 33) at 549.

369 *B v M* [2006] 3 All SA 109 (W) at paragraph 110; *Minister of Welfare and Population Development v Fitzpatrick and Others* [2000] 3 SA 422 (CC) at paragraph 17.

370 Article 12 of the CRC states that: (1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. (2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

371 Mahery, P. 'The United Nations Convention on the Rights of the Child: Maintaining its value in international and South African Law' in Boezaart, T (ed) *Child Law in South Africa.* 2009 Juta 309-330 at 321.

372 General Comment No.12 (2009) The right of the child to be heard CRC/C/GC/12.

373 Id at paragraph 106.

374 Id at paragraph 109.

375 Id at paragraph 111.

3.3.2 Human dignity

Human dignity is one of the central and founding values of the South African Constitution.[376] It lies at the centre of the protection of individual rights in the South African Constitution. The South African Constitution is dignity based, and this has resulted in the refashioning of the law in areas such as social justice and education.[377] Section 10 of the South African Constitution states that "Everyone has inherent dignity and the right to have their dignity respected and protected". This includes both psychological and physical integrity and empowerment of human beings.[378] In *S v Makwanyane* the importance of human dignity in South Africa was stressed:[379]

> The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter Three. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does….

The nature of cyber bullying inherently infringes on and diminishes the dignity of the victim. From the *Makwanyane* statement, as well as the status of the right to human dignity as a founding value of the South African Constitution, it can be inferred that the right to dignity of the victim of cyber bully must be valued highly when weighed against the right to freedom of expression of the cyber bully.

The concept of "Ubuntu" is central to human dignity.[380] The value of Ubuntu gives substance to the right of human dignity and means that values such as morality, compassion and respect for the dignity of others are taken into account when interpreting and protecting this right. Ubuntu is an African concept explained in *S v Makwanyane* as:[381]

> Generally, *ubuntu* translates as *humaneness*. In its most fundamental sense, it translates as *personhood* and *morality*. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of

376 Currie, I. and De Waal, J. *The Bill of Rights Handbook.* 2013 Juta at 250.
377 Hughes, A. *Human dignity and fundamental rights in South African and Ireland.* 2014 Pretoria University Press at 1.
378 Moodley (note 33) at 546.
379 1995(6) BCLR 665 (CC) at paragraph (144).
380 Botha (note 5) at 148.
381 1995(6) BCLR 665 (CC) at paragraph (308).

> communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.

Article 5 of the African Charter on Human and Peoples' Rights states that:[382]

> Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

In this article the right to human dignity is protected, and it is linked to the prohibition against cruel, inhuman and degrading treatment. In order to protect the dignity of human beings, they must not be submitted to such treatment. Section 12(1)(e) of the South African Constitution gives effect to this article. As cyber bullying can be degrading and cruel, there is a duty on the state to protect learners against cyber bullying.

If one looks at the adverse results of cyber bullying, it is clear that the human dignity and respect of the victim of cyber bullying is being infringed on. The flipside of this right is that the cyber bully's dignity is also protected. This means that the dignity of both the bully and the victim must be protected. As Ubuntu is focused on reconciliation rather than confrontation, different, non-confrontational means should be considered when disciplining a cyber bully at school.

The right to human dignity and the right to freedom of expression are often linked. In *Khumalo and Others v Holomisa*, the fundamental importance of the right to freedom of expression to a democratic society is recognised.[383] This right must however be interpreted in the context of the values of human dignity, freedom and equality.[384] The court further states that "it has long been recognised in democratic societies that the

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382 African Charter on Human and People's rights, OAU Doc CAB/LEG/67/3/Rev (1990).

383 *Khumalo and Others v Holomisa* (CCT53/01) [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771 (14 June 2002) at paragraph 25.

384 Id at paragraph 25.

law of defamation lies at the intersection of the freedom of speech and the protection of reputation or good name".[385]

The importance of the right to human dignity must be kept in mind when interpreting the right to freedom of expression as discussed below.

3.3.3 Freedom of expression

Freedom of expression is protected by section 16 of the South African Constitution.[386] Section 16 states that:

(1) Everyone has the right to freedom of expression, which includes –
(a) freedom of the press and other media;
(b) freedom to receive or impart information or ideas;
(c) freedom of artistic creativity; and
(d) academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to –
(a) propaganda for war;
(b) incitement of imminent violence; or
(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

Section 16(2) of the South African Constitution contains internal limitations to freedom of expression.[387] Cyber bullying can, depending on the individual circumstances, be classified as either hate speech or incitement of imminent violence. In these instances, as a form of unprotected speech, the cyber bully cannot rely on his/her right to freedom of expression.

Freedom of expression may also be limited if it infringes on another right in the South African Constitution. There have been a number of Constitutional Court cases regarding freedom of expression in schools, but they mostly relate to forms of expression other than speech.[388] Freedom of speech does, however, form part of the

385 Id at paragraph 26.
386 Currie and De Waal (note 376) at 338.
387 Mawdsley, R.D. and Smit, H.M. 'Students, websites and freedom of expression in the United States and South Africa' 2013 *De Jure* 132 at 154.
388 *Antonie* (note 18); *MEC for Education, KwaZulu-Natal, and Others v Pillay* 2008 (1) SA 474 (CC); *Le Roux* (note 19).

right to freedom of expression in South Africa.[389] In these cases the courts placed an emphasis on the importance of respecting and enhancing rights and values such as human dignity, democracy, mutual respect, tolerance and peace in schools. Although the following two Constitutional Court cases do not relate to cyber bullying, some valuable guidelines can still be identified.

In *Antonie v Governing Body, Settlers High School and Others,*[390] the applicant was a Rastafarian and in keeping with the religion, grew her hair into dreadlocks and covered her head. The learner and her mother approached the principal of the school for permission to wear dreadlocks and a cap, as an expression of her religion, while attending school. She did not receive permission, but proceeded to wear a cap to school. This resulted in her being charged and found guilty, during a disciplinary hearing, of serious misconduct. The principal testified that the "disruption and uncertainty" caused by her defiance could escalate. The court found that the growing of dreadlocks and the wearing of a cap were not prohibited by the Code of conduct for learners. Although this case relates to freedom of expressing religion in particular, there are some principles regarding freedom of expression in schools in general that can be inferred and applied to cyber bullying. Firstly, in order to limit the cyber bully's right to freedom of expression in a justifiable manner, the school's Code of conduct for learners must contain a provision for the regulation of cyber bullying. It should clearly identify cyber bullying as either misconduct or serious misconduct. If a posting on Facebook or a WhatsApp message falls within the ambit of cyber bullying, the cyber bully will not be able to rely on his/her right to freedom of expression.

In *MEC for Education, KwaZulu-Natal, and Others v Pillay*,[391] the respondent asked for an exemption from the Code of conduct for learners of the school for her daughter to wear a nose-stud to school. The exemption was based on the right to freedom of expressing her South-Indian traditions and culture and Hindu religion. The governing body refused the request and prohibited the wearing of nose-studs at school. The High Court found that the school's Code of conduct for learners unfairly discriminate on the ground of culture, and set aside the decision by the governing body. The school

389 *Manuel v Crawford-Browne* (2471/08) [2008] ZAWCHC 13; [2008] 3 All SA 468 (C) (6 March 2008) at paragraph 9.

390 *Antonie* (note 18).

391 2008 (1) SA 474 (CC).

appealed to the Constitutional Court on the basis that allowing S to wear a nose-stud or allowing others similar exemptions from the school's Code of conduct for learners would impact negatively on discipline at the school and, as a result, on the quality of the education it provided. The court found that expressing one's religion would not impact negatively on the discipline of the school and that schools must put proper procedures in place to make provision for exemptions to the school's Code of conduct for learners. From this case, it can be argued that freedom of expression is protected strongly, unless it impacts negatively on the discipline at school, and thus on the other learners' right to education.

There is one case specifically relating to a form of freedom of expression and cyber bullying in schools, thus the case will be discussed in detail.[392] In *Le Roux and Others v Dey*, the Constitutional Court had to decide on a case where a school deputy principal instituted a claim for infringement on the dignity and reputation against three learners. The facts can be summarised briefly as follows: A learner aged 15 at a prominent high school created an image in which the heads of the principal and deputy principal was pasted onto a picture of two gay bodybuilders in a compromising position. The picture included the two men sitting with their legs over one another's and their hands in the region of each other's genitals. Mr Le Roux pasted an image of the school badge on the picture to obscure the genitals. On the suggestion of other learners, the image was posted on the school noticeboard. The learners involved were punished by the school authorities. The children were also criminally charged, and they were sentenced to community service, e.g. cleaning cages at a local zoo. Dr Dey instituted a civil claim in the High Court, on the basis of injury to his dignity, good name and reputation. The High Court granted compensation of R 45 000 for defamation and insult to dignity. The supreme court of appeal upheld this decision. The applicants took the case on appeal to the Constitutional court.

The majority judgment of the Constitutional Court focused mainly on the principles of defamation. In his majority judgment Brand AJ confirmed the elements of defamation as a:[393]

(a) wrongful and

392 *Le Roux* (note 19).

393 Id at paragraph 84.

(b) intentional
(c) publication of
(d) a defamatory statement
(e) concerning the plaintiff.

The court stated that the only thing the plaintiff needed to prove at the outset of the case was that there was publication of defamatory matter concerning him- or herself. This creates the presumption that the publication was wrongful and intentional, and places the burden on the defendant to prove that it was not wrongful or intentional.[394] What is important to note for the definition of cyber bullying is that the court defined **publication** as speech, print, photographs, sketches, cartoons or caricatures.[395] Once it has been established that there is a defamatory publication, there is a two-stage enquiry. Firstly, the ordinary meaning of the publication must be established, and secondly, it must be established whether that meaning is defamatory. In order to do that, one must apply the objective test of what "meaning the reasonable reader of ordinary intelligence would attribute to the statement".[396] Once the meaning has been established via this objective test, the court will accept that the statement was defamatory if it is "likely to injure the good esteem in which the plaintiff is held by the reasonable person to whom it had been published".[397] In the light of the discussion above, the court had to establish whether the picture was defamatory to Dr Dey. On the first step of the enquiry, the court ruled that a reasonable observer would understand that Dr Dey and the principal were being associated with the "indecent situation that the picture portrays".[398] The court also stated that the purpose of this picture was to tarnish Dr Dey's image as a figure of authority.[399]

The court emphatically stated that although it can be argued that a reasonable observer would understand that the picture was a prank by a schoolboy, and that teachers are often the subject of such jokes, there is a line that may not be crossed.[400]

394 Id at paragraph 85.
395 Id at paragraph 86.
396 Id at paragraph 89.
397 Id at paragraph 91.
398 Id at paragraph 105.
399 Ibid.
400 Id at paragraph 116-117.

> That must be so because teachers are entitled to protection of their dignity and reputation; no less than to the protection of their bodily integrity. Conversely, learners are not exempted from delictual liability. In the case of bodily integrity and damage to property the line is usually bright and clear. If a schoolboy, as part of a prank, pulls a chair from under a teacher sitting down, the schoolboy will be liable for the damages resulting from the injuries the teacher may suffer…[401]

The court also stated that no grounds of justification were raised by the applicants. If it had been raised, the court would have had to investigate the balance between freedom of expression of learners and the dignity of educators.[402] The learners were found guilty of defamation and infringement of dignity. When awarding damages, the court took into account that the applicants were school children and were already punished.[403]

Judges Froneman and Cameron concurred by awarding damages based on the dignity claim, to Dr Dey. The judges determined that the picture did not infringe Dr Dey's reputation, but that his dignity and privacy was impaired.[404] The common law requirements for a dignity claim are a wrongful act, deliberately inflicted, impairing the plaintiff's dignity.[405] The plaintiff must also establish objectively, that the image portrayed him wrongfully and subjectively, that his feelings were violated.[406] From the testimony, it was evident that the plaintiff was hurt and affronted by the image, and thus the subjective element was met. The judges succinctly explained the objective standard. First, it was stressed that the objective standard was necessary to avoid trivial claims by persons that might be oversensitive. Because dignity claims are based on injured self-esteem or the feelings of the injured person, it had to be asked whether the reasonable observer would have considered Dr Dey's feelings because of the picture reasonable.[407] The judges found that a reasonable person in Dr Dey's position would be affronted by a lewd picture of themselves, and thus found that the claim for infringement of dignity must succeed.[408]

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401 Id at paragraph 118.
402 Id at paragraph 127.
403 Id at paragraph 152.
404 Id at paragraph 174.
405 Ibid.
406 Id at paragraph 175.
407 Id at paragraph 179.
408 Id at paragraph 190.

The judges made interesting observations with regard to jurisdiction. It was argued for the plaintiff that this case is important for maintenance of discipline at schools, and that it will adversely affect the authority of teachers should Dr Dey not succeed in his claim.[409] The judges found that the school did effectively discipline the learners at school level, and that Dr Dey chose to institute a civil action in his private capacity. The courts judged the case based on the civil claim, thus the importance of maintaining proper discipline at the school was not taken into account during the judgment.[410] By separating the school's code of conduct and duty/right to discipline the applicants from the civil claim instituted by Dr Dey, the court avoided the American problem of school jurisdiction.

With regard to restorative justice, the court justified their order by stating that human dignity is at the heart of the South African Constitution.[411] Although reconciliation between parties is an important constitutional endeavour, the law cannot enforce it, but the law should create conditions in which it is enabled.[412] Because the matter is already before the court, Dr Dey did not accept the apology of the respondents, and the importance of the right to human dignity, restorative justice was not applicable in this case.

In his minority judgment, Yacoob J stressed the importance of the right to dignity of both the respondent and the applicants, as well as the importance of protecting the right to freedom of expression.[413] In considering the importance of all the different human rights affected by this case, Yacoob J concluded that:[414]

> if there are two reasonable interpretations of an image made by a child, one which renders the image defamatory and another which does not have that consequence, courts should prefer that interpretation which does not hold the child liable provided that the construction is not strained.

He held that the average reasonable observer would have seen this as an attack on authority and not a personal attack against Mr Dey. He also made the following two

409 Id at paragraph 190.
410 Ibid.
411 Id at paragraph 202.
412 Ibid.
413 Id at paragraph 46–47.
414 Id at paragraph 51–54.

statements that are of importance to regulating cyber bullying in schools. Firstly, courts must balance the rights to freedom of expression and dignity appropriately.

A claim for damages due to an attack on human dignity will only succeed if it is firstly of such a serious nature as to justify the limitation of the right to freedom of expression.[415] Secondly, when there are school processes and criminal proceedings available in a situation, it is not justified to institute civil claims against children to punish them.[416]

Even though the minority and majority judgments made valuable statements on the balancing of the different rights in this novel situation, I agree with the minority judgment. However, there is support for the majority judgment. For example, Neethling and Potgieter argue that the court applied the principles of the law of defamation correctly, and that this judgment confirms that learners at school are not immune to actions of defamation by the educators if the learner's actions justify such a claim.[417] One can, however, argue that the law of defamation is not excluded from the reach of the best interests of the child principle. The majority judgment focuses on the rights of the educators and does not consider what will be in the best interests of the children. Although it is important to protect the human rights of educators, by being so determined in setting an example that the human rights of educators may not be infringed on, the court ignored all the different factors that may be taken into account in determining the best interests of the learners on the one hand, and the right to dignity of the educators on the other hand.

Buthelezi strongly disagrees with the minority judgment. He argues that while freedom of expression is important and needs to be protected, the South African Constitution is founded on the value of human dignity, and that freedom of expression and the best interests of the child were overemphasised at the expense of human dignity.[418] With the value placed on dignity in the South African Constitution, he has a valid argument. However, one should also not lose sight of the importance and value of the rights to

415 Id at paragraph 73.

416 Id at paragraph 76.

417 Neethling, J. and Potgieter, J.M. 'Defamation of school teachers by learners: Le Roux v Dey 2011 3 SA 274 (CC) 2011(32)(3) *Obiter* 721 at 730.

418 Buthelezi, M.C. 'In dissent: A critical review of the minority judgment of Yacoob J Le Roux v Dey 2011 (3) SA 274 (CC) 2012(33)(3) *Obiter* 719 at 731.

education and the best interests of the child. As stated above, the best interests of a child is a positive right for all children and not only a principle to consider when other rights are interpreted.

The principles that can be taken from the three cases discussed above are:

- There must be a policy on cyber bullying in place in order to regulate cyber bullying.
- This policy must protect the right to human dignity of both the bully and the victim.
- The policy must provide for respecting and enhancing rights and values such as human dignity, democracy, mutual respect, tolerance and peace in schools.
- The freedom of expression of the bully must impact negatively on the successful function of the school before his or her freedom of expression may be limited (this is in line with the American case law on freedom of speech in schools).
- The vulnerability of children should be taken into account during punishment for cyber bullying. Civil action must be avoided.

The right to freedom of expression is recognised in article 13 of the CRC.

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.
2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
   (a) For respect of the rights or reputations of others; or
   (b) For the protection of national security or of public order, or of public health or morals.

This child specific provision for the protection of freedom of expression gives clear guidelines on how this right should be protected, and when it may be limited. This right may be limited for the purpose of protecting the rights and reputation of others. This is a clear argument for the limitation of freedom of expression of the cyber bully when it limits the rights of the victim.

Article 19 protects the importance of freedom of expression. It declares that “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold

opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".

This article means that the right of learners to impart ideas and opinions via social media is protected. The protection of this right impacts on cyber bullying, as it is sometimes difficult to discern whether the learner is sharing an opinion, or bullying another learner.

The right to freedom of expression is also protected in the ICCPR.[419] The Human Rights Committee has issued a General Comment to clarify the right to freedom of expression further.[420] In paragraph 11 of the General Comment it is stated that the right to freedom of expression includes "political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse. It may also include commercial advertising". Paragraph 12 of the General Comment emphasises that the protection of freedom of expression extends to expression by means of "internet-based modes of expression". This right may be limited, but it must be done circumspectly and in accordance with the law. This means that learners have a right to express their personal opinions on the internet, but that the right may be limited in accordance with the law. If a learner expresses him or her in a way that constitutes cyber bullying, the right may be limited to protect other learners.

Article 9 of the ACHPR declares that individuals have the right to receive information and to express their opinions in the law. Thus, it can be argued that learners have the right to receive and send messages on social media and using information technology. This is in line with the right to freedom of expression in the ICCPR.

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419 Article 19
(1) Everyone shall have the right to hold opinions without interference.
(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
(3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
(a) For respect of the rights or reputations of others;

420 General Comment No. 34 (2011) Article 19: Freedoms of opinion and expression CCPR/C/GC/34 http://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf (Last accessed on 1 December 2016).

The right to freedom of expression is again recognised in article 7 of the ACRWC, it states that “Every child who is capable of communicating his or her own views shall be assured the rights to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws”.

It is important to bear in mind that the context in which rights are protected is also relevant. In this instance, the educational context in schools will impact on how freedom of expression is interpreted. Thus, an emphasis may be placed on the right to education.

3.3.4 Right to education

The right to education is protected in the South African Constitution. Section 29(1) of the South African Constitution states that everyone has the right to basic education as well as further education. The right to further education must be made available by the state progressively.

The case of *Governing Body of the Juma Musjid Primary School and Others v Essay NNO and Others (Centre for Child Law and Socio-Economic Rights Institute of South Africa as Amici Curiae)* deals specifically with the right to education.[421] On appeal the Constitutional Court stressed the importance of protecting the right to education and the best interests of the child. The court held that the right to a basic education is “immediately realisable” as it contains no internal limitations requiring that the right be “progressively realised” in “available resources” subject to “reasonable legislative measures”.[422] It emphasises that the right to education is an unqualified right, and is thus not internally limited.[423] A limitation of the right to an education is only justifiable if it complies with the limitation clause.[424] The court also found that the state had a positive obligation in terms of the South African Constitution to “respect, protect, promote and fulfil” the rights contained in the Bill of Rights. The court gave precedence

421 2011 (8) BCLR 761 (CC).
422 Id at paragraph 37.
423 Id at paragraph 19.
424 Id at paragraph 37.

to the best interests of the learners over the right to property of the other party involved in the case. From this case, it can also be argued that the courts are willing to limit other human rights in favour of the right to education and the best interests of the child.

Thus, the principle that can be taken from this case is that the right to basic education is unqualified. The state has a duty to positively provide education, and other individuals have a negative duty to not infringe on this right. It can be argued that freedom of expression should be limited where it has a negative impact on the education of the other learners in school, and not only the dignity of the victim. This is once again in line with American case law, and the principles set out on freedom of speech (cf. section
2.5.1 American case law regarding freedom of speech in schools). The South African constitution is silent on the content of the right to education, and we should thus be informed by IHRL.

The right to education was recognised formally as a human right in 1984 in the UDHR.[425]

Article 26 states that:

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.

This section not only stresses the right to education, but also the purpose and goals of education. Article 26(2) indicates the directives for any law and policy on cyber bullying in schools, and emphasises the fostering of understanding, friendship and tolerance.

425 Unicef, A Human rights-based approach to education for all http://www.unicef.org/publications/files/A_Human_Rights_Based_Approach_to_Education_for_All.pdf (Last accessed on 1 December 2016) at 7.

The international community adopted six goals for education at the 2000 World Education forum, namely:[426]

1. Expand early childhood care and education.
2. Provide free and compulsory primary education for all.
3. Promote learning and life skills for young people and adults.
4. Increase adult literacy by 50 percent, especially for women.
5. Achieve gender parity by 2005 and gender equality by 2015.
6. Improve the quality of education.

These goals impact on the duty of schools to protect learners against cyber bullying. Life skills of young people should be promoted; thus, learners must be educated with regard to the dangers of cyber bullying. As cyber bullying impacts on the quality of education a learner receives, it is another reason to regulate cyber bullying.

Unicef states that full realisation of the right to education is holistic and encompasses access to education, educational quality (based on human rights values and principles) and the environment in which education is provided.[427] This statement advocates an inclusive and whole-school approach to regulating cyber bullying. In education, discipline and regulation of cyber bullying, respect for human rights should be promoted.

The right to education includes the right to access to educational facilities and provisions, but also includes non-discrimination in the education system, as well as the improved quality of education.[428] Thus, states are not only obliged to provide education or access to education, but they must also provide a certain standard of education. As cyber bullying may interfere with the quality of education a learner receives, the problem must be addressed.

426 Id at xi.
427 Id at xi.
428 Id at 7.

Article 13 of the International Covenant on Economic, Social and Cultural rights (ICESCR) [429] declares that:

> The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

This article once again emphasises the aims, goals and purpose of education. Human dignity and a respect for human rights must be promoted among learners, and that includes prevention and regulation of cyber bullying. The minimum standards for the realisation of the right to education as contained in the 4A Framework refer to availability, accessibility, acceptability and adaptability.[430] The standards of adaptability and accessibility are of special interest for the regulation of cyber bullying in schools. Section 6 of the general comments defines the above as:

> **Accessibility**: educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party.
>
> **Adaptability**: education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.

Learners must be protected against discrimination, which can also happen via social media. Cyber bullying is a new phenomenon, and it is the duty of states to develop education law and policy to adapt and protect learners against this phenomenon.

Article 28 of the CRC protects the right to education, and article 29 states the aims of education. Article 28 obliges states parties to take all necessary measures to ensure that discipline in school is administered in a way that is consistent with the human dignity of the child, and is central to the protection of the rights of children.[431]

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429 International Covenant on Economic, Social and Cultural Rights, GA Res 2200A (XXI), UN Doc A/6316 (16 December 1966).

430 United Nations. 1999. Implementation of the International Covenant on Economic, Social and Cultural Rights. General Comment No 13: The right to education (Article 13 of the International Covenant on Economic, Social and Cultural Rights). 21st Session. UN Doc E/C/ 12/1999/10. Available at: http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/CESCR_General_Comment_13_en.pdf (Last accessed on 1 December 2016).

431 Coetzee, S.A. 'Discipline in Nigerian schools within a human rights framework' *African Human Rights Law Journal* 2010(10)(2) 478 at 483.

The CRC goes further than previous IHRL instruments in introducing unique perspectives regarding the right to education.[432] These perspectives include the equality of opportunity in education, removing barriers to education, respect and dignity when disciplining a learner, and the promotion of the development of children. It can thus be argued that cyber bullying must be regulated in order to prevent harm, such as a learner who drops out of school, or not fully realising his or her right to education due to his/her quality of education being negatively affected by cyber bullying. Respect and dignity of learners must be fostered in the school environment, thus any legal framework regarding cyber bullying must be reconciliatory and not punitive; discipline must be positive and promote the dignity of the bully.

This means that any policy on the regulation of cyber bullying in schools must protect the human rights of the victim, the bully and other learners at school. These rights are interrelated, and all the human rights should be balanced when developing the policy. The cyber bullying policy must protect marginalised groups, and protect against power imbalances between learners. Learners and educators must be empowered to protect themselves against cyber bullying, and legal mechanisms for addressing cyber bullying should be implemented.

The law and policy framework in chapter 6 must be measured against and comply with the principles stated above in order to comply with the CRC requirements for the protection of the right to education. As we are dealing with learners in schools, the IHRL standard of best interests of the child will impact on this framework.

Article 11 of the ACRWC offers a comprehensive provision for the right to education, and contains elements relevant to the regulation of cyber bullying. Firstly, states parties are obliged to reduce dropout rates, as one of the harmful consequences of cyber bullying is absenteeism (cf. section 2.2.2 The harm caused by cyber bullying), this is a factor that needs to be addressed by states. Secondly, the article not only speaks to the aims of education, but also provides for the respect of the dignity of the child. Education must foster respect for human rights, and strengthen traditional values

[432] Table found on page 8 of Unicef, A Human rights-based approach to education for all http://www.unicef.org/publications/files/A_Human_Rights_Based_Approach_to_Education_for_All.pdf (Last accessed on 1 December 2016).

and morals. This respect for human rights includes the respect for the privacy of the cyber bully and the victim of cyber bullying.

3.3.5 Right to privacy

Another right that may impact on the regulation of cyber bullying is the right to privacy. Section 14 of the South African Constitution states that:

> Everyone has the right to privacy, which includes the right not to have—
> (a) their person or home searched;
> (b) their property searched;
> (c) their possessions seized; or
> (d) the privacy of their communications infringed.

Section 14(d) is of particular interest as it protects the privacy of communication which will include telecommunication. As cyber bullying involves some form of communication, the privacy of both the cyber bully and the victim is protected.

Article 10 of the ACRWC states that:

> No child shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to the attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks.

UDHR Article 12 protects the right to privacy, and determines that “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks”.

These articles arguably protect the rights of the cyber bully as well as the victim. The cyber bully is protected against interference with his/her correspondence (this will include SMS’s, e-mails etc.) and the victim of cyber bullying is protected against attacks on his/her honour.

The right not to have one’s property searched also relates to the cyber bully and the victim. In most instances at schools, it will be easiest to seize the cellphone or the laptop of the offender to find proof of the cyber bullying. For an example on how the

right to privacy is protected in schools in South Africa, one can look at how searches and seizures in school are regulated, and how the right to privacy came into play in the legislation and policy on searches and seizures. Although the Schools Act does not deal with individual searches, the Regulations to prohibit initiation practices and the Regulations for safety measures authorises a search of an individual learner or his/her property if there a reasonable suspicion that he/she is in possession of a dangerous object.

As the right to privacy is not absolute, it can be limited if such a limitation is justified in terms of section 36 of the South African Constitution. The provision mentioned above is an example of how this right may be limited. It must also be borne in mind that the limitation must be just and reasonable, and that it must be done in terms of a law of general application.[433]

3.3.6 Just administrative action

In any law and policy regulating cyber bullying, section 33 of the South African Constitution should be taken into account. The importance of this right to discipline is evident from the fact that the Schools Act requires that schools' Codes of conduct for learners must provide for due process.[434]

Section 33 states the following:

(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
(3) National legislation must be enacted to give effect to these rights, and must –
(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
(b) impose a duty on the state to give effect to the rights in subsections; and
(c) promote an efficient administration.

In learners' disciplinary hearings, the following must be taken into account:

433 South African Constitution (note 10) at section 36.
434 Schools Act (note 1) at section 8(5).

1. Reasons for the decision must be given. When the governing body of the schools finds a learner guilty of cyber bullying, they must provide reasons for the finding. The reasons given for the finding must be fair and just.
2. The learner must be informed of his or her right to appeal the decision made.
3. Fair hearing and notice – There must be a fair hearing, and the learner must be given a chance to state his/her side of the case. Adequate notice of the hearing must be given to enable the learner to prepare for the hearing.
4. Impartial tribunal – The decision in the hearing must be made by a body that is impartial. This means the parties involved does not have a personal interest in the outcome of the hearing. Right to information – The learner must be informed of the particulars regarding the case against him- or herself.
5. Right to representation – In serious or complex matters, the parties are entitled to legal representation.[435]

UDHR Article 10 states that "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".

Section 33 of the South African Constitution echoes this article, and specifies that any hearing must be independent and fair. Thus, any law and policy regarding cyber bullying must provide for substantially and procedurally fair disciplinary hearings.

It is important to follow due procedure and to implement forms of discipline in line with the goals of education. Any hearing with regard to cyber bullying in schools must comply with section 33 of the South African Constitution. This means that hearings must be substantially and procedurally fair. The elements for procedural fair hearings in schools were discussed in the paragraph above. In order for a hearing to be substantially fair, cyber bullying must be included in schools' Codes of conduct for learners. Substantial fairness, *inter alia*, requires that a rule must be known.[436]

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435 Squelch, J. 'The right to administrative justice: the implications for school governing bodies' in *A critical chronicle of the South African Education Law and Policy Association (SAELPA) 1996-2005*, edited by J Beckmann. Pretoria: SAELPA 2006:366-368.

436 For further explanation on this, please see *Antonie* (note 18).

In this section I examined the duties the South African Constitution places on schools to protect learners against cyber bullying. The different human rights that may impact on the regulation of cyber bullying were also investigated.

3.4 Cyber specific IHRL

As the rights contained in the South African Constitution are not the only factors relevant to cyber bullying, one must also look at international conventions specifically pertaining to cyber crimes.

3.4.1 The African Union Convention on Cyber Security and Personal Data Protection[437]

In June 2014, the African Union adopted the Convention on Cyber Security and Personal Data Protection (hereinafter the African Convention on Cyber Security). The key objectives of this document are to:

- define key cyber terminologies in legislation;
- develop general principles and specific provisions related to cyber legislation;
- outline cyber legislative measures required at Member State level;
- develop general principles and specific provision on international cooperation as related to cyber legislation.[438]

The African Convention on Cyber Security defines a few key terms relevant to cyber bullying. The first definition is that of the concept of **child pornography**.

> **Child pornography** means any visual depiction, including any photograph, film, video, image, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where:
>
> a) the production of such visual depiction involves a minor;
> b) such visual depiction is a digital image, computer image, or computer-generated image where a minor is engaging in sexually explicit conduct or when images of their sexual organs are

437 The African Union Convention on Cyber Security and Personal Data Protection EX.CL/846(XXV). This document is not signed or ratified by South Africa. Even though South Africa is not bound by this Convention, it does address cyber security issues, and some guidelines can be taken from this document.

438 http://pages.au.int/infosoc/cybersecurity, (Last accessed on 1 December 2016)

produced or used for primarily sexual purposes and exploited with or without the child's knowledge;

c) such visual depiction has been created, adapted, or modified to appear that a minor is engaging in sexually explicit conduct.

As sexting is defined as the sending of nude or semi-nude photos or videos and/or sexually suggestive messages via mobile phone texting or instant messaging,[439] sexting in a school environment constitutes child pornography as per the definition given above. This is because learners at school will mostly be under 18 years, and thus comply with the definition of a minor in terms of section 28 of the South African Constitution. Even a learner who voluntarily sends a nude or explicit picture of himself/herself to another learner will be guilty of child pornography, as he/she is producing a sexually explicit visual depiction of a minor.[440]

The second definition is that of the concept of **electronic communication**. It is defined as "any transmission of signs, signals, written material, pictures, sounds or messages of whatsoever nature, to the public or a section of the public by electronic or magnetic means of communication".

This definition contains guidelines on what should be included as electronic communication in a definition of cyber bullying. Pictures and sound clips are included in this definition.

The third definition is that of the phrase **racism and xenophobia in information and telecommunication technologies**.

> **Racism and xenophobia in information and telecommunication technologies** means any written material, picture or any other representation of ideas or theories which advocates or encourages or incites hatred, discrimination or violence against any person or group of persons for reasons based on race, colour, ancestry, national or ethnic origin or religion.

Any material advocating hate or discrimination against certain groups is treated as a serious infringement. Marginalised groups are further protected in this Convention.

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439 Badenhorst (note 31) at 2.

440 This is confirmed by the definition of child pornography in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

Article 10 declares the “rights of all people, without discrimination of any kind, to use the Internet as a vehicle for the exercise and enjoyment of their human rights, and for participation in social and cultural life, should be respected and protected”.

Article 13 also implies the protection against unfair discrimination by declaring that:

> To help ensure the elimination of all forms of discrimination on the basis of gender, women and men should have equal access to learn about, define, access, use and shape the Internet. Efforts to increase access should therefore recognise and redress existing gender inequalities, including women’s under-representation in decision-making roles, especially in Internet governance.

Article 8 of the African Convention on Cyber Security places an obligation on states to establish a legal framework regarding cyber crimes that protect individuals against the infringement of their human rights.[441] The right to privacy is specifically mentioned. The state consequently has a duty to protect the privacy of learners against cyber bullies. A legal framework for cyber bullying in schools should be established. Article 25 further states that procedural measures to pursue and prosecute those who commit cybercrimes should be put in place.

The legal framework for the regulation of cyber bullying will thus have to be cognisant of the cyber bully’s rights too. States’ obligation to create a culture of cyber security[442] emphasises the need for programmes to educate stakeholders regarding online safety and cyber bullying.

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441 Article 8: Objective of this Convention with respect to personal data

1. Each State Party shall commit itself to establishing a legal framework aimed at strengthening fundamental rights and public freedoms, particularly the protection of physical data, and punish any violation of privacy without prejudice to the principle of free flow of personal data.
2. The mechanism so established shall ensure that any form of data processing respects the fundamental freedoms and rights of natural persons while recognizing the prerogatives of the State, the rights of local communities and the purposes for which the businesses were established.

442 Article 26: National cyber security system

1. Culture of Cyber Security

a) Each State Party undertakes to promote the culture of cyber security among all stakeholders, namely, governments, enterprises and the civil society, which develop, own, manage, operationalize and use information systems and networks. The culture of cyber security should lay emphasis on security in the development of information systems and networks, and on the adoption of new ways of thinking and behaving when using information systems as well as during communication or transactions across networks.

Article 29 of the African Convention on Cyber Security specifies certain cyber offences. Of relevance is article 29(3)(1)(a-h)

1. State Parties shall take the necessary legislative and/or regulatory measures to make it a criminal offence to:

a) Produce, register, offer, manufacture, make available, disseminate and transmit an image or a representation of child pornography through a computer system;
b) Procure for oneself or for another person, import or have imported, and export or have exported an image or representation of child pornography through a computer system;
c) Possess an image or representation of child pornography in a computer system or on a computer data storage medium;
d) Facilitate or provide access to images, documents, sound or representation of a pornographic nature to a minor;
e) Create, download, disseminate or make available in any form writings, messages, photographs, drawings or any other presentation of ideas or theories of racist or xenophobic nature through a computer system;
f) Threaten, through a computer system, to commit a criminal offence against a person for the reason that they belong to a group distinguished by race, colour, descent, national or ethnic origin or religion where such membership serves as a pretext for any of these factors, or against a group of persons which is distinguished by any of these characteristics;
g) Insult, through a computer system, persons for the reason that they belong to a group distinguished by race, colour, descent, national or ethnic origin, or religion or political opinion, if used as a pretext for any of these factors, or against a group of persons distinguished by any of these characteristics;
h) Deliberately deny, approve or justify acts constituting genocide or crimes against humanity through a computer system.

3. State Parties shall take the necessary legislative and/or regulatory measures to ensure that, in case of conviction, national courts will give a ruling for confiscation of the materials, equipment, instruments, computer program, and all other devices or data belonging to the convicted person and used to commit any of the offences mentioned in this Convention.

Child pornography through electronic means and spreading racist or xenophobic messages through electronic means are specifically mentioned as crimes. For example, spreading a nude or suggestive picture of another learner in order to embarrass them will constitute child pornography. Ridiculing a student via a medium such as Facebook for being from a different country or making racist comments online will fall under “spreading racist or xenophobic messages”.

The African Convention on Cyber Security obliges States to take legislative measures to punish offences created in the African Convention on Cyber Security, and to put procedural measures in place for the search of, and protection of computer systems to convict perpetrators of cyber crimes successfully.

The Convention contains provisions regarding the search, seizure and safekeeping of computer data for the purposes of empowering competent authorities to investigate a cyber crime. These provisions can act as guidelines for schools in the safekeeping of evidence in instances of cyber bullying. For instance, measures must be put in place to access and search data on a computer, and competent authorities must be empowered to collect and record data, or to compel service providers to collect or record data by means of a computer system. Service providers should also be compelled to keep any such investigations confidential.

The African Convention on Cyber Security provides guidelines for cyber security on a regional level and can be used to give more detail as to what needs to be included in cyber bullying law and policy. It is, however, not the only regional international instrument that specifically deals with cyber crime.

3.4.2 Council of Europe Convention on Cybercrime[443]

Although this Convention is not a regional convention for South Africa, some valuable guidelines may be taken from this Convention.

This Convention creates offences related to child pornography. Certain instances of sexting may arguably fall under child pornography. These offences are very similar to the offences created in the African Convention on Cyber Security.

Article 9 states that:

(1) Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct:

a producing child pornography for the purpose of its distribution through a computer system;

b offering or making available child pornography through a computer system;

c distributing or transmitting child pornography through a computer system;

443 Council of Europe Convention on Cybercrime Budapest, 23.XI.2001.

d procuring child pornography through a computer system for oneself or for another person;

e possessing child pornography in a computer system or on a computer-data storage medium.

(2) For the purpose of paragraph 1 above, the term "child pornography" shall include pornographic material that visually depicts:

a a minor engaged in sexually explicit conduct;

b a person appearing to be a minor engaged in sexually explicit conduct;

c realistic images representing a minor engaged in sexually explicit conduct.

Interestingly, this Convention provides for the criminal offence of aiding and abetting in a cyber crime. According to article 11 of the Convention:

1 Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, aiding or abetting the commission of any of the offences established in accordance with Articles 2 through 10 of the present Convention with intent that such offence be committed.

2 Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, an attempt to commit any of the offences established in accordance with Articles 3 through 5, 7, 8, and 9.1.a and c. of this Convention.

Thus, it may be argued that the person who forwards an image of cyber bullying, or indirectly participates in the cyber bullying, is also guilty of a cyber crime.

The Convention contains provisions regarding the search, seizure and safekeeping of computer data for the purposes of empowering competent authorities to investigate a cyber crime. These provisions can act as guidelines for schools in the safekeeping of evidence in instances of cyber bullying. Article 20 provides for states to adopt legislative measures to collect data in a very similar fashion as the measures in the African Charter on Cyber security. The only addition is to expand the responsibilities of the service provider further to collect or record data associated with specified communications, or to assist authorities in collecting such data.

3.5 South African legislation and common law

There are no specific laws or policy governing cyber bullying in South Africa. The response to cyber bullying depends on whether the bullying act constitutes a contravention of existing criminal law, common law, or civil law provisions.[444]

444 Badenhorst (note 31) at 7.

3.5.1 Criminal law remedies against cyber bullying

In this section I review possible sanctions under criminal law for cyber bullies.

3.5.1.1 Protection from Harassment Act 17 of 2011

This Act provides comprehensive protection against electronic stalking irrespective of whether the stalker is known or unknown to the victim.[445] The aims of the Act are stated in the preamble:

> SINCE the Bill of Rights in the Constitution of the Republic of South Africa, 1996, enshrines the rights of all people in the Republic of South Africa, including the right to equality, the right to privacy, the right to dignity, the right to freedom and security of the person, which incorporates the right to be free from all forms of violence from either public or private sources, and the rights of children to have their best interests considered to be of paramount importance;
>
> AND IN ORDER to –
>
> *(a)* afford victims of harassment an effective remedy against such behaviour; and
>
> *(b)* introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act,

The purpose of this Act is to protect victims of harassment and offer them legal remedies while still protecting the human rights of all the parties involved.

Section 1 of the Act defines harassment as follows:

> "harassment" means directly or indirectly engaging in conduct that the respondent knows or ought to know:
>
> *(a)* causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably –
>
> (i) following, watching, pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be;
>
> (ii) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or
>
> (iii) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving them where

445 Sissing, S.K. A Criminological exploration of cyber stalking in South Africa LLM dissertation Unisa 2013 at 77.

they will be found by, given to, or brought to the attention of, the complainant or a related person;

(b) amounts to sexual harassment of the complainant or a related person.

In terms of the same section, "harm" is defined as any mental, psychological, physical or economic harm.

"Sexual harassment" in turn is defined as any –

(a) unwelcome sexual attention from a person who knows or ought reasonably to know that such attention is unwelcome;

(b) unwelcome explicit or implicit behaviour, suggestions, messages or remarks of a sexual nature that have the effect of offending, intimidating or humiliating the complainant or a related person in circumstances, which a reasonable person having regard to all the circumstances would have anticipated that the complainant or related person would be offended, humiliated or intimidated;

(c) implied or expressed promise of reward for complying with a sexually oriented request; or

(d) implied or expressed threat of reprisal or actual reprisal for refusal to comply with a sexually oriented request.

Cyber bullying can be regulated under the definition of harassment if a learner knowingly engages in conduct that causes harm by sending electronic communication. A victim of cyber stalking is allowed to apply to a court for an interim protection order. Thus, the Act provides for an inexpensive civil remedy against harassment.[446]

Section 2 sets out the process for applying for such an order.[447] No legal representation is required for the application process, and it is considered to be

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446 Sewsunker, S. 'Inexpensive civil remedy for harassment' 2013(34) *DeRebus* 126 at 126.

447 *2.* (1) A complainant may in the prescribed manner apply to the court for a protection order against harassment

(2) If the complainant or a person referred to in subsection (3) is not represented by a legal representative, the clerk of the court must inform the complainant or person in the prescribed manner, of –

(a) the relief available in terms of this Act; and

(b) the right to also lodge a criminal complaint against the respondent of *crimen iniuria,* assault, trespass, extortion or any other offence which has a bearing on the *persona* or property of the complainant or related person.

(3) *(a)* Notwithstanding the provisions of any other law, the application for a protection order may, subject to paragraph *(b),* be brought on behalf of the complainant by another person who has a material interest in the well-being of the complainant or related person.

straightforward.[448] According to section 2(3)(b) of the Act, an application for relief must be brought with the written consent of the complainant, unless the court is of the opinion that the complainant cannot do so. This provision impacts on parents that may want to seek relief on behalf of their child. The child will have to give written consent for the proceedings to continue. It is questionable whether a young learner will be able to give consent that an application may be brought on their behalf. This act needs to be in line with the principles of child consent and the evolving capacity of the child.

Section 2(4), however, states that a child or a person on behalf of a child may bring an application for protection to the court without the assistance of a parent or guardian. This means that a child does not need the permission of his/her parents to bring an application for a protection order to court. With the written consent of the child, an educator may bring such an order on behalf of the child, without the consent of the parent/guardian.

Section 10 of the Act provides further protection measures for the person applying for the interim protection order. These measures include prohibiting the harasser to continue with the harassment or to enlist the help of another to continue the harassment, as well as any other measures the court deems fit. Section 10 provides protection for the victim of cyber bullying. Posting or leaving comments on a social network that is open to comments from other persons, is inviting or enlisting help to continue the harassment. Section 8 of the Act provides even more protection by safeguarding the anonymity of the complainant. Out of its own accord or by request, the court can order that the hearing takes place behind closed doors, and that the identity of the complainant and the details of the hearing not be made public. This section can be utilised gainfully in instances of cyber bullying. Victims of cyber bullying

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(b) An application referred to in paragraph *(a)* must be brought with the written consent of the complainant, except in circumstances where the complainant is a person who, in the opinion of the court, is unable to do so.

(4) Notwithstanding the provisions of any other law, any child, or person on behalf of a child, may apply to the court for a protection order without the assistance of a parent, guardian or any other person.

(5) The application referred to in subsection (1) may be brought outside ordinary court hours or on a day which is not an ordinary court day, if the court has a reasonable belief that the complainant or a related person is suffering or may suffer harm if the application is not dealt with immediately.

(6) Supporting affidavits by persons who have knowledge of the matter concerned may accompany the application.

(7) The application and affidavits must be lodged with the clerk of the court who must immediately submit the application and affidavits to the court

448 Sewsunker (note 447) at 126.

who do not report the cyber bullying for fear of retaliation can be encouraged to report the bully by being assured the complaint will be kept private.

The Act makes provision for criminal sanctions. Section 11 stipulates that when a protection or interim protection order is granted, the court must also authorise the issuing of a warrant for arrest. If the conditions of the protection order are violated, the warrant of arrest becomes active. Section 18 of the Act provides for a sentence of imprisonment of no longer than five years and a fine if the Act is breached.

3.5.1.2 Assault

Snyman defines assault as the unlawful and intentional act or omission which directly or indirectly impairs the bodily integrity of another person, or which inspires the belief or fear that such an impairment will take place immediately.[449]

The Regulations to prohibit initiation practices, defines assault as the unlawful and intentional use of direct or indirect force on another person or threatening a person with immediate personal violence in such a manner that person believes the threat will be carried out.[450]

The act of cyber bullying can qualify as assault where the victim believes that the violence he/she is being threatened with is serious and will occur. As we are dealing with cyber bullying and children, one would want to avoid charging a child with such a serious crime, and prevention and regulation of cyber bullying should rather take place at school level. Another common law crime relevant to cyber bullying is extortion.

3.5.1.3 Extortion

When a person unlawfully and intentionally obtains some advantage, which may be of either a patrimonial or non-patrimonial nature, from another by subjecting the latter to pressure, which induces him or her to hand over the advantage, it qualifies as the crime of extortion.[451] A possible example can be when one learner extorts another

449 Snyman (note 152) at 455
450 Regulations to prohibit initiation practices (note 40).
451 Snyman (note 152) at 426

learner to do his or her homework or write a test for him or her. Another example is where a learner may be blackmailed by another learner who threatens to reveal his/her HIV/AIDS status. Although it may be argued that this is a form of **outing**, it may be necessary to include extortion as a form of cyber bullying in law and policy on cyber bullying.

3.5.1.4 Child Abuse

In section 1 the Children's Act 38 of 2005, **child abuse** is defined as

> any form of harm or ill-treatment deliberately inflicted on a child, and includes –
> (*a*) assaulting a child or inflicting any other form of deliberate injury to a child;
> (*b*) sexually abusing a child or allowing a child to be sexually abused;
> (*c*) bullying by another child;
> (*d*) a labour practice that exploits a child; or
> (*e*) exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally;

According to this definition, bullying is seen as a form of child abuse. Cyber bullying exposes the child to psychological and emotional harm and also falls in the definition of child abuse. Not only is cyber bullying a form of child abuse, but it may also qualify for crimes against the good name of the learner. These crimes are discussed below.

3.5.1.5 Criminal defamation

Criminal defamation is defined as the unlawful and intentional publication of a matter concerning another, which tends to injure his or her reputation seriously.[452] Criminal defamation can include verbal and written defamation.[453] If the defamatory publication did not come to the attention of another person other than the victim, the bully can only be charged with *crimen iniuria*.[454] As cyber bullying consists of posting statements on social networks, or sending e-mails or text messages that injure the reputation of the victim, cyber bullies may be charged with criminal defamation. It must be noted that the Judicial Matters Amendment Bill (2016) provides for the repeal of the

452 Snyman (note 152) at 475.
453 Badenhorst (note 31) at 8.
454 Ibid.

crimes of defamation and *crimen iniuria*, but will not affect the civil liability for defamation.[455]

3.5.1.6 *Crimen iniuria*

Crimen iniuria consists of the unlawful, intentional and serious violation of the dignity or privacy of another person.[456] In a school context, the Regulations to prohibit initiation practices, defines *crimen iniuria* as "the unlawful and intentional violation of the dignity or privacy of another in circumstances where such violation is not of a trifling nature".[457] If the violation of the dignity or privacy of the victim of cyber bullying is serious enough, the bully may be guilty of *crimen iniuria*. Cyber bullying can also contravene existing legislation, such as the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

3.5.1.7 The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

This Act defines child pornography as:

> any image, however created, or any description or presentation of a person, real or simulated, who is, or who is depicted or described or presented as being, under the age of 18 years, of an explicit or sexual nature, whether such image or description or presentation is intended to stimulate erotic or aesthetic feelings or not, including any such image or description of such person –
>
> (a) engaged in an act that constitutes a sexual offence;
>
> (b) engaged in an act of sexual penetration;
>
> (c) engaged in an act of sexual violation;
>
> (d) engaged in an act of self-masturbation;
>
> (e) displaying the genital organs of such person in a state of arousal or stimulation;
>
> (f) unduly displaying the genital organs or anus of such person;
>
> (g) displaying any form of stimulation of a sexual nature of such person's breasts;
>
> (h) engaged in sexually suggestive or lewd acts;
>
> (i) engaged in or as the subject of sadistic or masochistic acts of a sexual nature;
>
> (j) engaged in any conduct or activity characteristically associated with sexual intercourse;
>
> (k) showing or describing such person –
>
> (i) participating in, or assisting or facilitating another person to participate in; or

455 Judicial Matters Amendment Bill: Government Gazette No 39857, 8 January 2016.

456 Snyman (note 152) at 469.

457 Regulations to prohibit initiation practices (note 40).

(ii) being in the presence of another person who commits or in any other manner being involved in, any act contemplated in paragraphs (a) to (j); or

(l) showing or describing the body, or parts of the body, of such person in a manner or in circumstances which, within the context, violate or offend the sexual integrity or dignity of that person or any category of persons under 18 or is capable of being used for the purposes of violating or offending the sexual integrity or dignity of that person, any person or group or categories of persons.

This Act has serious consequences for cyber bullies or learners who partake in sexting. If a learner sends a semi-nude picture of herself to her boyfriend, it will qualify as child pornography. Other examples of acts of cyber bullying that will fall under this Act is where a learner's posts the head of a fellow learners on a nude body and distributes the image of instances of so called revenge bullying. This is where a learner posts nude pictures shared by another learner during a relationship after that relationship has ended.

Section 19 of the Act states that:

> any person exposing or displaying, or causing exposure or display, of child pornography to a child is guilty of the offence of exposing or displaying, or causing the exposure or display, of child pornography or pornography to a child. A conviction in terms of this Act will also result in the child's name being registered as a sex offender in the national register for sex offenders.

This section means that the distribution of images that fit the definition above, whether it was created and distributed willingly or not constitutes an act of child pornography. For example, a girl who sends such an image of herself is guilty of child pornography, and if her boyfriend shows the image to another learner, he is also guilty of child pornography. Learners, who are unaware of this Act, may be found guilty of a serious crime that may affect their futures.

As can be seen from the discussion above, learners who take part in cyber bullying can be guilty of a number of crimes. There are a number of IHRL documents that deal with children and the law. The Child Justice Act 75 of 2008 gives recognition to the guidelines in these IHRL documents. When cyber bullies in schools are accused of a crime or crimes, this Act must be taken into account.

3.5.1.8 The Child Justice Act 75 of 2008

The Child Justice Act will be relevant in all instances where children are in conflict with the law. It must be read with all the crimes discussed above, and must be taken into account in creating any law and policy for the regulation of cyber bullying. A few pertinent provisions are discussed below.

The preamble of the Act states that:

> while envisaging the limitation of fundamental rights in certain circumstances, emphasises the best interests of children, and singles them out for special protection, affording children in conflict with the law specific safeguards, among others, the right –
>
> * not to be detained, except as a measure of last resort, and if detained, only for the shortest appropriate period of time;
> * to be treated in a manner and kept in conditions that take account of the child's age;
> * to be kept separately from adults, and to separate boys from girls, while in detention;
> * to family, parental or appropriate alternative care;
> * to be protected from maltreatment, neglect, abuse or degradation; and
> * not to be subjected to practices that could endanger the child's well-being, education, physical or mental health or spiritual, moral or social development;

Children in conflict with the law are provided special safeguards, and protection, and must only be detained as measure of last resort. The aims of the Act are to:

> • expand and entrench the principles of restorative justice in the criminal justice system for children who are in conflict with the law, while ensuring their responsibility and accountability for crimes committed;
> • recognise the present realities of crime in the country and the need to be proactive in crime prevention by placing increased emphasis on the effective rehabilitation and reintegration of children in order to minimise the potential for reoffending;
> • balance the interests of children and those of society, with due regard to the rights of victims;

Most of the offences that can be instituted for cyber bullying, such as defamation and assault, falls under schedule 1 of the Child Justice Act. These are seen as less serious crimes. Because the crimes are seen as less serious, it should always be attempted to first deal with instances of cyber bullying as misconduct at school level. In instances where sexual assault of assault (schedule 2 crimes) take place, schools must call in the policy. Discipline and punishment for cyber bullies at school should be in line with the principles of restorative justice, teach the learners to take responsibility for their actions, protect the best interests of the bully and the victim, and focus on

rehabilitation and integration. Reyneke identifies the principles of restorative justice as a victim centred approach, offender accountability, community involvement, reconciliation, the restoration of relationships, restitution, the making of amends, repairing harm, problem solving, dialogue, negotiation, reintegration, repentance and forgiveness.[458] These principles are in line with the principles of a whole-schools approach to cyber bullying in schools as discussed in chapter 2 (cf. section 2.4 Land can be included in any law and policy on cyber bullying in South African schools.

Section 3 of the Act makes provision for guiding principles on how children in conflict with the law should be treated. These guidelines adapted and applied in a school context are:

- When a learner is disciplined, the circumstances of the learner should be considered.
- The cultural values and beliefs of learners must be taken into account during proceedings. Discipline measures should relate to the seriousness of the misconduct. The best interests of the other learners (including the cyber bully) at the school should be taken into consideration.
- The learner must not be treated more severely than an adult would have been treated under similar circumstances. This in line with the statement made by the judge in *Le Roux v Dey* when he said that civil action should not be taken against learners to punish them. One should also consider the principle of the evolving capacities of the child here. An older child will be more aware of the consequences of his actions, and must thus be treated differently than a younger child who may be less aware that what he is doing is wrong.
- Learners should be treated and spoken to in accordance to their age. Educators must ensure that the learner understands the proceedings and is able to communicate properly. This guideline will once again relate to the evolving capacity of the child as mentioned in the previous guideline.
- There should be a fair disciplinary hearing, where the learner has the right to be heard. This will ensure the IHRL of the right to participation and expression of the child as contained in the CRC.
- Disciplinary proceedings against learners should not be delayed.

458 Reyneke, M. 'The right to dignity and restorative justice in schools' 2011(14)(6) PER 130 at 138.

- Parents and guardians should assist learners during the disciplinary proceedings, and should also be allowed to take part in the disciplinary proceedings.
- All learners should be treated equally in disciplinary proceedings, and this mean that a child without proper adult support should be provided with such support.
- Meetings should be held between the victim, the bully, the parents, a representative from the school and a school counsellor to facilitate understanding and reconciliation between the parties. This will also assist in creating awareness in the bully of the effect of cyber bullying victims.

3.5.1.9 The Films and Publications Act 65 of 1996

The Films and Publications Act defines **child pornography** as:

> any image, however created, or any description of a person, real or simulated, who is, or who is depicted or described as being, under the age of 18 years –
>
> (i) engaged in sexual conduct;
> (ii) participating in, or assisting another person to participated in, sexual conduct; or showing or describing the body, or parts of the body, of such a person in a manner or circumstances which, within context, amounts to sexual exploitation, or in such a manner that it is capable of being used for the purposes of exploitation.

Section 27(1) of the Act provides for an offence if a person creates, produces, contributes towards the production of, distributes or is in possession of child pornography. According to section 27(2) of the Act is also an offence if a person has knowledge of the above, and fails to report it to the relevant authorities.

Thus, learners who create or distribute sexually explicit images may be found guilty of child pornography. If learners or educators who are aware of these images do not report it, they are also guilty of an offence (see footnote 134).

Section 24E of the Films and Publications Amendment Bill,[459] provides for "revenge pornography". According to this proposed section:

459 As introduced in the National Assembly (proposed section 75), explanatory summary of Bill published in Government Gazette No. 39331 of 28 October 2015).

> Any person who knowingly distributes private sexual photographs and films in any electronic medium including the internet and social networking sites, without prior consent of the individual in the said sexual photographs and films with the intention to cause the said individual distress, shall be guilty of an offence and liable upon conviction, to a fine not exceeding R150 000 or to imprisonment for a period not exceeding two years or to both a fine and such imprisonment.

Section 24F of the Bill may have far-reaching consequences for learners who, for example, film an act of bullying or a fight between other learners. This section prohibits any person, including learners, from creating, assisting in the creation and/or distribution of film or photographs that depict scenes of violence or sexual assault involving children. By filming, photographing or distributing films or photographs of incidents of bullying or sexual violence between learners, a learner may be fined or even serve a 2-year jail sentence.

3.5.1.10 Cybercrimes and Cybersecurity Bill[460]

Section 17 of the proposed Bill may have an impact on cyber bullying in schools. Section 17(1) and 17 (3) states that:

> 17. (1) Any person who unlawfully and intentionally –
>
> (*a*) makes available, broadcasts or distributes;
>
> (*b*) causes to be made available, broadcast or distributed; or
>
> (*c*) assists in making available, broadcasts or distributes, through a computer network or an electronic communications network, to a specific person or the general public, a data message which advocates, promotes or incites hate, discrimination or violence against a person or a group of persons, is guilty of an offence.
>
> (3) For purposes of this section "data message which advocates, promotes or incites hate, discrimination or violence" means any data message representing ideas or theories, which advocate, promote or incite hatred, discrimination or violence, against a person or a group of persons, based on –
>
> (*a*) national or social origin;
>
> (*b*) race;
>
> (*c*) colour;
>
> (*d*) ethnicity;
>
> (*e*) religious beliefs;
>
> (*f*) gender;

460 Cybercrimes and Cyber Security Bill (GN 878 *GG*39161/2-9-2015)] www.justice.gov.za/legislation/invitations/CyberCrimesBill2015.pdf (Last accessed on 1 December 2016).

(*g*) gender identity;
(*h*) sexual orientation;
(*i*) caste; or
(*j*) mental or physical disability.

Thus, according to this Bill, it is not only an offence to create a data message that advocates hate or discrimination on certain grounds, it is also an offence to assist in the creation, or to spread such a message. Learners who participate in cyber bullying by merely sending on a WhatsApp message they received, may also be guilty of the offence of assisting in the offence of creating or spreading a message that incites hate or violence.

Not only are there criminal law remedies available to victims of cyber bullying, but there are civil law remedies as well.

3.5.1.11 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

Section 10(1) of the Act states that:

> Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to –
>
> (a) be hurtful;
> (b) be harmful or to incite harm;
> (c) promote or propagate hatred.

If learners publish comments on social media that is either hurtful, harmful or propagates hatred based on grounds such as race or sexuality, they can contravene section 10 of this Act.

3.5.2 Civil law responses

The two civil remedies most applicable to the context of cyber bullying are an interdict and defamation.

3.5.2.1 An interdict

An application for an interdict may be brought in the High Court for an order restraining a person from committing or continuing a wrongful act.[461] This remedy is also available where someone has been threatened with a wrongful act. For an example of how an interdict can be applied in instances of cyber bullying, one can look at the two reported cases regarding social media in South Africa. In the matter of *H, WS v W, N*, the applicant applied for an order to force the respondent not to post any information regarding the applicant on Facebook.[462] In *RKM v RLB,* the applicant made an urgent application to force the respondent to remove a posting on Facebook and refrain from posting further defamatory comments on Facebook regarding the applicant.[463] The following case clearly explains how an interdict can be used to force someone from refraining to publish defamatory statements. In *Manuel v Crawford-Browne,*[464] the Minister of Finance sought an interdict against the respondent to refrain from publishing defamatory statements accusing him of corruption. The court stated that the right to freedom of speech must be balanced against the right to dignity. It contended that though the freedom of publication cannot be curtailed easily as freedom of expression is fundamental to a democratic society, it is not a paramount value, and it must be interpreted in light of the constitutional values, especially human dignity. [465] In this case the court clearly set out the legal principles for seeking an interim interdict in order to prevent alleged defamatory behaviour. These principles are a *prima facie* right, apprehension of irreparable harm if relief is not granted, the balance of convenience favouring the granting of such an interdict and no other satisfactory remedy.[466] Hereafter a discussion of defamation will follow.

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461 Badenhorst (note 31) at 9.

462 *H, WS v W, N* (note 144). For an interesting discussion on the law of defamation and granting an interdict as relief in this case, please see Busch, S. 'Case noted: H v W the next step in South Africa's defamation jurisprudence' http://www.law.uct.ac.za/sites/default/files/image_tool/images/99/AltumSonaturVolume4Isssue2.pdf (last accessed on 1 December 2016).

463 *RKM v RLB* (note 146).

464 (2471/08) [2008] ZAWCHC 13; [2008] 3 All SA 468 (C) (6 March 2008).

465 Id at paragraph 9 and 16.

466 Id at paragraph 11.

3.5.2.2 Defamation

In *Khumalo and Others v Holomisa*, the Constitutional Court stated the necessary elements for a claim of defamation to succeed.[467] These elements are wrongfulness, intent, publication and a defamatory statement about the plaintiff.

In establishing whether the meaning of a publication is defamatory, the court will apply an objective test to determine "what meaning the reasonable reader of ordinary intelligence would attribute to the statement".[468] When a cyber bully posts something on a social network, or sends an SMS to a variety of people, and the meaning of the posting will be construed by a reasonable person as defamatory, the victim can institute a claim for defamation against the cyber bully. For a more in-depth discussion of defamation with regard to cyber bullying, please see the discussion of *Le Roux v Dey* above (cf. section 3.3.3 Freedom of expression).

Internet shaming is an emerging form of cyber bullying.[469] Where a cyber bully "shames" another person on the internet, they can be liable for a delictual action for defamation.[470]

In *Dutch Reformed Church Vergesig Johannesburg Congregation and Another v Rayan Soknunan t/a GloryDivinee World Ministries*, a South African case specifically related to freedom of expression and Facebook, the court made a number of valuable statements.[471] In this case, the Dutch Reformed Church (DRC) allowed another Christian organisation to conduct services in the church building.[472] Due to a large decrease in members, the DRC chose to close down, and to sell the church building. As the respondent could not meet the purchase price, the DRC sold the church to an Islamic academy for use as a school.[473] On hearing of this contract of purchase, the

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467 2002 (8) BCLR 771 (CC) at paragraph 18.

468 *Le Roux* (note 19) at paragraph 89.

469 Surviving a culture of shaming http://nobullying.com/shaming/ (last accessed on 1 December 2016).

470 Alfreds, D. 'Internet shaming could land you in jail' http://www.fin24.com/Tech/Opinion/Internet-shaming-could-land-you-in-jail-20150521 (last accessed on 1 December 2016).

471 (2012/14569 [2012] ZAGPJHC 97; 2012(6) SA 201 (GSJ); [2012] 3 ALL SA 322 (GSJ) (14 May 2012).

472 Id at paragraph 4.

473 Id at paragraph 4–6.

respondent started to lobby against the selling of the church.[474] This campaign included the posting of various articles on Facebook.[475] Numerous defamatory statements regarding the applicant was posted on the official Facebook page of the respondent, and the respondent claimed that he was not responsible, as he did not make the statements. The following is a very long, but very eloquent statement made by the court regarding the nature and responsibility of being the owner of a Facebook page:[476]

> The implications of such anonymity are that those persons who have made postings are not identified (save by a name which may nor may be their own (sic)), may or may not be contactable, cannot be cited as parties to these proceedings and cannot be interdicted from publishing anything which may have been or may be defamatory, inciting, inflammatory or unlawful in any manner. Unless and until they are identified and joined in proceedings, they are little different from persons who have attached a scrappy piece of paper to a felt notice board in a passage with a pin or stub of prestik.[477]
>
> However, Sooknunan has created and made available this notice board in a public passage. He then has an obligation to take down those scrappy pieces of paper which are shown to be unlawful in content or impact. He has made available the opportunity for such unlawful content, and is, in effect, the publisher thereof – much as a newspaper takes responsibility for the content of its pages.

This statement has severe consequences for individuals or organisations with Facebook pages. It means that even though the owner of the page did not create the defamatory publication, he/she can still be held responsible, as it was his/her responsibility to monitor the contents of the Facebook page.

In another eloquent statement on the impact and audience of a posting on Facebook, the court provided the following:[478]

> We certainly have no idea of who and how many have read the Facebook commentary. The Facebook readership may be local, regional, national or international … . In an argument the DRC's counsel pointed out that it would take just one person to perform some precipitate action –

474 Id at paragraph 10–13.
475 Id at paragraph 10–13.
476 Id at paragraph 49.
477 Id at paragraph 48.
478 Id at paragraph 71-74.

but who and where this one person is, what he or she would do, where they would do it – are all unknown.

This statement made by the court emphasises the reach and dangers of social media. One inflammatory or derogatory comment or statement may reach millions of people.

3.5.2.3 Negligence

In terms of the common law, educators act *in loco parentis*.[479] Simply put, this means that educators have a duty of care towards learners to take care of them as a reasonable parent would.[480] This implies that educators must take care of the mental and physical wellbeing of learners.[481]

The test for negligence in South African law is the objective standard of the reasonable person. The defendant is negligent if the reasonable person in his/her position would have acted differently from the defendant; and the reasonable person would have acted differently if he/she would have foreseen that his conduct would cause damage, and would have taken steps to prevent the damage.[482]

A higher duty of care than the reasonable person can be expected from educators. Authors like Potgieter and Coetzee argue that due to the higher level of expertise and proficiency of educators, they should not be measured against the reasonable person, but rather the reasonable educator.[483] This means that the test for negligence will assume that the reasonable educator has more knowledge and expertise in the educational setting that that of the reasonable person (parent).

Educators have a duty to protect learners against the possible harmful consequences of cyber bullying. As specialists in the field of education, they should have the relevant information on cyber bullying to not only foresee the harm that may befall the victim of

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479 Potgieter, J. 'Delictual negligence of educators in schools: the confusing influence of the "in loco parentis" doctrine' 2004(22)(3) *Perspectives in Education* 2004(22)(3) 153 at 153.

480 Ibid

481 Prinsloo, I.J. 'How safe are South African Schools?' 2005(25)(1) *South African Journal of Education* 5 at 9.

482 *Kruger v Coetzee* 1966 2 SA 428 (A) 430).

483 Potgieter (note 480) at 154 and Coetzee, S.A. 'Educator sexual misconduct: exposing or causing learners to be exposed to child pornography or pornography' 2015(18)(1) *PER/PELJ* 2107 at 2127.

cyber bullying, but to also take measures to stop incidences of cyber bullying at school. If an educator should fail to act in situations where a learner is being cyber bullied, the school may be liable for damages.

The principle of *in loco parentis* may also be used to argue the matter of jurisdiction of schools in cyber bullying. Because educators have a duty to protect learners from physical and psychological harm, they should have the authority to act in all instances of cyber bullying, not only when the cyber bullying take place at the school.

This argument, as well as the argument that the state, and thus schools, have the duty to provide quality education, have an important role to play in the regulation of off-campus cyber bullying. Because educators act *in loco parentis*, and because the state has a positive duty to provide quality education, any acts of cyber bullying that negatively impact on the learner's wellbeing, or the quality of education of the learner should be addressed, irrespective of where this act originates. Furthermore, the school as organ of state (see section 239 of the Constitution) and all its functionaries have a constitutional obligation in terms of section 7(2) to "respect, protect, promote and fulfil the rights in the Bill of Rights".

3.5.3 Education specific law and policy

As one of the objectives of this research was to draft law and policy on regulating cyber bullying in South African schools, a thorough analysis of relevant education law had accordingly been conducted.

The Schools Act is the most important Act relating to the governance of schools in South Africa.[484] Section 8 of this Act obliges governing bodies of schools to regulate the discipline at school by drafting and adopting a Code of conduct for learners. The Code of conduct for learners should be drafted in consultation with the stakeholders at the school, and must be aimed at establishing a disciplined school environment conducive to quality education. In order to maintain discipline at schools and provide quality education for all learners, the Code of conduct for learners must provide for the regulation of cyber bullying. Learners are obliged to comply with the Code of conduct

484 Barry (note 341) at 15.

for learners. An interesting question to explore would be whether schools would be allowed to discipline learners for off-campus cyber bullying if it has been included in the Code of conduct for learners. The Code of conduct for learners is a contract between learners, parents and the school. Thus, if all parties have agreed to the disciplinary measures for off-campus cyber bullying, schools should be able to discipline learners if the Code of conduct provides for that.

The Department of Education has published guidelines for drafting a Code of conduct for learners.[485] In contrast with common belief, the guidelines state categorically that a school's Code of conduct for learners is only enforceable against the learners of that school.[486] In line with section 2 of the South African Constitution, these guidelines include the requirement that the Code of conduct for learners must be in line with the South African Constitution and that it must reflect "the constitutional democracy, human rights and transparent communication which underpin South African society".[487] To ensure that the focus is on discipline and not punishment, the guidelines require that the Code of conduct for learners teaches and prepares learners to be responsible, moral citizens.

Applied to school rules and policy regulating cyber bullying, it means that such rules and policies must comply with Constitutional principles, set a standard for learners on how to behave in a morally acceptable way when using social media and other forms of electronic communication and enable them to function as responsible citizens of South Africa in that regard. There must thus be a focus on positive discipline. This is in line with the IHRL and protection of children in conflict of the law as discussed above.

Section 8A of the South African Schools Act provides for searches and seizures in schools. This provision authorises a principal or his/her delegate to search a group of learners if there is a fair and reasonable suspicion that there is a dangerous object or illegal drug on the school premises, or at a school activity, or in the possession of a learner at school or during a school activity. This section further stipulates factors to take into account before contemplating such a search. These factors include the best

485 Note 41.
486 Ibid.
487 Ibid.

interests of the learner/learners, the safety and health of the learners, reasonable evidence of illegal activity and all other relevant evidence. Provision is made for how the search must be conducted. Specifically relevant is that the search must be conducted in a reasonable and proportional manner.

Paragraph 4 of the guidelines protects the rights of learners. Section 4.3 states that:

> Every learner has inherent dignity and has the right to have his/her human dignity respected. That implies mutual respect including respect for one another's convictions and cultural traditions. Every learner also has the right to privacy, which includes the right not to have his/her person or property searched or his/her possession seized. However, the principal or an educator may search learners based on his/her reasonable suspicion followed by the use of search methods that are reasonable in scope.

This paragraph provides for respecting the privacy of learners, but private property, such as cellphones may be searched under certain circumstances.[488] From the provisions above, it is clear that when the principal or his/her delegate is acting in the best interests, and for the protection of learners at school, and when there is a reasonable suspicion that a learner is being bullied by a particular learner or group of learners, the cellphone/s of suspected bullies may seized and searched. This search should be done with the least possible amount of invasion of privacy of the suspected bully/bullies. All private information that is collected from the search of the phone should be kept confidential. It is also advisable to have a parent present when searching the phone of a suspected bully.

Paragraph 4.5 provides for freedom of expression and states that:

> 4.5.1 Freedom of expression is more than freedom of speech. The freedom of expression includes the right to seek, hear, read and wear. The freedom of expression is extended to forms of outward expression as seen in clothing selection and hairstyles. However, learner's rights to enjoy freedom of expression are not absolute. Vulgar words, insubordination and insults are not protected speech. When the expression leads to a material and substantial disruption in school

488 According to section 4(2)(f) of the Regulations for safety measures at public schools, no person may cause any form of violence or disturbances which can negatively impact on any public school activities. If a cyber bully causes violence or disruption at school by his or her actions, a police office or the principal of the school may search the person of that learner. The cellphone causing the disruption may then be seen as a dangerous object, and seized.

operations, activities or the rights of others, this right can be limited as the disruption of schools is unacceptable.

This paragraph has positive implications for the successful regulation of cyber bullying in schools. Although freedom of expression of learners is protected, the disruption of schools is not accepted. Thus, if cyber bullying interferes with the school operations or activities, or the rights of other learners, or includes lewd or vulgar speech, the freedom of expression of the cyber bullies may be limited in a school environment. Freedom of expression may be limited in similar instances as those declared by the American Supreme Court (cf. section 2.5.1 American case law regarding freedom of speech in schools). No mention is made of what will happen in instances where the actions take place at home and not at school or on school property.

Section 7 of the guidelines relates to discipline. It states that:

> 7.1 Discipline must be maintained in the school and the classroom to ensure that the education of learners proceeds without disruptive behaviour and offences. Its goal is to teach and lead learners to self-discipline.
>
> 7.2 The disciplinary process must be expeditious, fair, just, corrective, consistent and educative. Where possible the parent should be informed and involved in the correction of the learner's behaviour. Learners should be protected from abuse by adults or other learners.
>
> 7.3 Restraint is the act of controlling the actions of learners when such actions may Inflict harm to others or to the learner, or violate the rights of other learners or educators. Educators may use reasonable measures where necessary to prevent a learner from harming him/herself or others.
>
> 7.4 The South African Schools Act, 1996, empowers school authorities to discipline learners, but it is beyond the law to delegate this authority to fellow learners. Learners are partners with other members of the school and are not in charge of the school.
>
> 7.5 Every educator is responsible for discipline at all times at the school and at school related activities. Educators have full authority and responsibility to correct the behaviour of learners whenever such correction is necessary at the school. Serious misconduct must be referred to the principal of the school. However, a mechanism must be created at schools to handle discipline problems to reduce the load of the principal.

This section states the goals of discipline. In writing a law and policy framework for the regulation of cyber bullying, these goals must be kept in mind in the section on provision for punishment for cyber bullies. The section determines the requirements

for a disciplinary process and the authority of educators to punish learners. Learners may be suspended in certain circumstances. Section 11 of the regulations provides for conduct that may lead to suspension.

> Provincial regulations must be consulted in the compilation of a list of offences which may lead to suspension of a learner. Offences that may lead to such suspension include, but are not limited to the following:
> (a) conduct which endangers the safety and violates the rights of others;
> (b) possession, threat or use of a dangerous weapon;
> (d) fighting, assault or battery;
> (e) immoral behaviour or profanity;
> (f) falsely identifying oneself;
> (g) harmful graffiti, hate speech, sexism, racism;
> (j) disrespect, objectionable behaviour and verbal abuse directed at educators or other school employees or learners;
> (m) victimisation, bullying and intimidation of other learners;

Any of the offences described above may fall in the ambit of cyber bullying. Learners found guilty of cyber bullying may be suspended.

Sections 12, 13 and 14 of the regulations contain provisions that may be relevant for inclusion in any law and policy regulation cyber bullying in schools. Section 12 relates to the process of suspending and expelling a learner. A school governing body may suspend a learner for one week, after the learner has been found guilty of contravening the Code of conduct. Section 13 provides for due process that must be followed in disciplinary hearings at school. Section 14 states that criminal offences must be referred to the police for investigation.

3.6 Conclusion

This chapter identified the human rights obligations for the protection of learners in schools against cyber bullying. It further determined that although there is some protection on a national level by means of legislation that can be interpreted to include cyber bullying in schools, this protection is not sufficient. Protection of learners against cyber bullying needs to take place at the local/school level. Chapters 4 and 5 will contain a case study to determine whether learners are being protected at school level, and to give learners an opportunity to give their views on cyber bullying and the

prevention, detection and regulation thereof. This is in line with the law in context approach as discussed in chapter 1 (cf. section
1.6 S).

CHAPTER 4

RESEARCH METHODOLOGY AND DESIGN

4.1 Introduction

Chapter 2 contained a literature review on the nature of cyber bullying. A literature study of the American law and policy on cyber bullying was also included in chapter 2. In chapter 3 a literature study on IHRL regulations pertaining to cyber bullying, and current South African legislation that may be utilised to regulate cyber bullying in schools was conducted. This assisted in developing a qualitative study on cyber bullying in a selected South African school. In this chapter I discuss how the overall research methodology and design was used to conduct this qualitative study. This chapter thus includes the data collection instruments, data analysis methods and precautions taken to ensure quality and ethical research. I begin this chapter with the research paradigm just to remind readers of the belief system that guided my research.

A research design can be seen as a "road map" that is used to find answers to the research questions in the study.[489] Thyer defines a research design as follows: [490]

> A traditional research design is a blueprint or detailed plan for how a research study is to be completed – operationalizing variables so they can be measured, selecting a sample of interest to study, collecting data to be used as a basis for testing hypotheses, and analysing the results.

This chapter sets out the "road map" I followed in conducting research in a selected South African school regarding the phenomenon of cyber bullying. The purpose of conducting this socio-legal case study was to ensure that the law was not studied in isolation, but that the context of the South African school environment was taken into account.

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489 Kumar (note 67) at 122.

490 Thyer, B.A. 'Single-systems research design' in Grinnel, R.M. *Social work research and evaluation.* 1993 Peacock 94-117 at 94.

4.2 Research paradigm

As mentioned in chapter 1, this study is located in a critical realist paradigm. Critical realism recognises that researchers "will only be able to understand—and so change—the social world if we identify the structures at work that generate those events and discourses".[491] This means that this research recognises that "reality exists independently from those who observe it, but that it is only accessible through the perceptions and interpretations of individuals.[492]

Sayer sets out the key assumptions of critical realism as follows: [493]

1. The world exists independently of our knowledge of it.
2. Our knowledge of the world is fallible and theory-laden.
3. Knowledge develops neither wholly continuously, as the steady accumulation of facts within a stable conceptual framework, nor discontinuously, through simultaneous and universal changes in concepts.
4. There is necessity in the world; objects—whether natural or social— necessarily have particular powers or ways of acting and particular susceptibilities.
5. The world is differentiated and stratified, consisting not only of events, but objects, including structures, which have powers and liabilities capable of generating events. These structures may be present even where, as in the social world and much of the natural world, they do not generate regular patterns of events.
6. Social phenomena such as actions, texts and institutions are concept dependent. We not only have to explain their production and material effects but to understand, read or interpret what they mean. Although they have to be interpreted by starting from the researcher's own frames of meaning, by and large they exist regardless of researchers' interpretation of them
7. Science or the production of any kind of knowledge is a social practice. For better or worse (not just worse) the conditions and social relations of the production of knowledge influence its content. Knowledge is also largely - though not exclusively - linguistic, and the nature of language and the way we communicate are not incidental to what is known and communicated. Awareness of these relationships is vital in evaluating knowledge.
8. Social science must be critical of its object. In order to be able to explain and understand social phenomena we have to evaluate them critically.

In utilising this paradigm in my study, I recognise that the phenomenon of cyber bullying exists separately from my understanding of the theory thereof, and that

491 Carlsson, (note 56).

492 Ormston, R., Spencer, L., Barnard, M. & Snape, D. in Ritchie, J., Lewis, J., Mcnaughton Nicholls, C. and Ormston, R. *Qualitative research practice.* 2014 SAGE 1-25 at 21.

493 Sayer, A. *Method in social science: A realist approach.* 1992 Routledge at 5.

several different factors may impact on the existence, and the experience of cyber bullying by learners. In studying cyber bullying in a selected South African school, I could merely observe and interpret the occurrence of this form of bullying in the school. This is in line with the statement made by Shariff that definitions of bullying may not recognise all the nuances and complexities inherent in the act of cyber bullying (cf. section 1.2 B).

The following section explains the research approach used in this study.

4.3 Qualitative research approach

Kumar explains a qualitative research approach as an approach that: [494]

> is embedded in the philosophy of empiricism: follows an open, flexible and unstructured approach to enquiry; aims to explore diversity rather than to quantify; emphasizes the description and narration of feelings, perceptions and experiences rather than their measurement; and communicates findings in a descriptive and narrative rather than analytical manner, placing no or less emphasis on generalisations.

Qualitative research recognises and hears the voice of the research subjects.[495] Qualitative researchers aim to understand human actions and meanings that individuals and groups attach to their everyday lives, objects, and social relations so that we come to understand how they evaluate their lives through their beliefs and meanings.[496] This belief is suited to a critical realist paradigm of research, as the depth of a qualitative study enabled the research to take into account all the different factors that impact on the research participant's experience of cyber bullying. The participants in the study had an opportunity to state their personal views regarding cyber bullying, and was thus able to add a contextual element to the study of law and policy on cyber bullying.

494 Kumar (note 67) at 14.
495 Roberts (note 53) at 3.
496 Id at 4.

4.4 Socio-legal case study design

A case study is defined as "an intensive investigation of a single unit".[497] A case study examines the interaction of this single unit in its context.[498] This means that in doing case study research, researchers look at multiple perspectives "and attempts to understand the influences of multilevel social systems on subjects".[499] A single case may consist of a group, a community, a school or a subgroup of a population.[500] In this study, the "case", is the school, and how the phenomenon of cyber bullying is understood and experienced in that school.

Babbie and Mouton identified four design principles in case study research:[501]

1. Conceptualization is essential in case study research – the conceptual framework for the study must include the purpose of the study, presenting the principles guiding the study, sharing the reasoning behind research questions, and carefully defining questions. The conceptualization was completed in the previous three chapters. The research questions and the reasoning behind them were defined in chapter 1.
2. Contextual detail and in-depth description are crucial to successful case study research – to understand and interpret case studies, researchers must describe the context in detail. This design principle allowed the researcher to combine the case study design with socio-legal studies (which requires the consideration of context in legal studies) and to design this study as a socio-legal case study. In chapter 5 the context of cyber bullying in schools, and the unique problems this presents were discussed in detail.
3. Using multiple data sources is important in case studies of all kinds. This involves using more than one method, and a variety of informants. Different role-players in the school participated in this study, and different data collection instruments were used to gather the data from the participants. This enabled a well-rounded view of cyber bullying in the school that not only included the views of the learners, but of the educators and the school counsellors as well.

497 Babbie, E. and Mouton, J. *The practice of social research.* 2012 Oxford University Press at 281.
498 Ibid.
499 Ibid.
500 Kumar (note 67) at 155.
501 Babbie and Mouton (note 498) at 282–283.

4. Analytical strategies in case study research are closely linked to the manner in which the findings are organised – in planning on how to analyse case study findings, one must plan on how to organise findings, ask whether generalisation (transferability in qualitative case studies) is appropriate to the data, and look at the issue of theory development. The findings in this case study were used to inform the law and policy framework on the regulation of cyber bullying in schools, as it is important to both study the law and the social context to develop a functioning and informed framework.

As I have now explained the concept of a case study, it is important that we next discuss the population and sampling of this study.

4.5 Population and sampling

In qualitative sampling, the purpose is to access in-depth knowledge about a certain situation or individual on the assumption that the individual is typical of the group and hence will provide insight into the group.[502] In sampling for qualitative research, a number of different factors are taken into account.[503] These factors may include ease in accessing participants to the study, participants' knowledge about the subject and what is seen as a typical example of the case being studied.[504] Ritchie, Lewis, Elam, Tennant and Rahim discuss three key features in qualitative sampling:[505]

1. The use of prescribed selection criteria – to meet the aims of qualitative research, a sample must be chosen that is expected to inform the understanding of the research questions. A unit is chosen to both represent and symbolises features of relevance to the investigation.
2. Sample size – sample sizes in qualitative research needs to be kept relatively small, as qualitative research is rich in detail and thus a lot of information can be gleaned from each unit of data.
3. Additional and supplementary samples – in qualitative research, it is possible to supplement samples if the data is insufficient.

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502 Kumar (note 67) at 229.

503 Ibid.

504 Id at 228.

505 Ritchie, J., Lewis, J., Elam, G., Tennant, R. and Rahim, N. 'Designing and selecting samples' in Ritchie, J., Lewis, J., Mcnaughton Nicholls, C. and Ormston, R. *Qualitative research practice.* 2014 SAGE at 116-120.

Purposive sampling requires the researcher to make a judgement call on the suitability of a prospective participant.[506] According to Ritchie *et al* there are two main aims of purposive sampling, firstly to ensure that all factors that are key to the study are covered, and secondly to ensure that diversity is included.[507] Bryman explains that the researcher will oftentimes want to sample in such a way to ensure that there is enough diversity in the sample.[508]

Theoretical sampling is often used as a synonym for purposive sampling. Sampling in case studies must always have a theoretical base.[509] This means that groups must be selected on the basis of their relevance to the research questions.[510] This form of sampling proved useful in this case study, as due to a recommendation by the school principal, the school counsellors were also added to the case study. From the study it was also apparent that the school disciplinary officer needed to be interviewed in order to obtain data not provided by the principal and the LO educator.

Having taken into account the factors of ease of reaching the participants, knowledge about cyber bullying in schools, and diversity, I conducted the case study in a school in the Gauteng-North area. The population of the study consisted of grade 9 learners, the school principal, LO educator, discipline officer, and school counsellors. The "judgement" in choosing grade 9 learners was that they are of such an age that they most probably are aware of cyber bullying in schools, have either partaken in cyber bullying or have been victims thereof. Consideration was also given to not interfering with the work of the learners more than necessary, and thus only one of the more junior grades (grade 9), was elected to take part in the study. By conducting research on the views and experience of these learners, I was able to reach a deeper understanding of cyber bullying and the unique requirements for regulating this form of bullying.

By choosing the school principal, LO educator, discipline officer and school counsellors as part of the population, the aim was to get direct information on whether

506 Babbie and Mouton (note 498) at 202.
507 Ritchie (note 506) at 113.
508 Bryman (note 52) at 418.
509 Silverman, D. *Interpreting qualitative data.* 2014 SAGE at 62.
510 Ibid.

cyber bullying has occurred in the school, how the school have dealt with the incidences of cyber bullying, and what specific needs there are to be addressed in order to successfully regulate cyber bullying. The socio-legal design of this research thus not only gave expression to the critical realism paradigm but also informed the selection of a research population and participant sample that allowed the researcher to interpret the legal part of the study in context. The means of gathering the data from the participants in the study is discussed below

4.6 Data collection methods

Decisions regarding the methods of data collection rely on the research questions, but they also rely on factors such as "the context, structure and timing of research".[511]

4.6.1 Literature study

A literature study was done to determine the human rights obligations for regulating cyber bullying in South African schools, as well as current South African law and policy that may be used to regulate cyber bullying in schools. It was also used to investigate the laws and policy dealing with cyber bullying in the United States of America for examples of best practice, or possible shortcomings (cf. section 2.5.2 Cyber bullying legislation and policy in the United States of America).

4.6.2 Questionnaires

I opted for questionnaires in collecting data regarding learners' experiences with cyber bullying. Reasons for choosing questionnaires include protecting anonymity of the learners and acting in the best interests of child participants. Although it is important to gather information on cyber bullying, it is a sensitive subject, and learners had to be protected during the study. Convenience was also a factor in choosing this method of data collection, as conducting interviews with so many learners would have been too time-consuming.

511 Lewis, J. and McNaughton Nicholls, C 'Design issues' in Ritchie, J., Lewis, J., Mcnaughton Nicholls, C. and Ormston, R. *Qualitative research practice* 2014 SAGE 47–76 at 52.

Babbie and Mouton give some guidelines for asking questions,[512] and I adhered to these guidelines when constructing the questionnaires. Although the wording of these guidelines indicates that they apply to quantitative research, they are universal and apply to qualitative questionnaires as well. These guidelines can be summarised as follows:

- Questions and statements – both questions and statements should be used productively in a questionnaire. There should be flexibility in the design of a questionnaire.
- Make items clear – questionnaire items must be clear and unambiguous.
- Avoid double-barrelled questions – do not ask participants to give a single answer to a combination of questions.
- Participants must be competent to answer – ensure that participants can reliably answer the questions. Purposive sampling assists in ensuring this.
- Participants must be willing to answer – it is important to obtain consent beforehand.
- Questions should be relevant – the topic and questions must be relevant to the participants chosen to partake in the study.
- Short items are best – participants should be able to read and understand an item quickly.
- Avoid negative items – including a negation in a question may lead to uncertainty and misinterpretation.
- Avoid biased items and terms.
- Translation – participants must be questioned and must answer in a language they feel comfortable with.

Kumar describes the advantages of questionnaires as being less expensive to administer and offering greater anonymity.[513] As already discussed above, convenience and anonymity were the main reasons for choosing this method of data collection. Disadvantages of questionnaires that were considered and guarded against include limited application, low response rate, self-selecting bias, lack of opportunity to clarify issues, no opportunity for spontaneous responses and the response cannot be

512 Babbie and Mouton (note 498) at 233–239.
513 Kumar (note 67) at 181.

supplemented with other information.[514] Out of the more than three hundred questionnaires handed out, only 26 were received back with the proper consent. This small sample was not a problem in conducting the research, as data saturation was reached. Data saturation takes places when a point is reached where no new information is emerging from the questionnaires.[515] By the third questionnaire that was evaluated, the answers were repeating themselves.

In order to meet the research objectives to determine the definition, nature and forms of cyber bullying and to investigate the occurrence of cyber bullying in selected South African schools, and how it is dealt with by the schools, I had to gather certain information from learners in schools. Below I explain the information I wanted to obtain, and the questions I asked to meet this objective.

Theme 1: Forms of cyber bullying

1.1 Below you will find a table of different types of cyber bullying. Please indicate whether you belief it is a form of cyber bullying; whether you have been cyber bullied in this manner, or whether you have cyber bullied another learner in this manner.

Type of cyber bullying and definition	Do you think this is cyber bullying? Just state yes or no.	Have you ever been bullied in this manner. Just state yes or no.	Have you ever bullied another learner in this manner? Just state yes or no.
Harassment – repeatedly sending nasty, mean and insulting messages.			
Flaming – online fights using electronic messages containing angry or vulgar language.			
Denigration – 'dissing' or disrespecting someone online; sending or posting gossip or rumours about a person to damage his or her reputation or friendships.			
Impersonation – pretending to be someone else and sending or posting material to get that person in trouble or damage their reputation.			
Outing – sharing someone's secrets or			

514 Id at 181-182.
515 Id at 248.

embarrassing information or images online.			
Exclusion – intentionally and cruelly excluding someone.			
Cyber Stalking – involves threats of harm or intimidation through repeated online harassment and threats.			
Sexting – the sending of nude or semi-nude photos or videos and/or sexually suggestive messages via mobile phone texting or instant messaging.			

1.2 Are there any other behaviour not mentioned above that you think is a form of cyber bullying? Please explain.

1.3 Below you will find a table of different types of platforms used for cyber bullying. Please indicate whether you have access to these forms of technology. Please also indicate whether you have been cyber bullied in this manner, or whether you have cyber bullied another learner in this manner.

Type of platform used for cyber bullying	Do you have access to this platform? State yes or no	Have you ever been bullied in this manner? State yes or no.	Have you ever bullied another learner in this manner? State yes or no.	Is your use of this medium regulated by your parents? State yes or no	Is your use of this medium regulated by the school? State yes or no
Text messaging					
Pictures, photo's or video clips					
Phone calls					
e-mail					
WhatsApp					
Facebook					
Chat rooms					

<u>Theme 2: Elements of cyber bullying</u>

2.1 In the definition of cyber bullying given above, it states that cyber bullying must be repetitive. Do you think that is correct, or do you think a single action can be an act of cyber bullying?

2.2 Can you think of an example where a single action may be a form of cyber bullying?

2.3 Sometimes cyber bullies say that they did not know they were hurting another learner, or that they did not mean to hurt that learner. Do you think that should be regarded as a valid excuse for cyber bullying?

2.4 Can you think of an example of cyber bullying where a learner may have been hurt unintentionally?

Theme 3: Cyber bullies and cyber victims.

This theme was divided in two sections. One section was filled in by learners who were victims of cyber bullying, and the other section was filled in by learners who were cyber bullies. Learners who were both cyber bullies and cyber victims were requested to fill in both sections.

Theme 3A: Cyber victims

3.1 Please describe how you have been cyber bullied?

3.2 How many times have you been cyber bullied?

3.3 Does the same cyber bully repeatedly target you, and how often did that happen?

3.4 Is there more than one learner that cyber bullied you at the same time?

3.5 How did it make you feel to be cyber bullied?

3.6 Whom did you tell about the cyber bullying?

3.7 How did that person help you?

3.8 If you indicated that you did not report the cyber bullying, please give reasons why you did not report it.

3.9 What was your response to the cyber bullying?

3.10 How was the cyber bully who bullied you disciplined?

Theme 3B: Cyber bullies

3.1 How many learners have you cyber bullied?

3.2 How often do you cyber bully co-learners?

3.3 Why did you choose to cyber bully another learner?

3.4 How did you cyber bully another learner?

3.5 How did it make you feel to see you have hurt another learner?

3.6 Did anyone else help you in cyber bullying another learner?

3.7 What were the consequences (how were you disciplined) for cyber bullying another learner?

Theme 4: The unique problems that schools face in the regulation of cyber bullying.

4.1 Do you think it is harder to identify cyber bullies than traditional bullies?

4.2 Do you think a learner who leaves a nasty comment on a Facebook post is a cyber bully?

4.3 Do you think a learner who passes on a nasty image or text message is a cyber bully?

4.4 Does the fact that you can't escape from being cyber bullied by going home impact on how you feel about the bullying?

4.5 Do you think that educators should protect you from being cyber bullied by another learner even if the bullying does not take place at school?

4.6 What do you think should happen in cases of cyber bullying where the cyber bully did not intend for the message to spread to more than one or two people?

4.7 What would you regard as more embarrassing? When you were physically attacked or taunted in front of other learners in school, or when another learner posts something on the internet or sends a text message that a lot of other people can see as well?

4.8 What do you do to hide your cyber bullying activities from your parents and educators?

4.9 How do you think a cyber bully is different from a traditional bully?

4.10 Do learners often report cyber bullying, and if not, why do you think that is?

4.11 Can you name the different human rights that cyber bullies are infringing on when he or she cyber bullies a co-learner?

Theme 5: Regulation of cyber bullying

5.1 Did the school make any information on cyber bullying, the correct use of computers or any other related information available to learners? Can you give examples?

5.2 Has someone ever explained the dangers of cyber bullying to you? Who?

5.3 Where did you first learn about cyber bullying?

5.4 Do you know of any ways to protect yourself against cyber bullying? And where did you learn about it?

5.5 To whom should cyber bullying be reported?

5.6 Do you think your school is successfully protecting learners against cyber bullying?

5.7 What transgressions do you think will constitute cyber bullying in your school?

5.8 Who should be held responsible when you are being cyber bullied? Should it be the bully, the school, your educator, the internet service provider, yourself?

4.6.3 Interviews

Although there are many definitions of the concept of interviews, it can be described as "a person-to-person interaction, either face to face or otherwise, between two or more individuals with a specific purpose in mind".[516] Data gathered via interviews consists of verbal communication and narratives.[517] This form of data collection is valuable because it recognises that participants in the study are individuals with their own ideas and gives them an opportunity to give insight into the research subject.[518] Critical realists use interviews "to appreciate the interpretations of their informants and to analyse the social contexts, constraints and resources within which those informants act".[519]

Bryman emphasises the flexibility of the semi-structured interview.[520] The researcher has a list of prepared questions (interview guide), but there is leeway in following the interview guide and including questions not in the guide. This happens when the interviewer picks up on other relevant things said by the participant, or when there is a need to probe to find answers to the questions.[521] Being able to probe the participants in this study was useful to ensure that they stayed on topic, and to clarify concepts regarding cyber bullying. For example, the focus group was very quiet at the beginning of the discussion, and two participants in particular tended to lead the discussion. The other two participants needed to be encouraged and probed when they expressed their opinions.

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516 Kumar (note 67) at 176.

517 Lewis (note 512) at 55.

518 Ibid.

519 Smith and Elger (note 57) at 6.

520 Bryman (note 52) at 471.

521 Ibid.

The basic elements used in preparing an interview guide for a semi-structured interview include the following:[522]

- A certain amount of order in the topic areas – questions must flow, but the interviewer must be prepared to deviate from order of questions.
- Interview questions must not be too specific, but must be formulated to answer the research questions.
- Language must be comprehensible and relevant.
- Do not ask leading questions.
- Record information of the general and specific kind. The first category includes age and gender, and the second category includes position in company, years employed etc.

In order to reach the research objective regarding current problems that the selected schools experience with regard to cyber bullying, and how they are handling these problems, I conducted semi-structured interviews with selected school personnel. The questions in the interviews were structured to gather data regarding the occurrence of cyber bullying in the school, how it is regulated by the school, and any problems the schools faced in successfully resolving the matter. Below I explain the themes and questions of the interview guide. The themes were aimed at identifying whether cyber bullying occurs at the school, how it is regulated by the school, and how specific problems with regard to cyber bullying is addressed. The same questions were used for both the school principal and the school counsellors. The answers to the interviews were recorded and transcribed by the researcher.

<u>Theme 1: Occurrence of cyber bullying in the school.</u>

1.1 How serious is the problem of cyber bullying in your school?

1.2 Please give a few examples of instances where learners have cyber bullied other learners.

1.3 What emotional impact does cyber bullying have on the cyber bullied learners?

1.4 How do cyber bullying impact on the quality of learners' education?

1.5 What excuses/reasons did the cyber bullies offer for cyber bullying another learner?

522 Id at 473.

1.6 How common are incidences where cyber bullying was a group attack on another learner?

Theme 2: How is cyber bullying regulated by the school?

2.1 What measures does the school have in place to ensure learners are made aware of cyber bullying?

2.2 Of which aspects regarding cyber bullying are learners made aware/informed of?

2.2 How did the school handle the instances of cyber bullying you mentioned earlier?

2.4 How does the way in which you deal with cyber bullying differ from the way you deal with traditional bullying?

2.5 Were parents and counsellors involved in the handling of the cyber bullying incidents?

Theme 3: Specific problems that the regulation of cyber bullying present to schools.

3.1 The general belief is that cyber bullying is more difficult to regulate than traditional bullying. What is your view in this regard?

3.2 Do you have any thoughts or plans on what processes should be implemented to regulate or improve the regulation of cyber bullying in your school?

General

4.1 Is there anything else with regard to cyber bullying that you want to add or discuss?

From the pilot study (cf. section 4.8 P) it became evident that the discipline officer of the school also needs to be interviewed to gather further data on the disciplinary procedures for cyber bullies. The questions asked in theme 2 and 3 in the interview guide set out above were used for these interviews.

4.6.4 Focus groups

Kreuger defines a focus group as a discussion that is carefully planned to "obtain perceptions in a defined area of interest in a permissive, non-threatening environment".[523] One of the advantages of a focus group is that it allows participants

523 Kreuger, R.A. *Focus groups: a practical guide for applied research.* 1988 SAGE at 18.

to build on each other's comments, and that is exactly the aim of this focus group. It is to get data from school counsellors with knowledge on forms of cyber bullying in the school, the context of the cyber bullying and the effect of the cyber bullying on the victims. For this purpose the following questions were discussed in the focus group.

1. What is your view on cyber bullying in your school?
2. What constitutes cyber bullying according to you?
3. What are the causes of cyber bullying?
4. How do you assist the victims of cyber bullying?
5. How do you assist the cyber bully?
6. What is the effect of cyber bullying on both the victim and the bully?
7. How do you think instances of cyber bullying should be resolved?

4.6.5 Document analysis

Document analysis is useful in case studies that include other methods of data collections such as interviews.[524] There are four different criteria that need to be kept in mind when conducting document analysis; these include authenticity, credibility, representativeness and meaning.[525] By closely examining texts, a researcher is enabled to determine what is actually happening in the school, without having to ask the learners or educators.[526] During the document analysis of the Code of conduct for learners, I checked whether provision was made for classifying both bullying and cyber bullying as misconduct, whether there are any regulations regarding cellphone or internet usage at school, and whether the Code of conduct for learners refers to human rights and procedural fairness.

In order to correlate the data regarding the school's Code of conduct for learners and the regulation of cyber bullying, I conducted a content analysis of the school's Code of conduct for learners.

524 Rule and John (note 66) at 67.
525 Bryman (note 52) at 562.
526 Silverman (note 510) at 276.

4.7 Validity and reliability

Validity can be summarised as "the ability of an instrument to measure what it is designed to measure".[527] Validity in qualitative research relies on "assessing how well participants' meanings have been captured and interpreted".[528]

Ultimately, there can never be certainty whether an account was true, as there is no independent and completely reliable access to the truth.[529] In this research validity was judged on the adequacy of the data gathered with regard to the information already gathered in the literature study and review. Thus, sampling continued until data saturation took place. Data saturation means that no new data was emerging, that the category was developed and that relationships among categories were well established.[530]

In this study, reliability was insured by following low-inference descriptors. This means that the words that the participants used themselves were written down in the report as well.[531]

Reflexivity in research means that the researcher must be aware and reflective about her own research methods, values and decisions and the impact they have on her knowledge of the social world.[532] For research to be trustworthy and valid, the researcher must, in a reflexive manner, be clear on the research methodology used.[533]

Generalisation in research can be defined as the "potential for drawing inferences from a single study to wider populations, contexts or social theory".[534] Qualitative research is focused on finding a deeper understanding of a certain subject.[535] A qualitative study looks at the experience and perspectives of individuals on a topic,

527 Kumar (note 67) at 213.

528 Lewis, J., Ritchie, J., Ormston, R. and Morrell, G. 'Generalising from qualitative research' in Ritchie, J., Lewis, J., Mcnaughton Nicholls, C. and Ormston, R. *Qualitative research practice* 2014 SAGE 347-366 at 358.

529 Id at 359.

530 Bryman (note 52) at 421.

531 Silverman (note 510) at 84.

532 Bryman (note 54) at 393.

533 Ibid.

534 Lewis (note 529) at 365.

535 Okeke, C. 'Achieving qualitative validity, reliability and generalisability' in Okeke, C. and Van Wyk, M*. Educational research: an African approach.* 2015 Oxford University Press 207-223 at 220.

and is thus a large sample of the population is not required.[536] Transferability is seen as an alternative to generalisation, this entails providing dense descriptions of the research and the context, to enable other researchers to apply recommendations and findings to other cases.[537]

By studying a school with different demographics with regard to race and socio-economic status, the findings can be applied to a number of different cases and contexts. It should also once again be mentioned that this research has a high transferability value, as the same law and policy will be applied at all public schools in South Africa.

In order to determine whether the approach to the study as well as the data gathering instruments will be effective, I first conducted a pilot study.

4.8 Pilot study

A pilot study is used to determine the feasibility and validity of the main study.[538] A pilot study is a trial run of the main study.[539] The reasons for conducting a pilot study include the following:[540]

- assess the feasibility of a full-scale study or survey
- assess the likely success of proposed recruitment approaches
- determine what resources are needed for the study
- develop and test adequacy of research instruments
- establish whether the sampling frame and technique are effective
- collect preliminary data
- assess the suggested data analysis strategies in order to reveal problems

For the reasons mentioned above, conducting a pilot study was essential in refining the main study. In the pilot study it emerged that there were a few gaps in the methodology for collecting data. Firstly, the questionnaires were long and it took

536 Ibid.
537 Rule and John (note 66) at 105.
538 Gumbo, M. 'The pilot study' in Okeke, C. and Van Wyk, M. *Educational research: an African approach.* 2015 Oxford University Press 371-388 at 372.
539 Ibid.
540 Id at 377.

learners a while to complete. A number of parents did not sign the permission letters and those learners then had to be excluded as participants. Valuable information was gathered through the interviews, but is seems as if cases of cyber bullying was referred to a disciplinary officer or committee and thus the participants did not have knowledge of the particulars of the disciplinary process. After the interview with the school principal he called in two of the school counsellors and we had a lively discussion about cyber bullying. It was decided that a group discussion between the researcher and the school counsellors should be written up and added as another method of data collection (focus group).

Both the school principal and the LO educator referred me to the discipline officer of the school for more information on the exact disciplinary procedures followed in instances of cyber bullying at the school. It was subsequently decided that an interview should also be held with the discipline officer at the school. During analysis of the interviews, it emerged that the researcher's interview skills need to improve, more probing questions needs to be asked to gather the relevant information.

The pilot study was very successful; the school was extremely helpful and eager to be a participant in the study, as well as eager for me to use the results of the study. Due to the fact that the school was so helpful and strongly wanted to form part of this study, as well as the fact that a number of other schools declined to participate in the study, it was decided to use this school as the participant school. The focus group and the interview with the discipline officer were added to the pilot study. The pilot study school was also the only school out of the 11 schools that I contacted that was willing to participate in the research. Thus, the pilot study school and the participant school are one and the same.

4.9 Data analysis

There are different approaches to analysing qualitative data.[541] Content analysis is where a set of categories are identified.[542]

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541 Feza, N. 'Qualitative data analysis' in Okeke, C., Van Wyk, M. *Educational research: an African approach*. 2015 Oxford University Press: South Africa 458-476 at 461.

542 Silverman (note 510) at 44.

Kumar describes the process of analysing the contents of qualitative data in four steps.[543]

1. identify the main themes
2. assign codes to the main themes
3. classify responses under the main themes
4. integrate themes and responses into the text of the report

Following these steps was invaluable in analysing the data gathered by the interviews and questionnaires. In table 5 above, the questionnaire was divided into six different themes. These themes relate to the research objectives and questions regarding the impact of and unique problems that cyber bullying present to learners in schools. In analysing the data, these themes were coded and eventually integrated into the study. Table 6 above identifies the three themes in the interviews.

4.10 Ethical considerations

Ethical considerations should be the heart of any research.[544] There is consensus throughout the literature that ethics consists of the following main aspects:[545]

1. research must be worthwhile and not make unreasonable demands on the participants
2. participation should be based on informed consent
3. participation should be voluntary
4. adverse consequences of participation should be avoided and risks of harm known
5. confidentiality and anonymity must be respected.

4.10.1 Research must be worthwhile and not make unreasonable demands on participants

Research is necessary to improve conditions, thus it is acceptable to interview or question participants if the research is likely to help society.[546] It is always necessary for any researcher to consider the relevance and the importance of the research

543 Kumar (note 67) at 318.

544 Webster, S., Lewis, J. and Brown, A. 'Ethical considerations in qualitative research' in Ritchie, J., Lewis, J., Mcnaughton Nicholls, C. and Ormston, R. *Qualitative research practice* 2014 SAGE 77-110 at 78.

545 Ibid.

546 Kumar (note 67) at 284.

before continuing with the process.[547] Cyber bullying is a reality for learners. It is necessary to regulate this unique form of bullying in schools, and thus research must be conducted to provide information to inform any law and policy on this phenomenon. In this instance the research was necessary, but it was important not to lose sight of the sensitive nature of the subject matter.

4.10.2 Informed consent

It is unethical to gather information without the knowledge of the participants, and without their willingness to participate.[548] Informed consent means that participants must be informed of the type of information sought, the purpose of the research, what is expected by their participation, and how their participation might affect them.[549] Throughout the research project the informed consent of all the participants was requested and kept on file. As minors were involved in the study, the informed consent of the parents and assent to participate from the minor learners were requested. The objectives of the research as well as the sensitivity of the subject were also explained to the participants. In order to ensure that the minor participants of the study discussed the project with their parents or guardians, I sent out one permission letter for both the parents and the learner's consent and assent.

4.10.3 Voluntary participation

It is important that participants must not be pressured into participating in the study.[550] The idea that participation in the research will lead to transformation of the problem is often a motivating factor. Researchers must be careful not to promise more than they can deliver.[551] In order to comply with the standard of voluntary participations, I clearly stated in the permission letter that participation is voluntary, and I repeated that during the hand out of the questionnaires and during interviews.

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547 Sotuku, S. and Duku, S. 'Ethics in human science research' in Okeke, C. and Van Wyk, M. *Educational research: an African approach.* 2015 Oxford University Press 112-130 at 123 and Kumar (note 67) at 285.

548 Kumar (note 67) at 285.

549 Sotuku and Duku (note 548) at 119; Kumar (note 67) at 285.

550 Webster (note 545) at 92.

551 Id at 93.

4.10.4 Adverse consequences and risk of harm

Intentional harm must be prevented and potential harm must be minimized.[552] Harm can include the revelation of information that can embarrass participants or endanger their home, family life or friendships.[553] It is unethical if the way data is obtained creates anxiety or harassment.[554] It is suggested that researchers must consider all possible harmful consequences of the research, and balance the risk with the benefit of the research.[555] The topic of cyber bullying is extremely sensitive, as is evident from all the reported harmful consequences of cyber bullying.[556] Another risk is that the victim of cyber bullying can open themselves up to more cyber bullying by participating in the research and possibly naming the cyber bully. In order to minimise these risks, the questionnaires were strictly anonymous, no reporting of names were asked, it was stressed that participants need not answer questions they feel uncomfortable with, and the school counsellor was requested to be available to any participant who wanted counselling after completing the questionnaire.

Although this section briefly touched on anonymity and confidentiality, these concepts needs more elaboration.

4.10.5 Anonymity and confidentiality

As required, the researcher agreed to protect the identities of the participants throughout the research process.[557] Also, as expected from an ethical researcher, the researcher ensured that the sources of identification cannot be identified,[558] and that data was reported in such a way that participant could not be identified.[559] Pseudonyms were used to identify the participants and the school when reporting the data. The collected data were kept securely and only the researcher had access to it.

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552 Sotuku and Duku (note 548) at 123.

553 Babbie and Mouton (note 498) at 522.

554 Kumar (note 67) at 286.

555 Sotuku and Duku (note 548) at 124.

556 Vreeman and Carrol (note 156) at 78; Patchin and Hinduja (note 96) at 151; Fleming and Jacobsen (note 21) at 75; Badenhorst (note 31) at 3; Sticca and Perren (note158) at 740; Camacho, Hassanein and Head (note 103) at 133.

557 Sotuku and Duku (note 548) at 124.

558 Kumar (note 67) at 286.

559 Webster (note 545) at 6.

Focus group research may offer challenges to the protection of confidentiality, as there are a number of different participants involved in one discussion, and there is thus a greater chance for confidential information to leak out.[560] Notwithstanding the fact that the participants in the focus group were all school counsellors, and thus professional persons who are well aware of the fact that they may not disclose information regarding the learners they discussed, the researcher requested them to keep the discussion confidential. All the information was given voluntarily, and no names or personal details were mentioned when examples of cyber bullying were given.

4.11 Plagiarism

Plagiarism is defined as "the act or practice of taking someone else's work and passing it off as your own work".[561]

The Unisa ethical policy dictates that:

> where a student's or researcher's work is not authentically his/her own, such work does not qualify as an academic output, whether this is a student assignment or employee research, and will be viewed as plagiarism, which is defined as an appropriation of another's work whether intentionally or unintentionally without proper acknowledgement.[562]

To prevent plagiarism, I ensured that I always used quotation marks when directly quoting and where I used my own words in paraphrasing I acknowledge the original source(s).[563]

In order to ensure that plagiarism did not take place, the thesis was run through the turn-it-in programme and I received a positive report. The Turn-it-in originality report is attached as Appendix G.

560 Gumbo (note 525) at 372).

561 Tabane, R. 'Causes, consequences and preventative strategies' in Okeke, C. and Van Wyk, M. *Educational research: an African approach* 2015 Oxford University Press 513-536 at 514.

562 Unisa Ethical Policy 2007.

563 Tabane (note 568) at 517.

4.12 Conclusion

In this chapter, the methodology used for the case study in selected South African schools was explained. The ethical considerations for conducting a study of such a sensitive nature with minors was also discussed in chapters 1 and 4. The next chapter contains an analysis of the data collected in the case study.

CHAPTER 5

DATA PRESENTATION, ANALYSIS, INTERPRETATION AND RESEARCH FINDINGS

5.1 Introduction

In this chapter the data is presented, analysed and interpreted and the research findings formulated. This case study was done in a multi-lingual, former model C school.

The case study consisted of three interviews, a focus group, and questionnaires for the learners. Data is presented in the following order: the data on the document analysis of the school's Code of conduct for learners, the data extracted by means of the three interviews, data extracted from the focus group interview, and lastly the learners' responses to the questionnaires. At the end of each section the presented data was consolidated, analysed, interpreted and used to formulate findings. Lastly, the findings were triangulated.

5.2 Document analysis: code of conduct for learners

The school's Code of conduct for learners is detailed and contains the required provisions as set out in the Guidelines for Code of conduct for learners.[564]

The Code of conduct for learners contains a section on the rights of the learners; this includes an emphasis on dignity and respect. Sections 1.1.6 – 1.1.9 provide for the following:

1.1.6 We support human dignity, equality and freedom of choice and association within the boundaries of the Code of Conduct.

1.1.7 We support non-discrimination and equality, the right to fair treatment before the law and by implication the Code of Conduct of the school.

1.1.8 We support privacy, respect and dignity, particularly referring to mutual respect for one another, their values and their traditions.

564 Guidelines for Code of conduct (note 41).

1.1.9 We support non-violence and the freedom and security of a person implying non-cruelty, inhumanity, degrading and certain values of mediation and co-operation as well as the seeking of non-violent solutions to conflict and differences.

There is a section that specifically provides for how disciplinary proceedings should be conducted. Section 1.1.14 states that:

(i) Disciplinary action is applied reasonably, relevantly and consistently. Primarily it will be aimed at remedial and corrective action, and in extreme cases, punishment.
(ii) Any learner who is accused on account of misconduct will, unless the learner voluntarily pleads guilty, be considered not guilty, until guilt is proven by means of a fair hearing.
(iii) Excuses for/and admission of misconduct may not take place under duress of any nature and will not necessarily account for nullifying any form of unacceptable behaviour. This will only be allowed after due process and all stakeholders have been considered.
(iv) In principle, mass punishment is not allowed, with the exception of proven mutual conspiracy among the concerned learners, except the provisioning of detention classes as and when required.
(v) If a learner leaves the school premises without permission, the school will not be held responsible for any consequence of such action.
(vi) No discrimination against an HIV positive Learner or Educator is allowed.

These provisions are in line with section 33 of the South African Constitution as discussed in chapter 3 (cf. section 3.3.6 Just administrative action). Provision is made for both substantial and procedural fairness as is evident from the requirement that disciplinary action must be reasonable, relevant and consistent, and in providing for a fair hearing before any findings are made.

The Code of conduct for learners contains a provision that prohibits “violence, bullying, intimidation and threatening of any kind”. Although it may be argued that this provision is broad enough to cover cyber bullying, there are no provisions specifically relating to cyber bullying. Another provision states that “verbal, physical or any other form of abuse will not be tolerated”. Once again it can be argued that cyber bullying will be covered by this provision, but due to the unique nature of cyber bullying, this provision is not specific enough to deal with all the problems presented by cyber bullying (cf. section 2.3 C).

Section 1.14 of the Code of conduct for learners specifically deals with cellphones and other electronic equipment.

1.14.1 Learners are not allowed to bring computer games, CD players, radios, cell phones, iPods, etc. to school – unless permission to do so has been obtained from the principal.

1.14.2 Cell phones may not be used during school time, only before and after school, and must be switched off at all times during official school times.

1.14.3 Cell phones and electronic equipment used contrary to this rule will be confiscated immediately and will be retained in accordance with the Cell phone Policy and procedures of the school as follows: For the release of a cell phone the parent must pay a R150, 00 fine at the office.

1.14.4 Confiscated cell phones will only be returned to the parent accountable upon payment of the above charges.

1.14.5 Cell phones are brought to school mainly and solely at own risk and NO investigations regarding losses or thefts will be undertaken by the school.

1.14.6 NO earphones, DC players or MP3 players are allowed on the school premises and will be confiscated immediately.

1.14.7 Items confiscated will only be returned in line with the previous paragraph.

1.14.8 Unclaimed cell phones or electronic equipment will be offered for sale per auction at year end.

1.14.9 No cell phone theft will be investigated by the school.[565]

The Code of conduct for learners prohibits the use of cellphones and other electronic equipment during school hours. There are strict measures in place for the confiscation of electronic equipment when used during school hours. No provision is made for the use of school computers. Thus, although there are some measures in place to curb cyber bullying, and the use of equipment such as cell phones during school hours, the Code of conduct does not specifically provide for cyber bullying. Providing for the seizure of cell phones is not in line with section 8A of the Schools Act (cf. section 3.3.6 Just administrative action), as there are certain procedures that must be followed when seizing personal belongings. It can be argued that confiscation is provided for in the Code of conduct for learners and signed by parents and learners, and is thus a valid disciplinary measure.

The Code of conduct contains no warning with regard to possible criminal and civil charges that cyber bullying may attract. As it is an international law principle that

565 This provision is repetitive, as it is already provided for in section 1.14.5.

children should only be held criminally liable as a last resort, it is preferable to deal with cyber bullying at a school level. This does not mean that the bully may not be held liable for the crimes and civil claims discussed in chapter 3 (cf. chapter 3, section 3.5), and learners should be warned expressly about these possible consequences to their actions.

5.3 Interview with the school principal

The interview was divided into 3 different themes, namely the occurrence of cyber bullying in the school, how cyber bullying is regulated in the school, and the specific problems that the regulation of cyber bullying presents to the school. A section wherein the principal could add his own thoughts on the subject of cyber bullying in schools was also added to the interview.

Theme 1: The occurrence of cyber bullying in the school

Although no actual statistics were available, the principal confirmed that cyber bullying occurs in the school, he stated that "There is no research or statistics available to say it (cyber bullying) is serious, but the fact that it (cyber bullying) exists is true … There is definitely cyber bullying happening in school".

One specific case of cyber bullying was mentioned, and it was an instance where a group of friends victimised one learner and harassed her and called her names via social media. Thus, the cyber bullying was a group attack "It was a group of friends that bullied one learner, and it became very, very bad for that learner".

When asked about the group nature of cyber bullying, the principal stated that "More than often it is not a one on one thing necessarily, it does happen, but I think in most cases you get a group of learners who single out another learner".

The principal believes that the effect of cyber bullying is very serious for teenagers, and consequences of being cyber bullied includes depression, self-destructive tendencies and suicidal thoughts; "it makes them depressed … People want to take their own lives … for teenagers it is very serious".

The principal agreed with the statement that cyber bullying has a negative impact on the quality of education of learners. He believes that "learning can't properly take place if a person is under severe strain or under pressure from their peers. It definitely affects them".

The need to create awareness of the harm that cyber bullying can cause came to the fore as one of the important interventions schools should focus on (cf. section 2.3.1 The anonymous nature of cyber bullying). This need is confirmed by the principal because when asked about the excuses that cyber bullies offer for cyber bullying another learner, the principal stated that "the cyber bully rarely accepts that he is a cyber bully … the bully must be made to realise that he/she is psychologically damaging another person".

Theme 2: How is cyber bullying regulated by the school?

The principal was asked to discuss the measures that the school has in place for dealing with instances of cyber bullying. The school offers education regarding cyber bullying, time is allocated in the LO classes to discuss cyber bullying with the learners, as the principal believes that it is the easiest way to reach all learners and to make them aware of cyber bullying, he said that "All learners in the school have LO classes … the decision was made to actively talk to learners about bullying within the LO classes".

He also mentioned speakers at the schools such as the South African Police Services. "We do occasionally have interventions at school where the SAPS and social services speak to the learners at school about bullying …"

When dealing with instances of cyber bullying, the school follows all procedural steps for disciplinary proceedings as set out in the Code of conduct for learners:

> We get all the information by talking to the victim first and by talking to those that are transgressing … What we do is get the parents also in. You first look at both sides of the story and see how big is this whole situation, who is involved and then you get the parents in and try to resolve (the matter) through discussion, dialogue in an open forum where people sit together and talk things out … It doesn't always come to that, you are not always successful. Disciplinary proceedings are clearly explained in our Code of conduct, and there is a process to follow as well.

Thus, the school gathers the necessary information, hears both sides of the story, and involve the parents of the learners. Clearly set out procedures are followed and the school aims to resolve the matter through discussion and dialogue with the victim, the bully, the parents and educators. When asked on how the procedure for dealing with cyber bullying differs from the procedure for dealing with traditional bullying, the principal stated the following:

> Cyber bullying obviously speaks to WhatsApp's and all social media forms, while traditional bullying is more face to face … It involves cell phones; it involves electronic media and those types of things … I think … there must be measures put in place with regard to these specific learners. That can help them and assist them … in such a way that they cannot bully others. It is very difficult and not easy to do. There must be some control from the parent's side. It is important that the school and the parents have a close relationship in dealing with this. Together we can solve the problem. To try to solve it by ourselves from the school side is not possible … We do not allow cell phones to be on during school time. Cyber bullying can happen during break or after school. We allow learners to bring their cell phones to school. But it must be switched of and out of sight. We have free Wi-Fi, so the moment the school comes out you see a lot of learners working on their phones.

From this statement, it is clear that cyber bullying offers its own unique context, and must be regulated differently from traditional bullying. The involvement of parents is also emphasised.

Theme 3: Specific problems that the regulation of cyber bullying presents to schools

The principal was asked whether he agreed with the statement that cyber bullying was more difficult to regulate than traditional bullying. He stated that:

> Yes, because of the fact that you can see a person. In cyber bullying you cannot necessarily see a person. Cyber bullying is more difficult to regulate, as you can't spot it as easily as traditional bullying. It is difficult to limit the time that learners spend on social media, and the involvement of parents is essential.

When asked to share his own views on the regulation of cyber bullying the principal stated the importance of more research on the subject. He also expressed the view that information sharing, discussion groups and exchange of ideas on the subject are essential. He stated that:

> I just think that the fact that you are doing research on this, there should be more research and more things that we can discuss, and plans, and we should talk more, there must be more open forums for discussion and exchange of ideas to help assist schools and parents to be able to curb this.

This interview served to corroborate a number of the previous research findings. Cyber bullying does indeed take place at South African schools (cf. section 1.2 B), and more concrete measures for the regulation of cyber bullying need to be put in place. Cyber bullying is difficult to regulate, as you can't easily identify it, and it is hard to limit the time learners spend on social media (cf. section 2.3 C). Cyber bullying severely impacts on the quality of learning and has several adverse effects on the victims thereof (cf. section 2.2.2 The harm caused by cyber bullying). By frequently using the words "problematic", "serious problem" and "difficult", the principal stressed the extent of the problem of cyber bullying in schools, and the difficulty in the regulation thereof. There are rough measures in place to deal with cyber bullying, but these measures are not enough to address the specific context and problematic factors of cyber bullying. The words "work together", "more research", "sharing of ideas" and "more information" were also used frequently. This indicates that a whole-school approach must be adopted when regulating cyber bullying, and that there is a need for more discussion and sharing of ideas on this topic.

5.4 Interview with the LO educator

This interview was similar to the interview with the school principal, but two new and disturbing factors clearly emerged. Firstly, the high occurrence of a sexual nature in cyber bullying, and secondly, educators are cyber bullied or falsely accused of sexual misconduct by learners.

Theme 1: The occurrence of cyber bullying in the school

This LO educator confirmed that cyber bullying in schools is a very serious problem, and that it happens more often than realised. The LO educator stated that "I think very serious, I think cyber bullying takes place more often than what we realise. … I think Facebook has a huge impact on our children".

A number of examples of cyber bullying in the school was given. There is a girl in the school that was identified as a cyber bully. She regularly posted personal things about other girls on Facebook. Another girl in the school teased girls for not having sex with the bully's male friends; she sent WhatsApp messages to those males to discuss girls in her class openly. The one victim was so badly affected she couldn't focus in a class where she sat close to the cyber bully.

Another case at the school involved "outing" as a form of cyber bullying. One grade 11 learner had an affair with an older married man. Another learner saw them together, took a picture and "outed" them by sending the picture to a newspaper. This instance of cyber bullying may fall under the definition of outing as cyber bullying. A picture was taken with a cellphone, and then the picture was made public (although not electronically) to spread the victim's secret. This instance of possible cyber bullying raises an interesting question that will require more research into the means that can be used to cyber bully learners. Will mass communication, such as the radio or newspaper, also fall in the definition of cyber bullying?

In a case of "sexting" at the school, one girl sent an explicit photo to her boyfriend; he sent it to his friends. This is a perfect example of the dangers of sexting, and the reason why sexting along with cyber bullying should also be regulated in schools. The sexual nature of cyber bullying is quite alarming to the LO educator. She also observes that cyber bullying often results in physical altercations. "Everything is sexual, everything is sexual … . It very often does, I've had girls in my office for smacking each other".

Examples of learner-on-educator cyber bullying were also given. One educator was falsely accused by a learner for sending pornographic pictures and messages to learners. The child phoned a radio station posing as a concerned parent and shortly afterwards child protection services showed up at the school and started an investigation. The educator's laptop and phone were confiscated by the South African Police Services. The situation was extremely traumatising for the educator, and the educator had to get therapy. This educator still struggles and gets nightmares. Another example is where a learner started rumours that an educator was asking the female learner out on dates. The learner even went so far as to photo shop the image

of the educator onto pictures. A case of sexual harassment was brought against the educator, investigated and eventually dismissed.

The LO educator believes that "cyber bullying is very debilitating for the children" and that the use of social media impacts negatively on a learner's quality of learning:

The LO educator is of the opinion that victims of cyber bullying often become bullies; it is a way of lashing out at other learners. She believes that "they become bullies … they sense the fear; very often because they know the emotion, they know the impact. I think it is limited … sometimes it is a lash out".

Learners don't see their actions as cyber bullying. They believe that because they have the right to freedom of speech, they can say whatever they want, when they want to say it:

> They don't see it as bullying. They see it as part of their personality …freedom of speech. We can say what we want, how we want. Bullying is in their nature, cyber bullying has just given them a more powerful tool to affect others. Learners have a false sense of security that comments they make on Facebook will not be found out. They have this false sense of security that comments they make on Facebook will not be found out.

On sexting, the LO educator states that the danger of sexting is that "learners don't know where to draw the line between appropriate and inappropriate behaviour".

It can be argued that inappropriate behaviour increases the opportunity for cyber bullying by means of outing, blackmail or extortion.

The LO educator also confirms that cyber bullying contains a group element, "cyber bullying becoming a group attack is not intentional; it is more a wolf pack mentality".

Theme 2: How is cyber bullying regulated by the school?

The LO educator confirmed that cyber bullying forms part of the LO syllabus for grade 9's, and as the head of LO in the school, the LO educator specifically focuses on empowering learners to deal with cyber bullying. Learners are taught to block cyber bullies and that "what others say about you doesn't concern you".

The LO educator believes that educating learners on cyber bullying is not always successful as learners don't remember what they are taught, "they forget, they don't remember".

The LO educator referred to how parents and learners were called in to resolve specific instances of cyber bullying, but did not want to comment on the disciplinary process, as the LO educator was not involved personally.

Theme 3: Specific problems that the regulation of cyber bullying presents to schools.

The LO educator agrees with the statement that cyber bullying is more difficult to regulate, as it is much harder to track an instance of cyber bullying to the source of the bullying. She said that "I think it is true … it is very difficult to control cyber bullying …"

She commented that cyber bullies are also much more subtle than traditional bullies. With cyber bullying it is also harder to limit the access that bullies have to the victim. Learners can hide the evidence of cyber bullying easily, or simply deny that they sent the message by saying things like "That's my number, I didn't send it, I left my phone somewhere".

The LO educator mentioned a specific incident as an example where a female learner lied about being at a school activity. She briefly attended the school activity, and then slipped away to meet a boy for a date that she arranged via WhatsApp. When her educator and parent wanted to see the messages on her phone, it had already been deleted. This is not strictly an instance of cyber bullying and the fact that the LO educator used it as an example of cyber bullying is evidence of how educators sometimes misunderstand the nature of cyber bullying.

The LO educator also believes that parents are just not interested to assist with the problem of cyber bullying, as parents themselves spend too much time on their phones rather than to talk to their children, and this sends the wrong message to children. She is of the opinion that learners do not have the confidence in their parents to tell them that they are being cyber bullied.

Children also make use of cellphones to lie to parents. For example, children take pictures of them with friends at home, send the picture to their parents and then go out. Although this example once again cannot be seen as an instance of cyber bullying, it is an interesting observation, and future research should be done on this.

The LO educator believes that the term bullying is very broad and not covered adequately. "The term bullying is very broad, and we don't cover it effectively".

The LO educator is unsure whether the problem of cyber bullying in schools can be addressed adequately, as it is a vast problem and very contextual:

> I don't know how we are going to be able to put laws in place against cyber bullying, I think the term bullying is very vast, what might be offensive to one person might not be offensive to another. Context varies; the way children are raised varies.

The problem with how bullying is regulated in schools is that schools address the results of the bullying and not the cause of the bullying.

From this interview it emerged that there are different forms of cyber bullying currently taking place in the school, including learner-on-educator cyber bullying, harassment, flaming, denigration, impersonation, outing and sexting. The severe consequences for victims of cyber bullying were once again confirmed. The sexual nature of cyber bullying was emphasised strongly during this interview. It is also interesting to note that cyber bullying may cause physical violence between learners. Although there is some form of education for learners regarding cyber bullying, this is not sufficient, and learners often forget what they have learned, or do not listen.

5.5 Interview with the school discipline officer

This interview was added to the list of interviews on the recommendation of the school principal and LO educator.

Theme 1: The occurrence of cyber bullying in the school

The discipline officer confirmed that cyber bullying happens "every single day, if not every single period, learners report that they are being bullied … You can't tell how far it goes".

Cyber bullying often turns into psychical fights, and groups also get involved in cyber bullying where friends want to protect friends. The seriousness of the occurrences of cyber bullying varies.

The discipline officer raised an interesting contextual factor in cyber bullying, and that is culture. After boys have been initiated they change, and they feel that they must be obeyed as they are now men. Other boys like to enforce their presence and masculinity. Thus, it is a power thing, where the bully perceives himself as more powerful than the victim. Once again the group element of cyber bullying was emphasised, cyber bullying "starts as an individual thing, but everyone has their own groups …"

Theme 2: How is cyber bullying regulated by the school?

The discipline officer states that the school takes cyber bullying very seriously and addresses it in the Code of conduct for learners:

From the analysis of the Code of conduct it seems that cyber bullying can be covered under the provision against bullying in general, but there is no specific reference to cyber bullying, although the use of cellphones at school is prohibited.

Procedures are set out in the Code of conduct for learners:

> You start with warning, then written warning, eventually disciplinary hearing by governing body … We have procedures in our Code of conduct, you can't immediately take a learner to a disciplinary hearing, but you try your best to explain to the learners how serious cyber bullying is.

If it is serious, the parents are called and involved in disciplinary hearings; as an example the discipline officer described an instance where a picture was taken of a learner, and because she is dark skinned it was referred to as load shedding. The parents of the parties involved were called in to help resolve the matter.

The discipline officer points out those less severe instances of bullying is not reported to the parents, but rather dealt with directly by the school, as sometimes it is just instances of fighting between friends. Discipline should be applied differently in accordance with the seriousness of the cyber bullying. Not all instances of cyber

bullying should be treated the same, as "depending on what activities they are doing, it can be escalated".

In dealing with cyber bullying, the discipline officer states that the best interests of all the learners must be protected, but that instances where cyber bullying does not happen at school are problematic when "things happen at home, and then learners fight at school … but sometimes parents don't want instances at home being investigated".

With regard to the investigation into instances of cyber bullying, the discipline officer stated that it is not necessary to look at the data on the cellphones of the cyber bully to investigate instances of cyber bullying because "I don't necessarily need to go into their phones *per se*; the person reporting takes a picture as evidence … comes with his friends as witnesses".

The discipline officer indicates that victims who report cyber bullying often saved the proof of the bullying on their own phones, and if a learner reports cyber bullying, it gives you the right to investigate the incident further:

> Victims of cyber bullying can report the cyber bullying and they normally have evidence on their phones of the SMS's, WhatsApp's or photos of the comments … when somebody reports cyber bullying … it gives you a right to investigate.

The discipline officer further stated that children who are bullied are referred to counsellors on a daily basis. It is also important to speak to the bully so the context and factors behind the bullying could be understood better.

Theme 3: Specific problems that the regulation of cyber bullying presents to schools

The discipline officer agrees with the statement that cyber bullying is more difficult to regulate than traditional bullying, as it is hard to determine where to draw the line on what is cyber bullying and what not. He also believes that "sometimes they (learners) feel like they are playing … They don't realise the consequences". This statement is in line with what the other discipline officers had to say about learners not realising what the consequences of cyber bullying are.

The discipline officer suggested that learners themselves should be used to assist in regulating cyber bullying. For example, the school representative council are more aware of what is going on among learners, and learners also feel more at ease to report instances of bullying to them. They can then alert the educators if something should be investigated.

This interview corroborates the findings in the second interview that cyber bullying may follow on physical altercations. The impact of different cultures on cyber bullying was raised, and is a theme that will need more research. It is clear that there are different levels of cyber bullying, and not all cases are serious. Thus, different instances of cyber bullying must be treated differently. Clearer guidelines on what exactly constitutes cyber bullying, and how to treat the different forms of cyber bullying are needed. As seen from the Code of conduct for learners and the statement made by the discipline officer, the school does, however, valiantly try to protect the best interests of all learners fairly.

5.6 Summary of findings in the three interviews

The following themes emerged in two or more of the interviews:

- Cyber bullying does indeed occur at the school – All the participants in the interview confirmed that cyber bullying was a problem at the school. The Life Orientation educator stated that she believed cyber bullying occurred more often than one realises, and the discipline officer stated that bullying, whether it is traditional bullying or cyber bullying, occurred in the school on a daily basis. A number of examples of instances of cyber bullying in the school was given by the participants. These examples correlate with the different forms of cyber bullying as identified in the literature review (cf. section 2.2.1 The definition and types of cyber bullying). These instances of cyber bullying included harassment, flaming, denigration, impersonation, outing and sexting. The Life Orientation educator also identified instances of learner on educator cyber bullying.
- It is more difficult to regulate cyber bullying than traditional bullying – When the participants were confronted with the statement that cyber bullying is more difficult to regulate than cyber bullying, they agreed with the statement. This

confirms that cyber bullying is harder to regulate than traditional bullying (cf. section

- 2.2.3 The unique nature of cyber bullying). A number of reasons for this were given by the participants. Over and above the reasons evident from the literature review (cf. section 2.3 C), the following reasons were added by the participants: the belief that because cyber bullying takes place on social media, it is not as easy to spot as traditional bullying, it is difficult to regulate how much access learners have to social media, it is easy to hide evidence of cyber bullying, it is harder to track the source of cyber bullying, the term bullying is very broad and contextual, it is hard to determine whether an instance is cyber bullying or not. It is important to note that new challenges in the regulation of cyber bullying in schools were added by the participants. This includes that cyber bullies are more subtle than traditional bullies, difficulty in convincing parents to be involved with the regulation of cyber bullying and disciplinary process, and uncertainty as to what exactly constitutes cyber bullying.
- It is necessary to involve the parents of the learners in the management of cyber bullying in school – All of the participants were adamant that the successful regulation of cyber bullying needs the support of the parents of the learners involved. Not only must the parents practice some form of control over their children's social media use, but they must also be involved in disciplinary proceedings, as well as allowing the school to take the necessary steps in regulating cyber bullying. This data supports the whole-school approach to the regulation of cyber bullying as discussed in chapter 2 (cf. section 2.4 L).
- Cyber bullying has a group element – The participants confirmed that in most instances, cyber bullying was a group attack. The Life Orientation educator stated that she does not think it is intentional, but that the learners have a pack mentality, and will jump at the chance to take part in bullying the victim. This is in line with the literature review (cf. section 2.2.1 The definition and types of cyber bullying), and the important role the group element plays in bullying. The discipline officer stated that learners will often get involved in cyber bullying to protect their friends. It is unclear whether this group dimension of cyber

bullying relates to the age of the bullies, or to the nature of social media, or to both. This is a topic for further research.

- Cyber bullying leads to physical altercations (Life Orientation educator and disciplinary officer) – The Life Orientation educator as well as the discipline officer stated that in some instances, cyber bullying leads to physical altercations between the parties involved in the cyber bullying.
- Cyber bullying is a severe problem and negatively impacts on the quality of education for learners (school principal and Life Orientation educator) – The participants were asked to discuss the effects of cyber bullying on learners. These include depression, self-destructive tendencies and suicidal thoughts. The participants also commented that quality learning cannot take place when a learner is being cyber bullied. These effects mentioned by the participants correlate with the forms harm can take as identified in the literature review (cf. section 2.2.2 The harm caused by cyber bullying).
- There are different forms of cyber bullying, and instances of cyber bullying differ in severity – The participants agreed that the context of every cyber bullying incident must be taken into account, and that not all instances of cyber bullying must be treated the same. Discipline should be applied differently in accordance with the seriousness of the cyber bullying. This argument was discussed in the literature review on cyber bullying in chapter 2 (cf. section 2.2.1 The definition and types of cyber bullying).
- The school has procedures in place to regulate cyber bullying – From the Code of conduct for learners, as well as the interviews with the participants, it is clear that the school has procedures in place to regulate cyber bullying. The Code of conduct for learners contains a provision that prohibits “violence, bullying, intimidation and threatening of any kind”. Section 1.14 of the Code of conduct for learners specifically deals with cellphones and other electronic equipment, and prohibits the use thereof during school time. When dealing with instances of cyber bullying, the school follows all procedural steps for disciplinary proceedings as set out in the Code of conduct for learners. This includes investigation and involving all parties involved as well as parents. Clearly outlined procedures are followed and the school aims to resolve bullying

incidents through discussion and dialogue with the victim, the bully, the parents and educators.

- Learners do not understand the harm their actions can cause – When asked about the excuses that cyber bullies offer for cyber bullying another learner and some of the participants stated that, in general, the cyber bullies tend not to see themselves as bullies and seem to be unaware that their actions can have unintended and even severe consequences. Other excuses include the right to freedom of speech; they were merely playing and having a false sense of security that they will not be found out. These problems relating to taking responsibility for cyber bullying, and the anonymity of the internet were discussed in the literature review (cf. section 2.3 C).
- The school provides for education on cyber bullying, but it is not always successful – Cyber bullying forms part of the LO syllabus for grade 9s, where they are empowered to deal with instances of cyber bullying. The LO educator is of the opinion that this is not always successful as learners often do not remember what is said in class. It can be argued that learners tend not to see the link between the reality of cyber bullying, and their own use of social media, thus, the education on cyber bullying is purely academic and not translated into practice.

5.7 Focus group

The interviews gave valuable insights into the different viewpoints and perspectives that educators have on cyber bullying. By conducting a focus group, the focus moved from a purely educational perspective towards more psychological perspectives on the motives that learners have for cyber bullying and the effects cyber bullying has on learners and their education.

From the focus group it emerged that cyber bullying undeniably happens in the school, it merely depends on how much access learners get to technological devices:

> I do think it is a problem, and I do think it happens. I think it goes across the board…those students who have more access to technological devices, it happens more, but student who simply have cell phones can just send an SMS … One of the biggest things is lots of pictures being sent, lots of nudity, and that being shown to anyone.

The counsellors stressed that there is a large number of nude pictures that are distributed among learners. This, once again, emphasises the sexual nature of cyber bullying. The participants believe that this has become acceptable to learners, as "it is on movies, the kids are watching these movies, and they think that is a sexy way to be with someone … The media is making it acceptable".

Once again the negative consequences of cyber bullying were confirmed as "low self-esteem, don't think positive, social isolation, it reflects in their general ability at school … instead of focussing in class … they focus on rumours … Suicide …"

The counsellors discussed the effect that a learner's home life has on their behaviour. Learners do not learn proper values and online behaviour at home. A large number of learners come from single parent households and the parent struggles to keep food on the table, and thus do not have the time to invest in the learner. Parents often bully learners, so the only way to get release is to bully others at school. The following comments were made:

> Usually a lot of hurt in the bullies life. When you get down to the core, it is because they are hurting so much … a lot of people who are oppressed, oppress others, they continue the cycle. Home life is hard, get release by bullying kids at school. … the way they grew up counts … they have anger … they want revenge … there is no one at home they can relate to … they lash out at other children … the parents have a role they are not playing to their children … we don't show them that you must have respect.

What is evident from the statement above is that learners have to be taught respect for others at a community level. Context should be taken into account in each individual case. Learners who experience a lot of hurt in their lives hurt others back. A counsellor stated that one can't regulate meanness among learners, and will never get rid of it; learners must rather be taught how to deal with it in a constructive manner. Learners must also be encouraged not to join their friends in cyber bullying.

Another factor contributing to the increase in cyber bullying is that although learners get taught about bullying and human rights in the LO classes, learners don't understand that they are causing harm to others when they cyber bully them, because they don't envisage the harm. Learners don't realise the consequences of their

actions, because it is not a physical thing. Learners also do not pay attention to what they are taught in class:

> They get taught this in LO … you are giving a gun to a baby when you give this kind of technology to children … they are impulsive creatures … at this age they are very superficial … they don't understand they are causing harm. They don't see the consequence; because they hide behind anonymity … unlike physical fighting they don't see a bruise. The problem is … A lot of these children are not thinking critically … These kids have got so much emotion … they are hearing about it, learning about it … But is it sinking in?"

The important theme from the statement above is that learners do not like being dictated to; "dictating to these children is not going to help you", and they must rather be taught values in a more practical and tangible manner:

Instead, the focus group suggests that it is more productive and important to have programmes where learners hear how other learners feel about what is being done to them when they are being bullied. Participant one mentioned that in America there is an initiative where learners get together and discuss how bullying affects them, and an initiative to "put a whole bunch of kids in a room where they hear what they are doing … physically hear how their actions affect other people … see there is consequence to their actions …", might be helpful.

Rather, programmes should be developed where learners get the opportunity to speak, and where values are taught. Programmes where learners are trained practically to conduct healthy interpersonal relationships should be developed. In resolving cyber bullying, learners have to face each other to reach a solution:

> The only way to show these kids how to be a positive community is if we get practical programmes to teach them what it means to care for another human being … programmes where kids are getting positive reinforcement …

The focus group agrees with the statement that there are different levels of cyber bullying. Cyber bullying ranges from unintentional fights to severe cases. Examples given by the counsellors include passing on private WhatsApp messages and online fights. These cases should not be treated equally. In one specific instance at school, one girl badmouthed her friend on Facebook, and other learners soon got involved by picking sides and continuing the fight. Another girl was dating a much older man, a photo of her in her bra with this older man was sent around school. There was also an

instance where a boyfriend took suggestive pictures of his girlfriend and then showed it to others. Learners use social media to disrupt school as well.

> Acting like hooligans … Came into school clearly knowing what they will be doing … Discussing it on social media … and that is also a form of bullying … intimidation action to get teachers to do what they want them to do.

Another example of cyber bullying at the school is where an altercation happened between two boys after school. The one learner went to another learner's house and attacked him while he recorded the whole fight on video. The next day the video was spread around the school. The victim was extremely upset and felt that people would see him being humiliated.

Cyber bullying can also be directed at educators. An example given is where a learner claimed that an educator was getting too friendly with her via Facebook messages.

> This was also done via Facebook … I didn't find any validity … but problem is that it is a medium where people condition other people … it could get a teacher into big trouble … A lot of teachers use social media as a form of motivation … not sure where that line is.

Social media is a powerful tool for education and support of learners, but educators can get in severe trouble if a learner wrongly perceives these messages. A future recommendation for research is to establish guidelines for educators to use social media successfully as a teaching tool, without being subjected to these kinds of attacks from learners.

As there are different forms of cyber bullying, with varying levels of seriousness, these instances should not all be treated the same as "not everyone's intention is deliberate". Learners should rather be taught to react to being cyber bullied appropriately as "they don't know anything else … they resort to hurting them back".

More girls are involved in cyber bullying than boys, and cyber bullying does have a group element. Girls fight differently than boys, as girls tend to hold grudges, are more emotional, and know better how to hurt others emotionally. Girls also perceive things more personally, find it hard to forgive and take offence quickly and out of context:

> Girls are more emotional, know how to hurt … boys don't allow themselves to be emotional … physical thing … over and done … girls find it hard to forgive … hold a grudge ... women takes things too personally.

The counsellors agree that cyber bullying must be regulated, but that alone is not enough. There should be a whole-school approach, where behaviour at school is changed and addressed through practical programmes. It is especially important to address extremely severe cases, for example where a boy was sodomised at school by other learners, and the bystanders took a video.

There is not enough support given to educators and learners by the Government departments:

> Kids get enough of talking … must learn there are consequences to their actions … these kids aren't learning that at home … they are learning to defend themselves … very few of the kids have a mother and a father … they have no supervision … streets teach them to solve their problems …

5.8 Summary of findings in the focus group

The following findings were made after analysing the data from the focus group.

- There is a strong sexualised element in learners' cyber communication and learners show an inability to create proper relationships. The statements made by the counsellors emphasise what the LO educator has already said about the strong sexual nature of cyber bullying instances.
- Cyber bullying negatively impacts on the emotional well-being and quality of education of learners. The harm caused by cyber bullying was stated by all the participants in the interviews, as well as identified in chapter 2 (cf. section 2.2.2 The harm caused by cyber bullying). These consequences include low self-esteem, social isolation, paranoia, depression and suicide. A learner's general ability to focus at school is also influenced negatively.
- Learners do not have the emotional capacity to understand the possible harm their actions online can cause properly. The fact that learners do not foresee the harm inherent in their cyber bullying, impacts on the severity of the problem of cyber bullying. This lack of understanding the consequences of their cyber

bullying was mentioned by the principal, the LO educator, and discussed in the literature review on cyber bullying (2.3.1 The anonymous nature of cyber bullying).

- More girls are cyber bullies and victims of cyber bullying than boys, and educators can also be cyber bullied.
- The participants in the focus group feel that programmes need to be in place where learners are obliged to face the victims of cyber bullying and the consequences of their actions. Learners must also be taught values in a more practical and tangible way. This theme ties in with the previous theme, as well as the statements made that learners do not realise that their actions can harm others. This also supports the whole-school approach to cyber bullying as discussed in chapter 2 (cf. section 2.4 L).
- There are different levels of cyber bullying. Severe forms of cyber bullying must be punished more severely. Not all instances of cyber bullying must be treated the same, and every case of cyber bullying must be treated on an individual basis with the context of the case taken into consideration.
- Although the group element of cyber bullying is not as pronounced as in the interviews, it was mentioned by the participants in the focus group.
- The element of revenge bullying was mentioned. Cyber bullying can happen when a learner is hurt by another learner, and they will unthinkingly lash back at the person who hurt them as a defence mechanism. This can also tie in with the group element as mentioned by the discipline officer. Learners often get involved in bullying to protect their friends.

5.9 Learner questionnaire

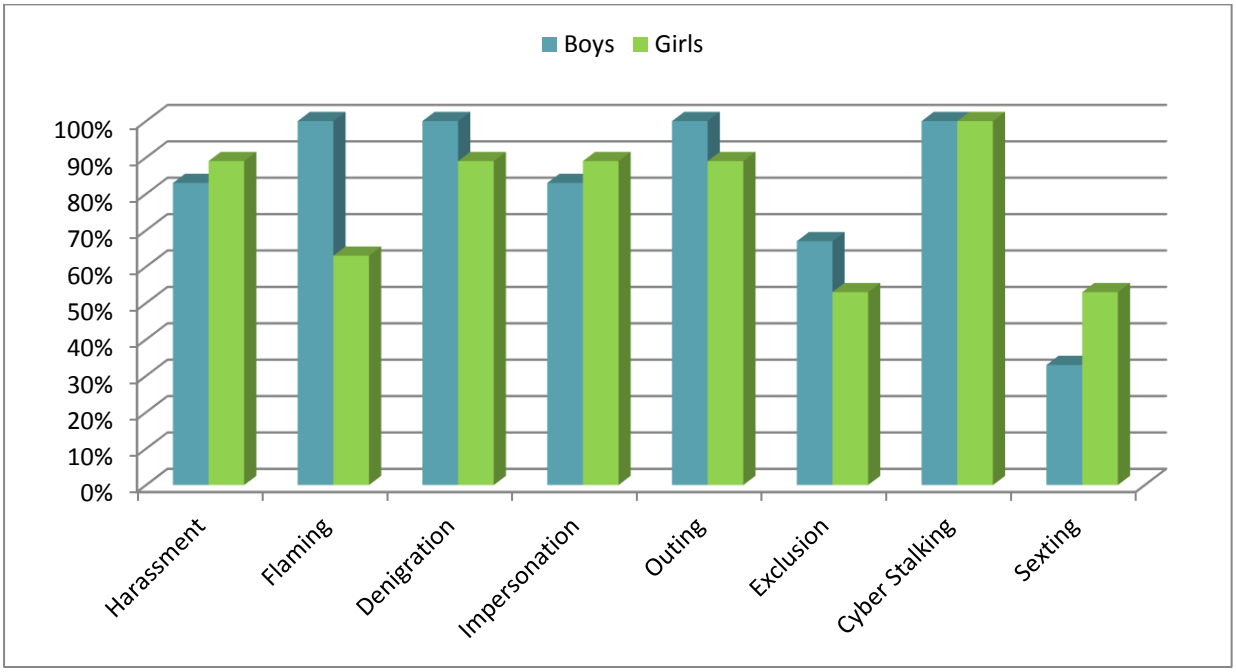
The number of grade 9 learners who participated in the questionnaire was disappointing, but it was still possible to gather relevant information and provide feedback on the quality of the questionnaire. Twenty six questionnaires containing the relevant assent and consent were returned by the learners, it was arranged to go back to the participant school for more data, but that was not necessary in the end as information saturation was reached. At the start of the pilot study the educators informed me that it might be difficult to get feedback if learners do not complete the questionnaire at school, as they might not take the time to complete it, and their

parents might not fill in the permission slips. Out of the twenty six questionnaires, only six of the questionnaires were completed by male students.

Section 1 of the questionnaires was aimed at gathering data with regard to the different forms of cyber bullying in South African schools, as well determining what platforms learners use to cyber bully other learners.

Although more females participated in the questionnaire in comparison to the number of males, the tables are divided between males and females for the purpose of gathering information on how the forms of cyber bullying differ between the genders. The first table illustrates whether learners perceive the traditionally recognised forms of cyber bullying as cyber bullying, the second table indicates the percentage of learners who have been cyber bullied in a certain manner, and the third table illustrates the percentage of learners who have cyber bullied other learners.

Table 4: Recognised types of cyber bullying learners perceive as constituting cyber bullying

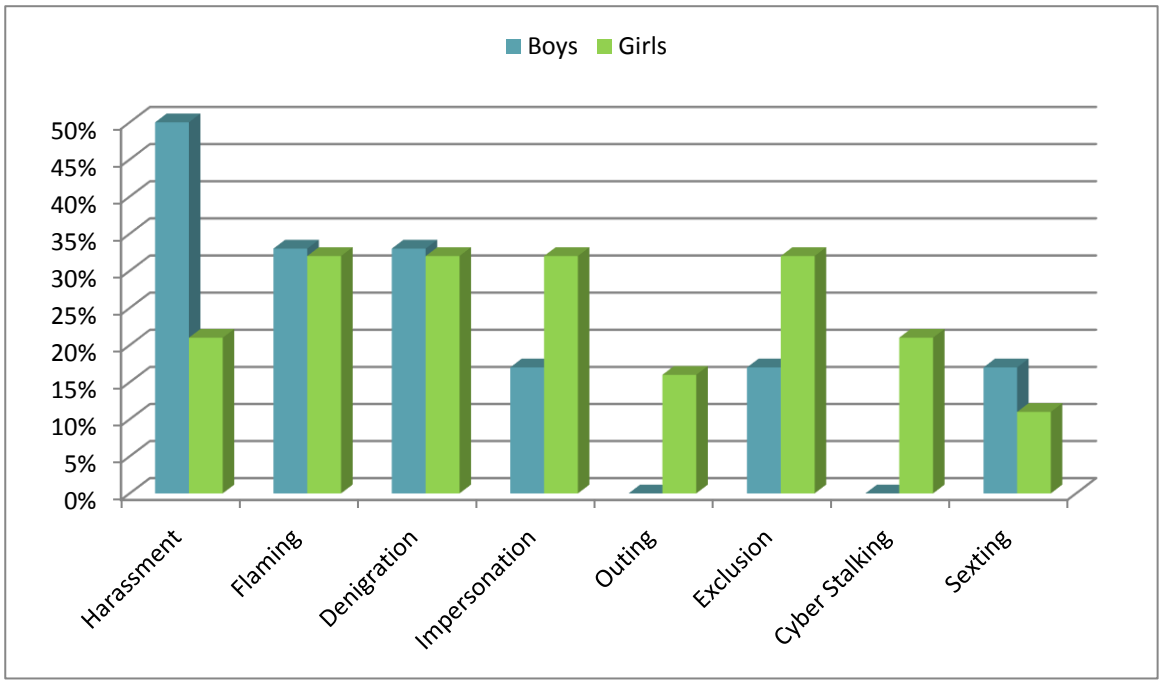


There are some differences between how boys and girls perceive the different forms of cyber bullying, as illustrated by the chart above. Markedly more boys than girls see instances of flaming and exclusion as cyber bullying. This can perhaps be attributed to

the differences between how girls and boys fight. There is also a big discrepancy in the number of girls who view sexting as a form of cyber bullying, compared to the number of boys.

The majority of learners agree that the above mentioned forms of cyber bullying, do indeed constitute cyber bullying, except for sexting and exclusion. Only 50% of learners think that sexting is cyber bullying, and only 42% of learners think that exclusion is a form of cyber bullying. From the questionnaire it is evident that all of the forms of cyber bullying mentioned above occur in the school. Learners were asked whether the list mentioned above was exhaustive, or whether they could identify any other forms of cyber bullying. 75% of the participants stated that the list was exhaustive. The other participants identified things such as threatening other learners, lying about other learners to ruin their friendships and photo shopping pictures of other learners. These answers by the participants can indicate that they do not understand the definition and different forms of cyber bullying as listed in the questionnaire clearly. This in turn can then indicate that there is definitely a need to provide learners with more information on cyber bullying.

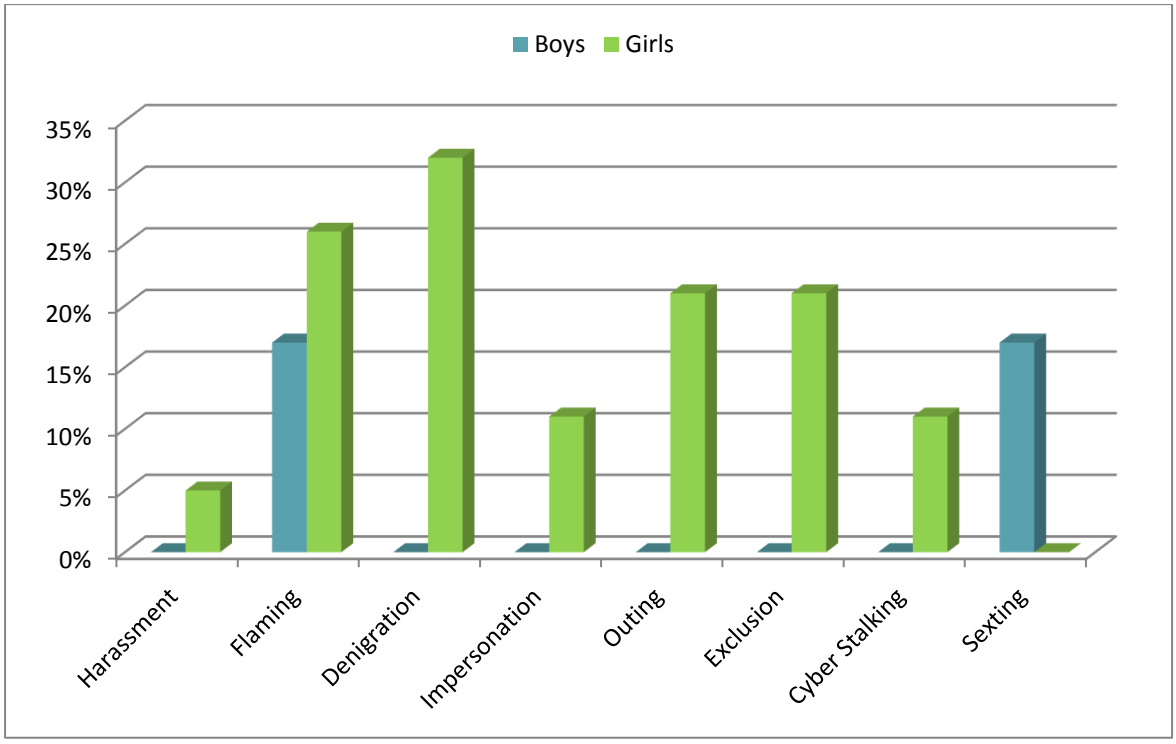
Table 5: Forms of cyber bullying that the learners were subjected to



The percentage of boys who admitted to being cyber bullied via harassment is almost double than the percentage of girls. An equal percentage of boys and girls have been cyber bullied in the forms of flaming and denigration. In the other four categories, more girls than boys have been cyber bullied in that manner.

The most popular form of cyber bullying is harassment, followed by flaming, denigration, impersonation and exclusion. Even though the sexual nature of cyber bullying have been emphasised in the interviews, the least number of learners have admitted to being cyber bullied in such a manner. As this data provided by the learners do not correspond with the data provided by other participants in the study, it can be an indication that learners do not want to admit to being involved in sexting, and that they are embarrassed by the nature of their acts.

Table 6: Forms of cyber bullying learners committed



The boys only admitted to committing cyber bullying in two forms, namely sexting and flaming.

Most girls who admitted to cyber bullying another learner used denigration and flaming, although girls committed cyber bullying in all of the nine mentioned forms.

This may illustrate the point made by the educators and school counsellors that more girls commit cyber bullying, and that girls fight differently from boys. Cyber bullying in some instances may only be the result of a fight between friends, and may escalate where groups of friends then get involved in the fight. A number of such instances were mentioned by the LO educator and the school counsellors.

With regard to the platforms that the participants have access to, the following data was gathered. The first table relates to the access that learners have to the different platforms used for cyber bullying. The second table relates to how these different platforms were used by the learners to cyber bully other learners, and the third table relates to how learners' access to these platforms is regulated in some manner by parents or educators.

Table 7: Learners' access to cyber bullying platforms

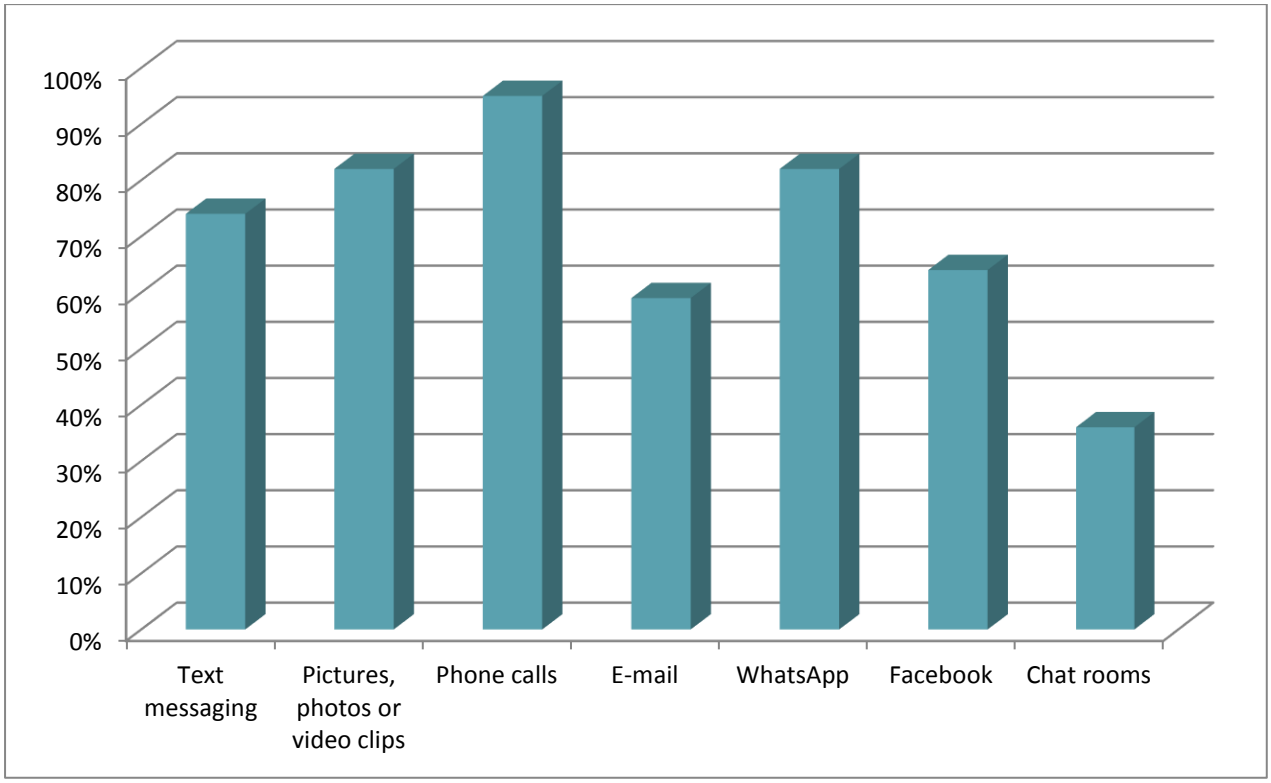
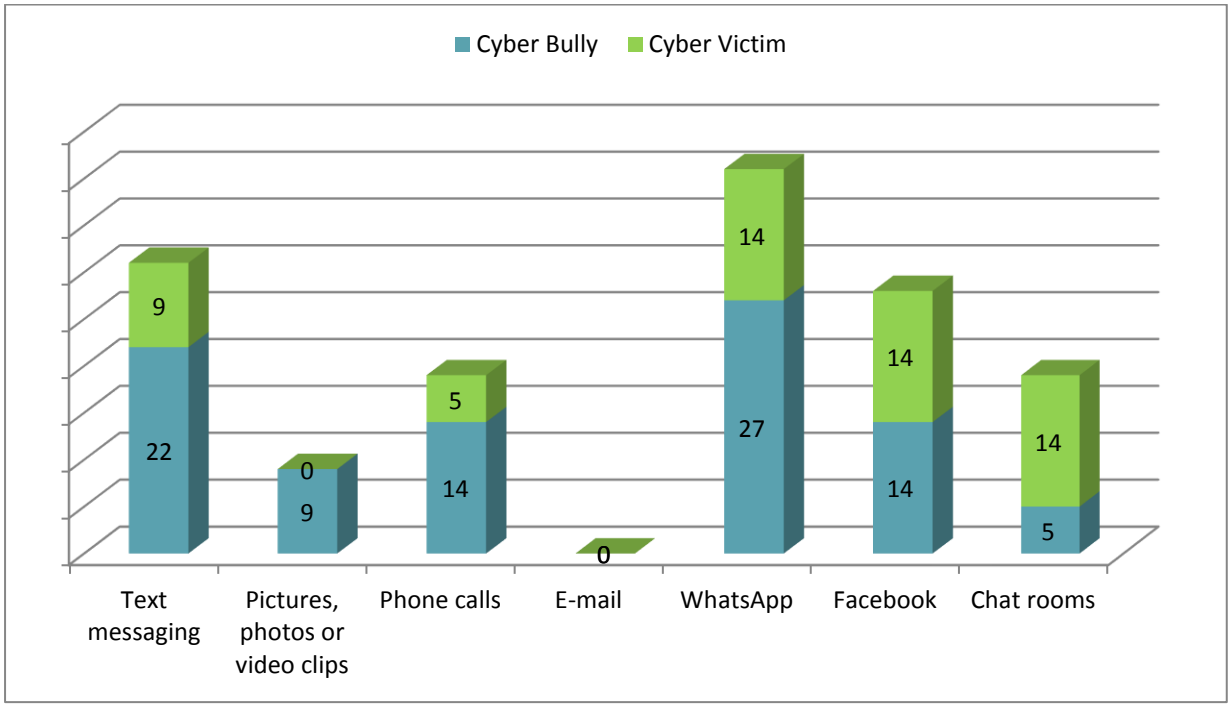
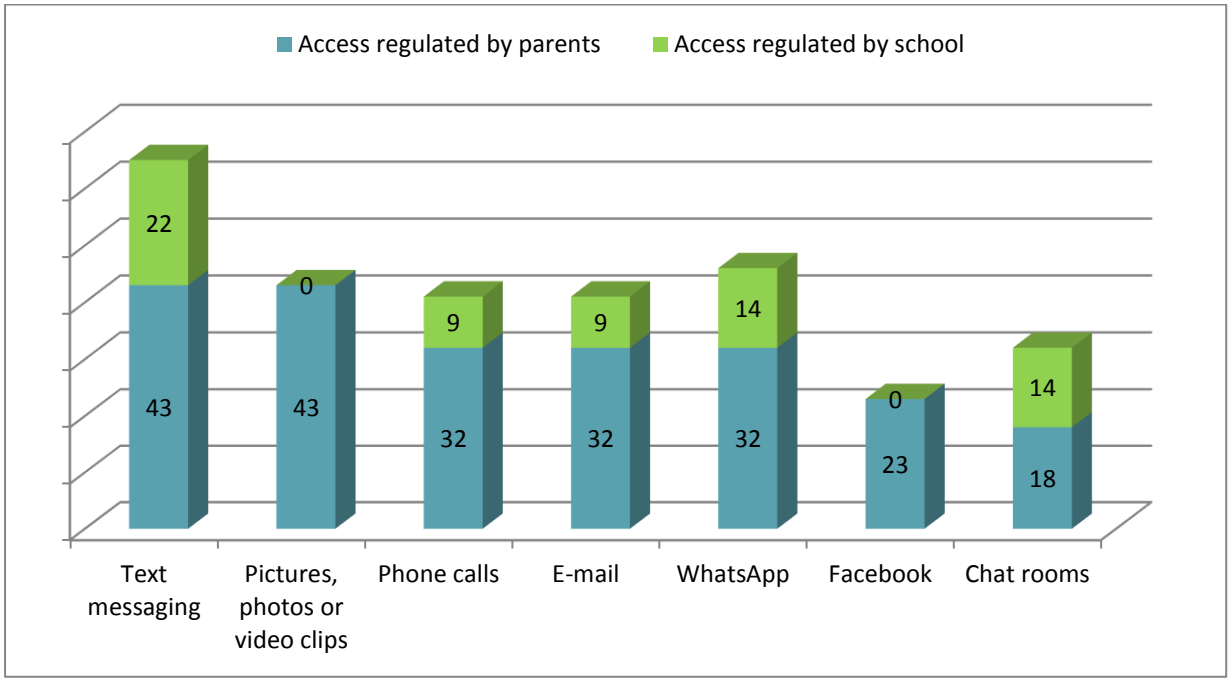


Table 8: Percentage of learners who used a specific platform to cyber bully or have been the victim of cyber bullying via a specific platform



The most popular platforms that were used for cyber bullying among the learners in the school were WhatsApp, text messaging and Facebook. Once again it can be argued that these are the most popular social media applications among the youth at the moment. It is also more easily accessible than e-mails or chat rooms. Another argument that may be relevant is that e-mails and phone calls are too personal. It is more difficult to hide cyber bullying activities on these platforms, as a voice can be recognised easily, and a personal e-mail address can easily be traced, or used for revenge bullying purposes. This indicates that cyber bullying increases with ease of access to cyber bullying platforms, and where it is easier to hide cyber bullying activities.

Table 9: Percentage of learners having access to cyber bullying platforms which are regulated by parents and/or the school



The interesting information that can be gathered from this table is that parents do in some way regulate the internet usage of their children. It is important to include parents in disciplinary measures regarding cyber bullying and offer parents more information on cyber bullying, how to identify it and what to do when their child is involved in cyber bullying.

Section 2 of the questionnaire related to the different elements of cyber bullying. These questions were asked specifically to gather information on the repetitive nature of cyber bullying and the element of fault. 72% of the participant learners agreed that a single action can constitute cyber bullying, and it need not be repetitive. One participant insightfully stated that a single act can be perceived as multiple attacks. With regard to whether a single action can constitute cyber bullying, the following comments were made:

> people all over the world can see nasty things written on your Facebook wall, even if it is only done once; a single act of cyber bullying can harm or intimidate you

They listed examples such as:

> starting rumours; posting an embarrassing picture; badmouthing someone; posting someone's personal information online

With regard to intention, the answers are varied. Some participants strongly feel that a cyber bully who says he/she did not have the intention to bully another learner is lying. Some participants believe it is possible to offend someone without realising it, and some participants think that some learners are too sensitive and perceive something innocent as bullying. This corroborates the statements made by educators and school counsellors that learners do not necessarily realise the harm their actions can cause, and that each case of cyber bullying must be treated in context. Examples given for unintentionally hurting other learners include posting something on Facebook that the other person takes offence at, spreading news that you did not know was a secret or posting a photo on Facebook that the other person perceives as being embarrassing.

Section 3 of the questionnaire asked questions from the viewpoint of either a victim or a bully. Only 32% of the participants answered this part of the questionnaire. This was to be expected, as this is the more personal section of the questionnaire and learners might not have wanted to divulge sensitive information. The first part of this section related to victims of cyber bullying. The participants had to describe how they were cyber bullied and they mostly indicated denigration. One participant reported being bullied for not being South African. Some instances of harassment were also identified. 50% of the participant victims indicated that they were only cyber bullied once, 50% of the participants indicated that they were cyber bullied more than five times. Most of the instances of cyber bullying involved groups and not a single cyber bully, and the victim was targeted by the same cyber bullies repeatedly. The negative feelings associated with cyber bullying as indicated by the participants include feeling unwanted and excluded, sadness, anger, hurt, loneliness, low self-esteem, and self-loathing. Although some participants indicated that they did not tell anyone, interestingly, most of the participants indicated that they reported the bullying either to a parent or a sibling. Most participants indicated that the person they told about the cyber bullying supported them by empowering them not to care what the cyber bullying was doing, and emphasised their self-worth. Only in one instance did the parents of the victim speak to the cyber bully. This stresses the importance of following a whole-school approach and involving parents in the regulation of cyber bullying. There was a poor or no response to questions 3.8 and 3.9 that deal with the reporting and resolving of instances of cyber bullying respectively. There were two

instances where the cyber bully was disciplined by being suspended and one instance where the cyber bully apologised.

Only 12% of the participants completed the section on cyber bullies. Thirty three percent of the participants indicated that they cyber bullied another learner once. All of the participants indicated that it was a form of revenge bullying, and reported extreme feelings of guilt and shame afterwards. The forms of bullying included flaming, outing and denigration. In all of the reported instances of cyber bullying, the participants indicated that they did not act alone, and that friends participated in the bullying. All the participants indicated that their parents or an adult found out about their cyber bullying, and put a stop to it. The learners' answers directly contradicted what the participants in the interviews and focus group had to say about the involvement of parents in regulating cyber bullying.

Section 4 related to the unique problems that schools face in the regulation of cyber bullying. Sixty seven percent of the participants indicated that they believe cyber bullies are harder to identify than traditional bullies. Statements made by the participants include that it is easy to hide your identity online; anyone can be a cyber bully, cyber bullies can be someone close to you such as your best friend or parent and cyber bullies hide behind technology. Only one participant emphatically stated that it is much easier to identify cyber bullies. Sixty two percent of the participants indicated that although a person may not have created a Facebook post by participating and leaving a nasty comment, that person is also a cyber bully. The other participants stated that you are only giving your opinion and that you have freedom of speech. Sixty seven percent of participants indicated that passing on a nasty message is also a form of cyber bullying. Only 38% of the participants stated that it is hard to escape cyber bullying, as it can happen anywhere and not only at school.

Sixty two percent of the participants think that schools should protect them against cyber bullying, especially through education and advice on how to deal with cyber bullying. Participants also stated that it is hard for schools to protect them, as the bullying is done electronically, and some of the bullies don't even attend the same school.

Seventy one percent of the participants believe that when a learner sends a nasty message, intending for the message to be private, the learner should still be punished if the message is spread through no fault of his/her own. The participants also believe that the person who spreads the image or message is also guilty of cyber bullying.

Only 52% of the participants indicated that being cyber bullied is more embarrassing than being bullied in the traditional way. Most of the participants opted not to answer questions 4.8 and 4.9 that deal with hiding cyber bullying activities and how a cyber bully differs from a traditional bully.

There were a number of different answers to the question on the non-reporting of cyber bullying. Some participants feel that no action will be taken against the cyber bully; participants are scared the cyber bully may retaliate, they want to hide the bullying from their parents, the cyber bullying does not really impact them, and they don't know who the cyber bully is. The participants are not very aware of their human rights that are being affected by cyber bullying; most of them do, however, identify the right to freedom of speech.

Section 5 contained questions on the regulation of cyber bullying. Most of the participants indicated that they received some form of education on cyber bullying, especially in LO classes. Participants indicated that cyber bullying should be reported to a responsible adult, either educators or parents. About half of the participants think that their school is protecting them from cyber bullying successfully. Participants did not know how to answer question 5.7. As the pilot study was used as the case study as well, this problem could not be resolved, and the question remained unanswered. By not being able to answer this question, it can be an indication that schools' Codes of conduct should state clearly how cyber bullying constitutes misconduct. This is an indication of the fact that cyber bullying should be defined clearly in a school Code of conduct for learners. A surprising number of participants believed that they should be held responsible for being cyber bullied themselves. Other participants indicated the bully, the school and the internet service provider.

5.10 Summary of data in the questionnaires

- Cyber bullying occurs in the participant school.
- The data supports the finding in chapter 2 (cf. section 2.2.1 The definition and types of cyber bullying) that an action need not be repetitive to constitute cyber bullying.
- Learners are not aware of their human rights with regard to cyber bullying – From the questionnaires it was evident that the learners are aware of their right to freedom of expression. It can be argued that the cyber bullies are aware of their rights, but that the victims of cyber bullying are not necessarily aware of their rights.
- Learners are not aware that schools have a duty to protect them against cyber bullying.
- Learners are not aware of how cyber bullying is a transgression in terms of their school's Code of conduct for learners.
- The most common type of cyber bullying in this school is revenge bullying, or denigration.
- There is a group element involved in most of the instances of cyber bullying.
- Learners prefer to report the cyber bullying to a family member. This supports the finding that a whole-school approach needs to be followed in the regulation of cyber bullying.

5.11 Triangulation and summary of all the data in the case study

The following categories of data could be deducted from the various datasets, and the document analysis.

- Cyber bullying without doubt occurs in the participant school – this was confirmed by the participants in the interviews, the focus group, as well as the participants in the questionnaires.
- The data supports the argument in chapter 2 (cf. section 2.2.1 The definition and types of cyber bullying) that an action need not be repetitive to constitute cyber bullying.
- Learners are not aware of their human rights with regard to cyber bullying. The participants in the focus group as well as the LO educator stated clearly that

cyber bullies refer to their freedom of expression when they justify their bullying actions. From the questionnaires it was also evident that the learners are aware of their right to freedom of expression. It can be argued that the cyber bullies are aware of their right to freedom of expression, but not their duties with regard to exercising this right. The victims of cyber bullying are not necessarily aware of their rights.

- Learners are not aware that schools have a duty to protect them against cyber bullying, and learners are not aware of how cyber bullying is a transgression in terms of their school's Code of conduct for learners. This can be triangulated with the data received from the LO educator and the focus group that learners do not listen in class when they are being educated regarding cyber bullying.
- The most common types of cyber bullying in this school is revenge bullying, or denigration – this data is confirmed by the interviews as well as the focus group where the participants stated that learners do not know how to deal with their emotions, or do not know how to confront cyber bullies.
- There is a group element involved in most of the instances of cyber bullying – this has been confirmed by all the participants.
- Learners prefer to report the cyber bullying to a family member. This supports the finding that a whole-school approach needs to be followed in the regulation of cyber bullying. This is also a contradiction to the data gathered from the rest of the participants in the interviews and focus groups. It is perhaps possible to argue that a great deal of the cyber bullying takes place while learners are at home and not at school and the educators are thus not aware of the extent of the cyber bullying. This makes sense because the learners do not have access to their cellphones, tablets, laptops etc. during school hours.
- There are different forms of cyber bullying such as passing on a message or commenting on a nasty Facebook message, and there should also be different forms of disciplinary measures – this statement was confirmed by all the participants involved in the study.

Now that all the data has been presented, analysed, interpreted and triangulated the findings in the study are summarised.

5.12 Summary of important findings in the case study

The following are the relevant findings in the study that must be taken into account and addressed in any law and policy regulating cyber bullying in South African schools.

- The participants in the study agreed that cyber bullies do not always recognise the possible harm their actions can cause.
- Cyber bullying impacts negatively on the quality of education learners receive. Rather than focus in class, learners think about being cyber bullied and do not concentrate.
- The participants in the interviews indicated that learners are being educated on cyber bullying, but they only vaguely remember what they have been taught. Reasons offered by the participants is that this can be attributed to learners not paying attention in class, learners not wanting to be told how they must act, or not realising the seriousness of cyber bullying. Because a learner cannot see the harm that his/her actions caused, the action of cyber bullying other learners is not “real” to them.
- There are procedural steps in place in schools to deal with severe cases of cyber bullying. When developing a law and policy framework for cyber bullying, focus should be placed on the subtle nuances and context of cyber bullying. Not all instances of cyber bullying must be treated the same, as cyber bullying differs in severity and may sometimes just be a fight between friends that have turned nasty.
- It is essential to involve parents in the regulation of cyber bullying. Learners report cyber bullying to their parents, parents need to offer some form of regulation of the platforms learners use to cyber bully others, as cyber bullying often takes place at home.
- Trends in cyber bullying in the participant school are: the sexual nature thereof, that cyber bullying often results in physical altercations, more girls than boys are perpetrators of cyber bullying, and the group element of cyber bullying.
- Educators can also be cyber bullied.
- Learners do not yet have the tools to conduct proper relationships on social media.

- Cyber bullies are more subtle and harder to track down than traditional bullies.
- Cyber bullying creates regulation problems for schools when it happens outside of school.
- Repetition need not be an element of cyber bullying.
- Learners are not aware of how cyber bullying can constitute a transgression in their school's Code of conduct for learners. Thus, they do not link current forms of misconduct with cyber bullying.
- No provision is made for how evidence is gathered and kept in instances of cyber bullying in schools.
- A whole-school approach to regulating cyber bullying is the most suitable approach.

5.13 Conclusion

This chapter contains the presentation, analysis and interpretation of data collected in the case study regarding cyber bullying in a specific school. This analysis is in line with the literature review, and highlighted important aspects that need to be addressed in South African schools. The next chapter contains a summary of the conclusion and a recommendation on how cyber bullying should be addressed in South African schools and suggested insertions in the Guidelines for Code of conduct and Regulations for safety measures, draft Guidelines for the regulation of cyber bullying in schools, draft provisions for schools' Codes of conduct for learners and an information brochure on cyber bullying.

CHAPTER 6

FINDINGS, CONCUSION AND RECOMMENDATIONS: A LAW AND POLICY FRAMEWORK TO REGULATE CYBER BULLYING IN SOUTH AFRICAN SCHOOLS

6.1 Introduction

In chapter 1 of this report, the background to the research problem, the research aim and objectives as well as the methodology used to achieve these objectives were explained. Chapter 2 contains a literature review on the unique nature of cyber bullying. The study was designed as a socio-legal case study. The “legal” part of the study consisted of literature studies on the American law on cyber bullying (included in chapter 2), the IHRL framework relevant to cyber bullying, and the current South African legal framework that can be utilised to regulate cyber bullying in schools (included in chapter 3). Chapters 4 and 5 of the report consist of a case study that was completed in a South African school. The “socio” part of the research was used to inform the development of a relevant law and policy framework for the regulation of cyber bullying in this school contextually. This framework can be transferred to other public schools operating in the same law and policy framework. Chapter 6 contains a summary of the findings, triangulation between the case study dataset and the literature studies of the American and South African law and policy framework, the conclusions and the recommendations.

6.2 Summary of findings, conclusions and recommendations

In the following section, the findings, conclusions and recommendations are summarised. The section is structured to include the findings as well as the conclusions and recommendations, as the recommendations are applied in the sections that contain the original contributions of this research, namely suggested insertions in the Guidelines for Code of conduct and the Regulations for safety measures, Draft guidelines for the prevention and regulation of cyber bullying in public schools, Draft provisions to be included in schools’ Codes of conduct for learners, and an Information brochure on cyber bullying. For ease of reference, the findings,

conclusions and recommendations are structured under each of the research sub-questions.

6.2.1 Conceptualising cyber bullying

The first objective of the study was to determine the definition, nature and forms of cyber bullying.

Chapter 2 contains a literature review with regard to the unique nature of cyber bullying. In an effort to determine the unique nature of cyber bullying, cyber bullying was compared to traditional bullying (cf. section

2.2 T). Although traditional bullying and cyber bullying have certain elements in common (cf. section
2.2.3 The unique nature of cyber bullying), cyber bullying is a distinct and extremely harmful form of bullying. There are several ways in which cyber bullying differs from traditional bullying (cf. section
2.2.3 The unique nature of cyber bullying). Because of the nature of social media platforms, one instance of cyber bullying can quickly spread to a large audience, and no repetition is required as with traditional bullying (cf. section 2.2.1 The definition and types of cyber bullying). The element of intent is not necessarily required to commit an act of cyber bullying. Fault in the form of negligence will also suffice (cf. section 2.2.1 The definition and types of cyber bullying). The anonymous nature of cyber bullying creates a disconnect between the cyber bully and the victim, and a learner who merely comments on a derogatory Facebook post, or passes on a funny SMS may not necessarily have the intention of cyber bullying the victim, but is perpetuating the instance of cyber bullying negligently (cf. section 2.2.1 The definition and types of cyber bullying). The fact that cyber bullying can take place anywhere, but still impact negatively on the school environment, the numerous possible human rights violations involved in instances of cyber bullying and the difficulty in detecting and regulating instances of cyber bullying separate cyber bullying from traditional bullying. Thus, it is necessary that cyber bullying in schools be addressed differently than traditional bullying in schools.

After studying a number of different definitions of traditional bullying the following elements were identified (cf. section 2.2.1 The definition and types of cyber bullying):

- harm
- repetition
- power imbalance

It was concluded that the three elements above will not fit into the unique nature of cyber bullying and that current definitions of cyber bullying are not complex enough to encompass the unique nature of cyber bullying, and to address the challenges that cyber bullying presents to schools for the regulation thereof. It is recommended that a separate definition for cyber bullying, containing the unique elements of cyber bullying be included in schools' Codes of conduct for learners.

The following key elements of cyber bullying (cf. section 2.2.1 The definition and types of cyber bullying) were identified from the different definitions of cyber bullying in the literature review:

- an act
- fault
- the use of a communication device to commit the act
- actual harm to the bullied victim
- a negative impact on school activities

It is clear that there is no uniform definition of cyber bullying, and although the elements of cyber bullying is identified, it is not uniformly used in the different definitions of cyber bullying. It is necessary to develop a standard definition of cyber bullying that can be used in the school context. It is recommended that the following definition be used for cyber bullying in schools:

Cyber school bullying is the intentional or negligent use of electronic media which causes harm to another learner or educator, impacts negatively on the education of that learner, or creates circumstances that are not conducive to teaching or learning.

The different forms of cyber bullying were identified in the literature review (cf. section 2.2.1 The definition and types of cyber bullying). Sexting and cyber stalking were not included in this original list. Sexting should be included as a type of cyber bullying, as sexting may include activities such as coercion, increased aggression and violence

(cf. section 2.2.1 The definition and types of cyber bullying). These may all be linked to cyber bullying. The definition of cyber stalking can also lead to cyber bullying (cf. section 2.2.1 The definition and types of cyber bullying). From the case study it emerged that learners are not aware of how cyber bullying will lead to misconduct in schools (cf. section 5.10 S). American policy best practices suggest that cyber bullying, and the behaviour that causes cyber bullying must be defined clearly (cf. section 2.4 L). Thus, the law and policy framework must clearly define all of the forms of cyber bullying misconduct.

Group processes play an important role in bullying. Group processes in bullying may differ in traditional bullying and cyber bullying. With traditional bullying, the bully is egged on by the group present; with cyber bullying, millions of anonymous people can participate in the bullying and encourage each other to carry out further harmful acts of bullying. One can argue that by continuing an act of cyber bullying, that person will also meet the basic requirements of bullying. Even if the idea did originate with a person, the person consciously decided to harm another person by taking part in the bullying. This question was raised in the case study, and the majority of the participants felt that this should be treated as a lesser form of misconduct (cf. section 5.10 S). This means that the ways of participating in acts of cyber bullying differ from traditional bullying, and provision should be made for learners who participate in cyber bullying by passing on a photo or commenting on a bullying status update. Thus, learners who did not necessarily initiate the cyber bullying can also be guilty of cyber bullying. A policy on cyber bullying in schools should also differentiate between instances where a learner created a humiliating image for the purpose to pass it on to other learners, or where the learner only meant for his/her friend to see that image, and no one else. Provision should also be made to differentiate between instances where a learner created a derogatory post on Facebook, and where other learners commented on that post. All of these mentioned actions should constitute cyber bullying, but depending on the severity of the actions and the type of fault that is present, there should be lesser forms of discipline for learners who participated in the cyber bullying than for the learners who started the cyber bullying. This will address the contextual element and unique nature of cyber bullying once again.

When determining whether a learner is guilty of cyber bullying, the element of fault is important. In committing cyber bullying, the cyber bully must either be aware of the fact that he/she is causing harm to another learner through his/her actions, or the cyber bully foresees the possibility of harm, but unreasonably decides that the harm will not ensue from the action or if the cyber bully acted negligently. This will happen when the reasonable person in the bully's position would have acted differently from the bully in that the reasonable person would have *foreseen* that his/her conduct would cause damage, *and* would have taken steps to *prevent* the damage but the bully did not take such steps. There should be a clear cyber bullying policy in place that defines cyber bullying and the disciplinary measures thereof. In this way, a learner should have known that his/her actions might harm another learner, and by continuing with his/her actions, it is easy to prove that he/she foresaw the possibility of harming another learner, and reconciled his/her actions to that possibility.

Schools are faced with unique challenges when regulating cyber bullying (cf. section 2.3 C). These challenges include the anonymous nature of cyber bullying, school jurisdiction to regulate cyber bullying, the nature of technology, learners might know more about technology than educators, changing bully profiles, failure to report cyber bullying, human rights challenges and the identification of new stakeholders. Policy on bullying in schools should make a distinction between traditional bullying and cyber bullying to address these challenges sufficiently.

The best approach for addressing cyber bullying in schools is the whole-school approach (cf. section 2.4 L). This means that bullying is a systemic problem and must thus not be directed at bullies and victims individually, but must be directed at the whole-school context. Intervention should thus not only focus on punishment and rehabilitation of the bully and victim, but also on other stakeholders and role-players in the prevention strategy. Interventions should also focus on curriculum, social skills training, mentoring and social worker support. Learners should be warned of the possible criminal sanctions they face when they cyber bully another learner.

Once the unique nature of cyber bullying had been determined, it became clear that traditional methods of regulating bullying in schools should be adjusted to regulate cyber bullying. In order to determine how to regulate cyber bullying in South African

schools best, a literature study was done to determine how cyber bullying is regulated in the United States of America (cf. section 2.5 T). The reason for this literature study of relevant law and policy of the United States of America was that a number of cases on cyber bullying have been decided, and there is a developed law and policy framework.

6.2.2 Guidelines from American law on cyber bullying

The second objective of this study was to examine how cyber bullying in American schools is regulated by law. This literature study provided examples of best practice in regulating cyber bullying in schools.

A number of cases regarding the rights of learners to freedom of expression (or freedom of speech in America) were decided by the American Supreme Court. The following guidelines were identified in these cases. (cf. section 2.5.1 American case law regarding freedom of speech in schools).

- Freedom of speech may be limited when it leads to substantial and material disruption of school activities, or where it interferes with the rights of others.
- Freedom of speech may be limited when language is so lewd that it undermines the educational responsibilities of the school.
- Freedom of speech may be limited where the restriction is “reasonably related to pedagogical concerns”.
- Freedom of speech of students must be applied with the consideration of the special characteristics of the school environment, and in light of what is appropriate for students at school.
- The courts weigh the importance of protecting speech that is unpopular and controversial, against the responsibility of schools to educate students regarding socially acceptable behaviour and enabling them to take their place in society.

These guidelines should inform law and policy regulating cyber bullying in South African schools to avoid human rights challenges by learners and/or parents.

Most of the states in the USA have passed anti-bullying laws. From the literature study it emerged that successful laws on cyber bullying contain the following aspects, namely the regulation of instances of cyber bullying away from school, the protection of school personnel, the compulsory adoption of cyber bullying policy reporting systems and the prohibition of retaliation (cf. section 2.5.2.2.1 Purpose).

In paragraph 2.7.2.2 several principles were identified that needed to be included in policy for the regulation of cyber bullying in schools. These principles include a purpose statement, scope, descriptions and definitions of prohibited behaviour, enumeration of groups, district policy development, policy review, written records, consequences and mental health (cf. section 2.5.2.2 American policies regarding cyber bullying in schools). An anti-cyber bullying policy must state the issues that are to be addressed clearly, state the negative effects of cyber bullying clearly and indicate that cyber bullying is not acceptable (cf. section 2.5.2.2.1 Purpose). The scope of the policy needs to determine the jurisdiction that schools will have in regulating cyber bullying (cf. section 2.5.2.2.2 Scope). Cyber bullying can only be regulated effectively when it is defined clearly. Cyber bullying policy must include definitions of the behaviour that is prohibited (cf. section 2.5.2.2.3 Descriptions and definitions of prohibited behaviour). Any policy on cyber bullying should have a section where it is stated clearly that cyber bullying based on race, colour, national origin, gender, religion, disability and sexual orientation is prohibited (cf. section 2.5.2.2.4 Enumeration of groups). Cyber bullying must be regulated at a local level, and the process of creating policy at local level must be collaborative with all stakeholders in education (cf. section 2.5.2.2.5 District policy development). Regular review is required in order to determine the success of the policy (cf. chapter 2, section
2.5.2.2.6 Policy review). Written records of incidences of cyber bullying must be kept to track the patterns of cyber bullying and to assist in keeping proper evidence (cf. section 2.5.2.2.7 Written records). A section that provides for different sanctions depending on the severity of the harm and the specific circumstances must be included in cyber bullying policy (cf. section 2.5.2.2.8 Disciplinary measures). Lastly, provision must be made for the care and counselling of the victim and the cyber bully in the aftermath of a cyber bullying incident (cf. section 2.5.2.2.9 Mental health).

In determining what needs to be included in law and policy regulating cyber bullying in schools, it is not sufficient to only look at best practices in another country, one needs to determine how the human rights of the learners should be protected.

6.2.3 Human rights and cyber bullying

The third objective of the study was to explore human rights obligations that provide for the protection of learners in schools against cyber bullying. Exploring these obligations helped to determine the content that needs to be included in any law and policy regulating cyber bullying in schools. In chapter 3, the different human rights that impact on cyber bullying were discussed (cf. section 3.3 C).

IHRL places a positive duty on states, and thus the public school, to protect learners against cyber bullying. Cyber bullying is recognised as a form of violence that children need specific protection from (cf. section 3.3.1 Children's rights and the best interests of the child principle). The South African Department of Basic Education and schools must implement law and policy on cyber bullying in schools.

There are IHRL measures for juvenile justice that applies to cyber bullies at school. The Beijing Rules and the Rijadh guidelines determine certain factors that are important for the regulation of cyber bullying and especially in disciplining cyber bullies (cf. section 3.3.1 Children's rights and the best interests of the child principle). South African law prescribes that restorative justice must be the aim for children in conflict with the law (cf. section 3.5.1.8 The Child Justice Act 75 of 2008), and American policy dictates that good anti cyber bullying policy should include disciplinary measures of a remedial nature (cf. section 2.5.2.2.8 Disciplinary measures). Participants in the case study stated that the ideal way to deal with cyber bullying was to involve the parents of the bully and the victim, and for all parties to meet and resolve the matter (cf. section 5.6 S Now that all the data has been presented, analysed, interpreted and triangulated the findings in the study are summarised.

5.12 S). The aim of disciplining a cyber bully should be of a restorative nature. Applied to cyber bullying, this will mean that the goal of any law and policy regulating

cyber bullying must be to avoid legal intervention and to deal with both cyber bullies and cyber bullying victims humanely.

Learners have a right to be heard (cf. section 3.3.1 Children's rights and the best interests of the child principle). This means that learners will play an active role in promoting and protecting his/her rights. Learners should be consulted in the process of developing law and policy on cyber bullying.

Cyber bullying can violate the following human rights of learners unjustifiably: children's rights as contained in section 28 of the South African Constitution,[566] human dignity, freedom of expression, the right to education, the right to privacy and the right to just administrative action. There is a duty on South African schools to protect, promote and fulfil these human rights of learners, and law and policy on cyber bullying in schools must be implemented to give effect to this duty.

The best interests of the child is the paramount concern in all aspects relating to the child, including the regulation of cyber bullying. Any legal framework regarding the regulation of cyber bullying must have the best interests of the child as a paramount concern (cf. section 3.3.1 Children's rights and the best interests of the child principle). The best interests of not only the victim of bullying, but the bully as well as the other learners in the school must be taken into account (cf. section 3.3.1 Children's rights and the best interests of the child principle). The legal framework must also include procedural safeguards, as well as flexibility to treat every instance of cyber bullying on an individual basis and to enable the disciplinarians to include the elements mentioned above in an assessment of what the best interests of the learners will be in the particular situation (cf. section 3.3.1 Children's rights and the best interests of the child principle).

The victim of cyber bullying and the cyber bully have the right to human dignity. The human dignity of both the bully and the victim must be protected (cf. section 3.3.2 Human dignity). The guidelines provided in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice and the United Nations

566 See discussion in paragraph 3.3.1 for the relevant children's rights encapsulated in section 28 of the Constitution.

Guidelines for the Prevention of Juvenile Delinquency are of high importance for inclusion in any law and policy regulating cyber bullying (cf. section 3.3.1 Children's rights and the best interests of the child principle). The following recommendations can be made with regard to this right and a law and policy framework on cyber bullying.

- There should be a policy on cyber bullying in place in order to protect learners against cyber bullying in school.
- This policy should protect the right to human dignity of both the bully and the victim.
- The policy should provide for respecting and enhancing rights and values such as human dignity, democracy, mutual respect, tolerance and peace in schools.
- In order to limit the freedom of expression of the bully, factors such as the negative impact on the functioning of the school, the negative impact on the quality of education of the victim, protecting learners against psychological harm, and the best interests of the children at the school should be considered.
- The vulnerability of children should be taken into account during punishment for cyber bullying. Civil action must be avoided. (cf. section 3.3.3 Freedom of expression).
- As Ubuntu is focused on reconciliation rather than confrontation, conciliatory means must be considered when disciplining a cyber bully at school.

The right to freedom of expression can be violated when regulating cyber bullying in schools. Cyber bullies have the right to freedom of expression, but this right may be limited under certain circumstances. The provision also contains a section on forms of expression that are not protected by the right to freedom of expression. (cf. section 3.3.3 Freedom of expression).

The following guidelines from South African case law should be kept in mind when regulating cyber bullying:

- There should be a policy on cyber bullying in place in order to regulate cyber bullying.
- This policy should protect the right to human dignity of the bully and the victim.

- The policy should provide for respecting and enhancing rights and values such as human dignity, democracy, mutual respect, tolerance and peace in schools.
- The vulnerability of children should be taken into account during punishment for cyber bullying. Civil action must be avoided.

The educational context in schools will impact on how freedom of expression is interpreted. This means that the right to education is important for consideration in developing a law and policy framework for the regulation of cyber bullying. As cyber bullying impacts on the quality of education a learner receives, it is another reason, over and above the constitutional and human rights mandate to protect children against cyber bullying or regulate cyber bullying in schools (cf. section

3.3.4 Right to education). Life skills of young people should be promoted, thus learners should be educated with regard to the dangers of cyber bullying (cf. section

3.3.4 Right to education). By mainstreaming cyber bullying, for example addressing cyber bullying in all subjects that allow for it, learners can be sensitised to the harm cyber bullying can cause and the boundaries of freedom of expression.

In paragraph 3.3.5 it was argued that the right to privacy is not absolute. The right to privacy may be limited if such a limitation is justified in terms of section 36 of the South African Constitution (cf. section 3.3.5 Right to privacy). It should also be borne in mind that the limitation must be just and reasonable, and that it must be done in terms of a law of general application. Thus, it is imperative to create law and policy on cyber bullying in schools to enable schools to limit the privacy rights of learners justifiably and reasonably (cf. section 3.3.5 Right to privacy).

Action taken against the cyber bullies must comply with rules of just administrative action. As discussed in paragraph 3.3.6, the right to just administrative action entails that any hearing with regard to cyber bullying in schools must comply with section 33 of the South African Constitution. This means that hearings must be substantially and procedurally fair (cf. section 3.3.6 Just administrative action). In order for a hearing to be substantially fair, cyber bullying must be included in a school's Code of conduct for learners (cf. section 3.3.6 Just administrative action). Substantial fairness, *inter alia*, requires that a rule must be known. Thus, it must be stated clearly

that cyber bullying is prohibited at schools (cf. section 3.3.6 Just administrative action). Disciplinary measures in schools relating to cyber bullying must be restorative and contain an element of education regarding the respect for human rights and the dignity of other human beings (cf. section 3.3.6 Just administrative action). The rights of offenders and victims must be balanced during any cyber bullying investigation and hearing process. The right to freedom of expression, privacy, right to have his or her best interests be regarded as paramount and right to administrative justice of the offender must be balanced against the victim's right to be protected, right to dignity and right to education and right to have his or her best interests be regarded as paramount. Schools may access private laptops, tablets or cellphones of alleged offenders to obtain evidence of cyber bullying, but this must be done in the least restrictive manner possible in order to ensure the rights of the alleged offenders as well.

Article 29 of the African Convention on Cyber Security specifies certain cyber offences (cf. section 3.4.1 The African Union Convention on Cyber Security and Personal Data Protection). Child pornography through electronic means and spreading racist or xenophobic messages through electronic means are specifically mentioned as crimes (cf. section 3.4.1 The African Union Convention on Cyber Security and Personal Data Protection). For example, spreading a nude or suggestive picture of another learner in order to embarrass them will constitute child pornography. Ridiculing a learner via a medium such as Facebook for being from a different country or making racist comments online will fall under "spreading racist or xenophobic messages". These actions should be addressed in education law, and included as forms of misconduct in schools' Codes of conduct for learners.

As sexting is defined as the sending of nude or semi-nude photos or videos and/or sexually suggestive messages via mobile phone texting or instant messaging,[567] sexting in a school environment constitutes child pornography according to the definition given above. This is because learners at school will mostly be under 18 years, and thus comply with the definition of a minor. Even a learner who voluntarily sends a nude or explicit picture of himself/herself to another learner will be guilty of

567 Badenhorst (note 31) at 2.

child pornography, as the learner is producing a sexually explicit visual depiction of a minor.[568]

The African Convention on Cyber Security obliges States to take legislative measures to punish offences created in the African Convention on Cyber Security, and to put procedural measures in place for the search of, and protection of computer systems to convict perpetrators of the cybercrimes successfully (cf. section 3.4.1 The African Union Convention on Cyber Security and Personal Data Protection). The Convention contains provisions regarding the search, seizure and safekeeping of computer data for the purposes of empowering competent authorities to investigate a cyber crime (cf. section 3.4.1 The African Union Convention on Cyber Security and Personal Data Protection). These provisions can act as guidelines for schools in the **safekeeping of evidence** in instances of cyber bullying. Schools should address searching and seizing learners' cellphones and other communication media in their search and seizure policies.

Once the human rights obligations of the state to protect learners against cyber bullying were established, the current South African law and policy framework was studied to determine the problems a South African school faces on a daily basis.

6.2.4 Current South African law and policy framework

The fourth objective of the study was to review current South African law and policy and how it may speak to cyber bullying in schools. Determining the current legislative context in South Africa was essential to establishing how cyber bullying should be addressed in a South African context. In chapter 3, the existing South African legal framework for the regulation of cyber bullying was determined (cf. section 3.5 S). This included the relevant sections in the South African Constitution, applicable case law, criminal and civil remedies and education specific laws.

568 This is confirmed by the definition of child pornography in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

There is no cyber bullying specific law and policy in South Africa. Although there are numerous criminal and civil remedies for victims of cyber bullying in South Africa, these remedies are not specifically aimed at cyber bullying, and is thus not fully adequate. For example, the Protection from Harassment Act 17 of 2011 provides for the regulation of cyber bullying under the definition of harassment, if a learner knowingly engages in conduct that causes harm by sending electronic communication (cf. section

3.5.1.1 Protection from Harassment Act 17 of 2011). A victim of cyber stalking is allowed to apply to a court for an interim protection order (cf. section

3.5.1.1 Protection from Harassment Act 17 of 2011). Further protection offered by the Act to victims of cyber stalking include prohibiting the harasser to continue with the harassment or to enlist the help of another to continue the harassment, as well as any other measures the court deems fitting, as well as protecting the anonymity of a complainant (cf. section

3.5.1.1 Protection from Harassment Act 17 of 2011). The Act also makes provision for criminal sanctions (cf. section

3.5.1.1 Protection from Harassment Act 17 of 2011). Although this Act can be interpreted to provide protection for a victim of cyber bullying, it does not comply with IHRL pertaining to children completely. When this Act is used, the cyber bully may be involved in civil proceedings, or when he/she breaches the protection order, in criminal proceedings as well. The aims of juvenile justice and the best interests of the child principle mean that involving children in court proceedings or criminally charging them should only be a measure of last resort. It is better to make provision for this type of bullying at a school level and thus be able to put measures in place for reconciliation, education, discipline and support before the Act of bullying reaches the criminal justice system. Only when there is a serious threat or the matter can't be resolved at school level should the courts get involved. Cyber bullies can be found guilty of more serious crimes than harassment, such as the common law crime of assault. This of course emphasises the importance of well-developed school policies.

In paragraphs 3.5.1.2 – 3.5.1.6, certain crimes such as assault, abuse, extortion, criminal defamation and *crimen iniuria* were discussed. Again it was established that these crimes may be used in cases of cyber bullying, but it is not ideal. As we are dealing with cyber bullying and children, one would want to avoid charging a child with such a serious crime. This is in line with IHRL principles on children, in particular the principle that children should only be detained as measure of last resort and the best interests of the child principle. Cyber bullying should rather be regulated at school

level, although it may be unavoidable to charge children criminally in serious instances of cyber bullying.

Cyber bullying can fall in the ambit of several education law specific provisions as discussed in paragraph 3.5.3. Cyber bullying offers unique challenges to schools, and unique new forms of misconduct in schools, and thus these provisions are not adequate. Separate provision should be made for cyber bullying in education law.

It emerged from the literature study that the South African law and policy does not provide for the regulation of cyber bullying in schools adequately, and thus law and policy need to be developed. In order to regulate cyber bullying in schools successfully, the practical problems that schools face with regard to cyber bullying had to be investigated.

6.2.5 Practical problems identified in case study

The fifth objective of the study was to get a practical view on the occurrence of cyber bullying by investigating the phenomenon and how it is dealt with in a selected South African school. As already mentioned this study was designed as a socio-legal case study. The “socio” part included determining how learners in a South African school take part in cyber bullying, and how the school views and addresses these instances of cyber bullying. The cyber bullying law and policy framework is not developed in isolation, but the school context and the voice of the stakeholders are taken into account.

From the case study (cf. section 5.6 S), and the literature review (cf. section 2.3 C), it emerged that cyber bullying is more difficult to regulate than traditional bullying, as it may be anonymous. Another dangerous element linked to the anonymity of cyber bullying is that learners do not see the

effect their actions have on other learners, and thus the cyber bullying may increase in severity (cf. section

5.8 S). Firstly, parents, learners and educators must be informed on how to recognise cyber bullying, and steps that can be taken to stop the continuation thereof. This also relates to the fact that learners may possibly be more technologically savvy than educators or parents (cf. section 2.3 C). Secondly, learners who cyber bully other learners should be made to face their victims so they can become aware of the hurt their actions have caused (cf. section 5.6 S).

The unique, almost boundless, nature of cyber bullying creates problems in determining school jurisdiction (cf. section 2.3 C). What happens where cyber bullying takes place beyond the school grounds, or school activities? The discipline officer of the participant school stated that in these instances it is difficult for the school to claim that the school has authority to discipline learners because some parents will not cooperate and just state that it is beyond the discipline limits of the school (cf. section 5.6 S). Schools have a duty to protect learners against bullying or cyber bullying when it happens during school hours. It can be argued that this duty should be extended to cyber bullying that happens outside of school hours when it impacts on the quality of learning of learners at school. This is the case in American freedom of speech cases where the freedom of speech of a cyber bully may be limited if it negatively impacts on the running of the school (cf. section 2.5.1 American case law regarding freedom of speech in schools). In the case study it was mentioned on numerous occasions that cyber bullying results in poor quality of learning for the victim (cf. section 5.10 S). South African law is silent on this matter, but a possible solution is to state clearly in law and policy on the regulation of cyber bullying in schools that schools have the jurisdiction to discipline a cyber bully where the actions of the cyber bully impacts on the quality of learning of learners at school.

From the case study, it was also evident that the sexual nature of cyber bullying among learners is problematic (cf. section 5.6 S). The sexual nature of cyber bullying is a unique new element to bullying in schools, and this is not addressed properly in the participant school's Code of conduct for learners (cf. section 5.6 S). The sexual nature of cyber bullying should be addressed in school policy on cyber bullying.

In the case study the participants indicated clearly that the most popular forms of cyber bullying are revenge bullying, followed by denigration (cf. section 5.11 T). This finding closely links with the statements made by the LO educator (cf. section 5.4 I) and the school counsellors (cf. section 5.7 F) that learners do not have the emotional capacity to deal with cyber bullying properly, and do not realise the harm their actions can cause. Thus, instead of following the proper procedures when they are being bullied by another learner, learners would rather strike back in anger and hurt, and so continue the cycle of bullying. There should be education on cyber bullying and the consequences thereof. In this instance, consequences can be divided into the harm cyber bullying causes, and the disciplinary measures that will apply if a learner cyber bullies another learner or educator.

Another disturbing trend that has emerged is where learners take videos of violent or humiliating incidences that happen at school on their cellphones and then distribute them. Examples include: where a learner was being physically bullied, and other learners just stood around, took videos, and did nothing to stop the incident (cf. section 5.7 F). This is evidence of the fact that there is a growing lack of human compassion (Ubuntu) in South Africa.

A whole-school approach to addressing cyber bullying in schools tackled the problematic elements of regulating cyber bullying (cf. section 2.4 L). This was also pointed out by the school principal, the LO educator and the school counsellors in the case study (cf. section 5.11 T). A whole-school approach to addressing cyber bullying should be included in law and policy on cyber bullying in South African schools.

There is not enough awareness regarding cyber bullying among the stakeholders in the schools. The following aspects should be included when creating awareness of cyber bullying (cf. section 2.4 L):

- a clear definition of cyber bullying
- indicators for cyber bullying
- existing support available for victims of cyber bullying

- the dangers of participating in social media
- the harm caused by cyber bullying
- reporting and disciplinary procedures for cyber bullying
- social skills and positive traits such as treating others with kindness, respect and empathy
- human rights with regard to cyber bullying

It is recommended that literature be made available to parents, learners and educators that address the above mentioned aspects. In agreement with the school counsellors, programmes should be developed to show learners the harm their actions can cause when they cyber bully other learners in a practical manner, and to teach them positive personality traits.

All schools should have a policy on cyber bullying that clearly defines cyber bullying and sets out the sanctions cyber bullying another learner may attract. Such a policy must state the responsibility of all stakeholders in instances of cyber bullying clearly.

6.3 Assumptions

The assumptions made in chapter one of this dissertation was verified by the research.

cyber bullying has a more complex nature than traditional bullying (cf. section

- 2.2 T)
- cyber bullying is more difficult to regulate than traditional bullying (cf. section 2.3 C)
- the South African legal framework does not adequately regulate cyber bullying in schools (cf. section 3.5 S)

6.4 A legal framework for the regulation of cyber bullying

The purpose of this research was to develop a law and policy framework for the regulation of cyber bullying in South African schools. In order to develop this law and policy, research designed as a socio-legal case study was undertaken. The relevant

literature on cyber bullying was reviewed, literature studies of the IHRL, American and South African legal frameworks were undertaken, and a case study was done in a South African school to determine the problems at school level. Including a case study in the report ensured that the practical implications of law and policy regulations on school level were taken into account. After completing this research, the findings were analysed and certain recommendations were made.

The next section contains the recommended legal framework for the regulation of cyber bullying in South African schools.

6.4.1 Suggested insertion in the Guidelines for the Consideration of Governing Bodies in adopting a Code of conduct for Learners[569]

Cyber bullying should be added as serious misconduct in paragraph 11 of the Guidelines for Code of conduct.

6.4.2 Suggested insertion in the Regulations for Safety Measures at Public Schools[570]

The following definition for school cyber bullying should be included in the Regulations for Safety Measures at Public school.

Definition

Cyber school bullying is the intentional or negligent use of electronic media which causes harm to another learner or educator, impacts negatively on the education of that learner, or creates circumstances that are not conducive to teaching or learning.

It is recommended that cyber bullying should be addressed in the Regulations for Safety Measures at Public Schools as regulation 4A. The following wording is recommended:

Cyber bullying

569 Guidelines for Code of conduct (note 41)

570 South Africa (Republic). 2001. Regulations for safety measures at public schools. (Government Notice 1040 of 2001). *Government Gazette* 22754, 12 October 2001. Pretoria: Government Printer.

(1) Subject to any applicable provincial law, a *governing body* of a *public school* must provide for the regulation of cyber bullying in the school.
(2) The *Minister* may, after consultation with the *Council of Education Ministers*, determine guidelines for the consideration of *governing bodies* in adopting guidelines for the regulation of cyber bullying in schools.

6.4.3 Draft guidelines for the regulation of cyber bullying in schools

Further clarity on cyber bullying can be given by drafting a comprehensive policy on the Guidelines for the prevention and regulation of cyber bullying in public schools. These guidelines for the prevention and regulation of cyber bullying in public schools were developed by using the Guidelines for the Prevention and Management of Sexual Violence and Harassment in Public Schools 2008, and were adapted to fit the need for the regulation of cyber bullying.

Guidelines for the prevention and regulation of cyber bullying in public schools

Introduction

Cyber bullying is a new and unique form of bullying that is becoming an increasing problem in South African schools. Cyber bullying negatively impacts on the quality of learning of learners, and is thus a barrier to learning that needs to be addressed.

Cyber bullying deprives the victims of human dignity, quality education and freedom from all forms of violence. Because of the public nature of social media platforms, cyber bullying can spread quickly, and a large number of learners can get involved in this type of bullying. By not being able to see a physical manifestation of the harm cyber bullying cause victims, cyber bullies may be emboldened to continue or even increase the bullying.

The Guidelines for the prevention and regulation of cyber bullying in public schools have been developed to assist schools and communities with the prevention and regulation of cyber bullying. These guidelines should be made available to all schools.

Purpose

The purpose of these guidelines is to assist schools and communities in following a whole-school approach when preventing and regulating instances of cyber bullying in schools. Specifically, these guidelines sets out definitions and forms of cyber bullying, and procedures on how to deal with cyber bullying when gathering evidence, following disciplinary procedures and disciplining cyber bullies.

These guidelines seek to establish a safe and secure school environment with respect for the human rights contained in the Bill of Rights and International Human Rights documents.

Ultimately, the prevention of cyber bullying is the responsibility of the entire school community. The Department of Basic Education, school management, the school

governing body, educators, administrative personnel, school counsellors, learners and parents or guardians must all be involved in the fight against cyber bullying in schools.

Scope of application

These guidelines are applicable to all public schools, including school management teams, educators, learners, and school governing bodies and support staff.

Prevention activities

1. The Department of Basic Education will, wherever possible, provide ongoing training sessions for school-based educators and school governing body members and all other persons covered by these guidelines.
2. Each school shall include a provision in the school's Code of conduct for learners that prohibits cyber bullying. Schools are encouraged to develop regulations on cyber bullying after consultation with parents, guardians, school employees, volunteers, learners, educators and community representatives.
3. The contents of these guidelines may also be used to develop education material that can be used towards the prevention of cyber bullying in schools and through peer education campaigns.
4. Written records must be kept on all incidents of cyber bullying and the resolution or outcome to each incident. A yearly report must be made to the district department of basic education on the recorded events. District and regional offices should forward the information concerned to the provincial offices who will in turn forward the information to the national office. This information is vital for tracking the effectiveness of the guidelines.
5. The chair of the governing body should report on incidents of cyber bullying, and how it was resolved by the school in the annual feedback to the parents.

Confidentiality

All cases of alleged cyber bullying should be treated with confidentiality as far as possible, to protect the privacy of the individuals involved and to ensure that the complainant and the accused are treated fairly.

Nature and forms of cyber bullying

For the purposes of these guidelines:

1. Cyber school bullying is defined as the intentional use of electronic media with the purpose to harm another learner or educator and which impacts negatively on the education of that learner or creates circumstances that are not conducive to teaching or learning.
2. (a) The following can be seen as different forms of cyber bullying:
    (i) Harassment – conduct aimed at causing harm, or the belief that harm is imminent through communicating with the victim through electronic media.[571]
    (ii) Flaming – online fights using electronic messages containing angry or vulgar language.
    (iii) Denigration – "dissing" or disrespecting someone online; sending or posting gossip or rumours about a person to damage his or her reputation or friendships.
    (iv) Impersonation – pretending to be someone else and sending or posting material to get that person in trouble or damage their reputation.
    (v) Outing – sharing someone's secrets or embarrassing information or images online.
    (vi) Exclusion – intentionally and cruelly excluding someone.
    (vii) Cyber stalking – involves threats of harm or intimidation through repeated online harassment and threats.
    (viii) Sexting – the sending of nude or semi-nude photos or videos and/or sexually suggestive messages via mobile phone texting or instant messaging that leads to activities such as coercion, increased aggression and violence.
    (ix) The filming of and distribution of video clips that may hurt or harm another.

(a) Perpetuating instances of cyber bullying by distributing negative images or messages, or by commenting on negative social media posts about a learner, educator, administrative personnel or parent of the school can constitute cyber bullying.

3. Racism and xenophobia in information and telecommunication technologies means any written material, picture or any other representation of ideas or

571 This definition was expanded in line with the Protection from Harassment Act 17 of 2011.

theories which advocate or encourage or incite hatred, discrimination or violence against any person or group of persons for reasons based on race, colour, ancestry, national or ethnic origin or religion. This must be treated as serious misconduct.

4. The prohibition against cyber bullying is in effect while learners are on school property, at any school-sponsored activity, on school-provided equipment or transportation, or at any official school bus stop. If the act takes place off school property or outside of a school-sponsored activity, this policy is in effect if the conduct is directed specifically at a learner or educator and negatively impacts on the quality of learning at the school.

Effects of cyber bullying

Cyber bullying not only impacts on the victim of cyber bullying, but it also negatively impacts on the school environment and quality of learning. Because of the nature of cyber bullying, a large number of students may get involved in one incident of cyber bullying. The direct negative impact of cyber bullying on the victim includes the following: sleep disturbances, headaches, depression, anxiety, social anxiety, social isolation, low self-esteem, self-harm, truancy, lower levels of academic performance, lower family relationship quality, and in extreme cases, murder or suicide.

Procedure

In dealing with reported incidents of cyber bullying, the following procedure is recommended:

1. Where possible, the learner should ask the bully to stop, and block the bully on social networking sites.
2. The learner must keep all record of the alleged cyber bullying incidents.
3. The incident must be reported to a trusted adult or educator. This can be done verbally or in writing or both.
4. Provision should be made for a system where cyber bullying can anonymously be reported. The identity of whistle-blowers must be protected.
5. A member of staff must report any instance of cyber bullying or retaliation the staff member has witnessed or become aware of to the principal or to the school official identified in the plan as responsible for receiving such reports. If

the school principal or a designee determines that cyber bullying or retaliation has occurred, they must:

(a) Notify the guardians/parents of both the cyber bully and the victim.

(b) Notify the parents or guardians of the victim, of the action taken to prevent any further acts of cyber bullying or retaliation.

(c) Warn the cyber bully about severe consequences for retaliation against the victim of cyber bullying for reporting the incident, and take necessary steps should that happen.

(d) Arrange a meeting with the cyber bully, victim, parents/guardians and school counsellors to try and resolve the matter.

(e) If deemed necessary in the context of every individual situation, take necessary steps to institute a disciplinary hearing.

(f) Whenever deemed possible in the context of every individual situation, follow a restorative justice approach and take appropriate remedial action. The restorative justice approach should include the following factors:

(i) Cyber bullying should be resolved at school level, to avoid criminal and civil actions against learners;

(ii) The evolving capacity of the child must be considered;

(iii) Meetings should be held between the victim, the bully, the parents, a representative from the school and a school counsellor to facilitate understanding and reconciliation between the parties;

(iv) After the reconciliatory meeting, if deemed necessary, there should be a disciplinary hearing that takes proper cognisance of all the contextual factors that impact on a particular instance of cyber bullying;

(v) The best interests of all the children involved should be balanced.

Jurisdiction

Schools will have jurisdiction over cyber bullying, whether it occurs during school hours, or after school, in the following instances:

- When a learner causes harm to another learner or educator by cyber bullying
- When cyber bullying impacts negatively on the education of a learner

- When cyber bullying creates circumstances that are not conducive to teaching or learning at the school.

In instances where cyber bullying is reported between learners from different schools, the relevant parties should all meet to find an acceptable solution in line with restorative justice principles.

Disciplinary proceedings and sanctions

Sanctions for any learner who commits one or more acts of cyber bullying may range from positive behavioural interventions up to and including suspension or expulsion, as set forth in Guidelines for Code of conduct for learners, GN 776 GG 18900 of 15 May 1998.

School governing bodies shall consider the nature and circumstances of the incident, the age and maturity of the learner, the degree of harm, previous incidences or patterns of behaviour, or any other factors, as appropriate to respond to each situation properly. Sanctions for a learner who commits an act of cyber bullying shall be unique to the individual incident and will vary in method and severity according to the nature of the incident, the developmental age of the learner, and the learner's history of problem behaviours and performance. Preference should be given to a restorative justice approach.

Disciplinary measures shall be designed to correct the problem behaviour, prevent further instances of cyber bullying and to protect the victim of cyber bullying. The main goals of disciplinary measures shall be to avoid disruptive behaviour and to teach and lead learners to self-discipline.

Expelling or suspending a learner must be done in line with the South African Schools Act 84 of 1996 and the Guidelines for the Consideration of Governing Bodies in adopting a Code of conduct for learners, GN 776 GG 18900 of 15 May 1998. Provincial regulations must be consulted in the compilation of a list of offences which may lead to suspension of a learner. This list is determined by the Minister and is included in paragraph 11 of the Guidelines for Code of conduct. Offences that may lead to such suspension and which may cover instances of cyber bullying include, but are not limited to the following:

(a) conduct which endangers the safety and violates the rights of others;
(b) possession, threat or use of a dangerous weapon;
(d) fighting, assault or battery;
(e) immoral behaviour or profanity;
(f) falsely identifying oneself;
(g) harmful graffiti, hate speech, sexism, racism;
(j) disrespect, objectionable behaviour and verbal abuse directed at educators or other school employees or learners;
(m) victimisation, bullying and intimidation of other learners;
(n) cyber bullying of learners or educators.

Specific offences must be included in the Code of conduct for learners

Schools must make provision for cyber bullying as a form of misconduct in the Code of conduct for learners. Cyber bullying, as well as the specific forms of prohibited behaviour must be defined clearly. In this provision the following should be included:

- The form of fault that accompanied the act, for example whether it was a negligent or intentional act, should be taken into consideration. There must be a differentiation in the treatment of cyber bullies who intentionally bullied another learner, and those who negligently bullied another learner. Discipline should be more severe in the first instance.
- A differentiation must be made between instances of cyber bullying where a learner created a harmful or offensive image, text message or post, and where a learner participated in the cyber bullying by spreading an image or commenting on a post he/she did not create. Discipline should be more severe in the first instance.

Respect for human rights

- Cyber bullying is a form of violence, and learners must be protected against this form of bullying. There is a duty on the state to protect learners against cyber bullying.
- All learners are entitled to the human rights contained in the South African Constitution, and have the responsibility to the respect the rights of other learners.

- The best interests of not only the victim of bullying, but the bully as well as the other learners in the school must be the primary consideration for the school when dealing with instances of cyber bullying. The voices and opinions of both the victim and the bully must be heard when disciplinary action is taken in instances of cyber bullying.
- Every learner has inherent dignity and has the right to have his/her human dignity respected. Every learner must have respect for the human dignity of other learners and educators.
- Every learner also has the right to privacy, which includes the right not to have his/her person or private communications searched or his/her possession seized. However, the principal or an educator may search learners based on his/her reasonable suspicion followed by the use of search methods that are reasonable in scope.
- Freedom of expression is more than freedom of speech. The freedom of expression includes the right to seek, hear, read and wear. However, learners' rights to enjoy freedom of expression are not absolute. Vulgar words, insubordination and insults are not protected speech. When the expression negatively impacts on the quality of learning for other learners, expression may be limited.
- Any disciplinary action with regard to cyber bullying in schools must comply with section 33 of the South African Constitution. This means that hearings must be substantially and procedurally fair. In order for a hearing to be substantially fair, cyber bullying must be included in a school's Code of conduct for learners. Substantial fairness, *inter alia*, requires that a rule must be known. Thus, it must be stated clearly that cyber bullying is prohibited at schools. Disciplinary measures in school relating to cyber bullying must be restorative and contain an element of education regarding the respect for human rights and the dignity of other human beings.

Cyber bullying and educators

Cyber bullying is not exclusive to learners. Educators may also be cyber bullied by learners. Every schools needs to prohibit the cyber bullying of educators in the Code of conduct for learners, and make provision for disciplinary sanctions where educators are being cyber bullied.

Support for victims of cyber bullying and cyber bullies

The Department and its schools will have a procedure for referring learners targeted by cyber bullying, engaged in cyber bullying or violent behaviour and others to counselling, mental health and other services, as appropriate. Such procedure will include information about the types of services and support available.

The policy for the regulation of cyber bullying recommended above will need to be implemented at local (school) level. This should be done by incorporating the provisions of the policy into Codes of conduct for learners. In the next section a recommendation will be made as to how these Guidelines should be included in Codes of conduct for learners.

6.4.4 Draft provisions for schools' Codes of conduct for learners

It is recommended that the following provisions be added to schools' Codes of conduct for learners.

Cyber school bullying is the intentional or negligent use of electronic media which causes harm to another learner or educator, impacts negatively on the education of that learner, or creates circumstances that are not conducive to teaching or learning.

Cyber bullying is prohibited while learners are on school property, at any school-sponsored activity, on school-provided equipment or transportation, or at any official school bus stop. If the cyber bullying takes place off school property or outside of a school-sponsored activity, this policy is in effect if the conduct is directed specifically at a learner or educator and negatively impacts on the quality of learning at the school.

The consequences for any learner who commits one or more acts of cyber bullying may range from positive behavioural interventions up to and including suspension or expulsion, as set forth in Guidelines for the Consideration of Governing Bodies in adopting a Code of conduct for learners, GN 776 GG 18900 of 15 May 1998.

In these provisions in the Code of conduct for learners, a definition of cyber bullying is given, provision is made for cyber bullying that does not take place at school, and the consequences for cyber bullying are set out. It is also recommended that an information brochure be given to learners and parents.

6.5 Information brochure on cyber bullying

The following brochure should be given to parents and learners to enable them to understand the nature and dangers of cyber bullying better, and to know how to react in instances of cyber bullying.

Information brochure on cyber bullying

Introduction

Traditional bullying is defined as "intentional peer-victimisation, either physical or psychological, that can involve teasing, spreading rumours, deliberate exclusion from group activities and physical violence such as hitting and kicking". [572]

Cyber bullying is defined as "the use of information and communication technologies to support deliberate, repeated, and hostile behaviour by an individual or group that is intended to harm others".[573]

The legal definition of school cyber bullying is:

> School cyber bullying is the intentional or negligent use of electronic media which causes harm to another learner or educator, impacts negatively on the education of that learner, or creates circumstances that are not conducive to teaching or learning.

572 Fleming and Jacobsen (note 21) at 73.

573 Belsey http://www.cyberbullying.ca/ (last accessed on 1 December 2016). Also see Kift, Campbell and Butler (note 3) at 62.

The Centre for Justice and Crime Prevention identifies the following means by which cyber bullying may occur:[574]

- text messages
- pictures or video clips via mobile phone cameras
- phone calls
- e-mails
- chat rooms
- instant messages (Whatsapp, Yahoo, Msn)
- websites and blogs
- social networking sites (Facebook, Myspace, Twitter)
- internet gaming

Cyber-bullying may take the following forms:[575]

- Harassment – conduct aimed at causing harm, or the belief that harm is imminent through communicating with the victim through electronic media.[576]
- Flaming – online fights using electronic messages containing angry or vulgar language.
- Denigration – "dissing" or disrespecting someone online; sending or posting gossip or rumours about a person to damage his or her reputation or friendships.
- Impersonation – pretending to be someone else and sending or posting material to get that person in trouble or damage their reputation.
- Outing – sharing someone's secrets or embarrassing information or images online.
- Exclusion – intentionally and cruelly excluding someone.
- Cyber stalking – involves threats of harm or intimidation through repeated online harassment and threats.[577]
- Sexting – the sending of nude or semi-nude photos or videos and/or sexually suggestive messages via mobile phone texting or instant messaging, [578] that leads to activities such as coercion, increased aggression and violence.

574 Burton and Mutongwizo (note 32) at 2.
575 Hayward (note 30) at 89.
576 This definition was expanded in line with the Protection from Harassment Act 17 of 2011.
577 Badenhorst (note 31) at 2.

- The filming of and distribution of video clips that may hurt or harm another.
- Perpetuating instances of cyber bullying by distributing negative images or messages, or by commenting on negative social media posts about a learner, educator, administrative personnel or parent of the school can constitute cyber bullying.

The STOP Cyberbullying program have identified and listed four main types of cyber bullies:[579]

- The Vengeful Angel – cyber bullies don't see themselves as bullies at all. They see themselves as righting wrongs, or protecting themselves or others from the "bad guy" they are now victimizing. This includes situations when the victim of cyber bullying or offline bullying retaliates and becomes a cyber bully him-/herself. These cyber bullies may be angry at something the victim did and feel they are taking warranted revenge or teaching the other a lesson. The "Vengeful Angel" cyber bully often gets involved trying to protect a friend who is being bullied or cyber bullied.
- The Power-Hungry or Revenge of the Nerds – some cyber bullies want to exert their authority, show that they are powerful enough to make others do what they want and some want to control others with fear. Sometimes the kids want to hurt another kid. Sometimes they just don't like the other kid. These are no different than the offline tough schoolyard bullies, except for their methods. Power-hungry" cyber bullies usually need an audience. It may be a small audience of their friends or those in their circle at school. Often the power they feel when only cyber bullying someone is not enough to feed their need to be seen as powerful and intimidating. They often brag about their actions. They want a reaction, and without one may escalate their activities to get one. Interestingly enough, though, the "Power-hungry" cyber bully is often the victim of typical offline bullying. They may be female, or physically smaller, the ones picked on for not being popular enough, or cool enough. They may have greater technical skills. Some people call this the "Revenge of the Nerds" cyber bullying. It is their intention to frighten or embarrass their victims. And they are empowered by the anonymity of the internet and digital communications and

578 Ibid.
579 http://www.stopcyberbullying.org/prevention/index.html (last accessed on 1 December 2016).

the fact that they never have to confront their victim. They may act tough online, but are not tough in real life.

- The “Mean Girls” – “Mean Girls” cyber bullying is usually done, or at least planned, in a group, either virtually or together in one room. This kind of cyber bullying is done for entertainment. It may occur from a school library or a slumber party, or from someone’s family room after school. This kind of cyber bullying requires an audience. The cyber bullies in a “mean girls” situation want others to know who they are and that they have the power to cyber bully others. This kind of cyber bullying grows when fed by group admiration, cliques or by the silence of others who stand by and let it happen.
- The Inadvertent Cyber bully or “Because I Can” – Inadvertent cyber bullies usually don’t think they are cyber bullies at all. They may be pretending to be tough online, or role playing, or they may be reacting to hateful or provocative messages they have received. Unlike the Revenge of the Nerds cyber bullies, they don’t lash out intentionally. They just respond without thinking about the consequences of their actions. They may feel hurt, or angry because of a communication sent to them, or something they have seen online. And they tend to respond in anger or frustration. They don’t think before clicking “send.” Sometimes, while experimenting in role-playing online, they may send cyber bullying communications or target someone without understanding how serious this could be.

How does cyber bullying differ from traditional bullying?

Smith identifies several ways in which cyber bullying differs from traditional bullying:[580]

- It depends on some degree of technological expertise.
- It is primarily indirect rather than face to face, and thus may be anonymous.
- The perpetrator does not always see the reaction of the victim.
- The variety of bystander roles in cyber bullying is more complex than in traditional bullying.
- A motive for traditional bullying is gaining status by being abusive to others in front of peers. This will often be lacking in cyber bullying.
- Cyber bullying can reach larger audiences than traditional bullying.

[580] Smith (note 166) at 93-103.

- It is difficult to escape from cyber bullying as victims may access the malicious comments or images anywhere on cellphones and or computers.

Boulton *et al* list the differences between cyber bullying and traditional bullying as follows:[581]

- The possibility of remaining anonymous is much higher with cyber bullying.
- There is a relative lack of supervision by adults of cyber bullying compared to traditional bullying.
- The accessibility to victims is much higher for cyber bullying compared to traditional bullying.
- The degree of "editability" (being able to reflect on words to maximize the impact on the victim) is much higher in cyber bullying.
- There is potentially a much higher audience for cyber bullying than for traditional bullying.

Sabella *et al* state that cyber bullying may be perceived as more sinister or dangerous than traditional bullying for the following reasons:[582]

- Cyber bullies are not restrained by space or time.
- The anonymity of cyberspace makes it possible for bullies to hide and thus to strike at any time and from any place.
- Due to technology, cyber bullying can occur at the speed of thought and in front of a large audience.
- Cyber bullies can be crueller than traditional bullies as they may incorporate different media such as pictures and sound effects.

They further warn against the existence of several myths regarding cyber bullying that may lead to contribute towards the current "hype" surrounding cyber bullying. These myths include:[583]

- Everyone knows what cyber bullying is – There is variability in defining cyber bullying even among cyber bully researchers.

581 Boulton, Hardcastle, Down, Fowles and Simmonds (note 167) at 146.
582 Sabella, Patchin and Hinduja (note 168) at 2704.
583 Id at 2704–2707.

- Cyber bullying is epidemic – the majority of studies estimate that only between 6% and 30% percent of teens have been cyber bullied.
- Cyber bullying causes suicide – while there is a correlation between suicide and cyber bullying, there has been no research done that proves cyber bullying directly leads to suicide. There are many different factors involved.
- Cyber bullying occurs more often than traditional bullying – most research indicates that cyber bullying occurs less often than traditional bullying.
- Like traditional bullying, cyber bullying is a rite of passage all teens experience – no matter how often it occurs, bullying is never acceptable.
- Cyber bullies are outcasts or just mean kids – the majority of research on cyber bullying has shown that children participate in bullying as either revenge or because they are "just playing."
- To stop cyber bullying, just turn off your computer or cellphone – technology is an important educational and social tool for youths. To encourage youths to switch off technology because of being cyber bullies might have them miss out on experiences. Also, once having seen a negative message, that message cannot be unseen by just switching off a cellphone. Also, you may switch off your phone or not access social media but co-learners may not.

The consequences of cyber bullying

Negative outcomes resulting from cyber bullying found in a number of studies. Victims of cyber bullying experience:[584]

- lower levels of academic performance
- lower quality family relationships
- a number of psychosocial difficulties and affective disorders[585]
- anxiety
- depression
- suicidal tendencies
- social anxiety
- social isolation
- self-harm tendencies

584 Sticca and Perren (note 158) at 740.
585 Ibid. Camacho, Hassanein and Head (note 103) at 133.

- loss of self-confidence

The following table appears as a summary of the negative effects of cyber bulling in Popovac.[586]

CYBER BULLYING CAN LEAD TO:

- Depression, suicidal ideation and other psychological problems
- Development of somatic complaints such as headaches and stomach aches
- Impaired concentration (affecting school performance)
- Truancy
- Anxiety and fear of being rejected, excluded or humiliated
- Loneliness and isolation
- Substance abuse
- Delinquency and aggression
- Weapon-carrying
- Poor parent-caregiver relationships (as a result of children lashing out at family members who are often unaware of the cyber bullying being experienced)
- Offline victimization

Sources: Kowalski RM, Limber SP & Agatston PW, *Cyber bullying: Bullying in the digital age*.UK: Blackwell Publishing Ltd, 2008; De Wet C, *The voices of victims and witnesses of school bullying*. Department of Comparative Education and Education Management. University of the Free State, 2005.

In discussing the negative consequences of cyber bullying, it is also important to identify who is at risk of being cyber bullied. Youth that are identified as at risk of being cyber bullied include the following:[587]

- vulnerable, immature, or socially naïve teens who may lack sufficient knowledge and skill to engage in effective decision-making
- younger teens who may have overprotective or naïve parents but who likely have healthy peer relations and good values
- youth who have temporarily impaired relations with parents and/or peers and are currently highly emotionally upset

586 Popovac and Leoschut (note 161) at 5. Badenhorst (note 31) at 3.
587 Feinberg and Robey (note 162) at 2.

- youth who face major ongoing challenges related to personal mental health and disruptions in relations with parents, school, and/or peers

Important legal consequences of cyber bullying

Cyber bullying violates a number of different human rights; these rights include the right to equality, the right to human dignity, the right to freedom and security of the person, the right to privacy, and children's rights.

Existing South African legislation protects learners in schools from bullying in general, but there is no legislation or policy directly aimed at regulating cyber bullying in schools. Learners who cyber bully other learners may be found guilty of a number of different crimes. These crimes include harassment, assault, extortion, abuse, criminal defamation and *crimen iniuria*. Learners who send sexually explicit pictures of themselves or other learners under the age of 18 may be guilty of child pornography.

There are also civil remedies available to learners or educators who have been cyber bullied. Victims of cyber bullying may bring an interdict against the cyber bully to stop them from continuing their actions, and they may also institute a claim for defamation.

How do I prevent or stop cyber bullying?

The following advice was found on the ConnectSafely website.[588]

For learners

Know that it's not your fault. What people call "bullying" is sometimes an argument between two people. But if someone is repeatedly cruel to you, that's bullying and you mustn't blame yourself. No one deserves to be treated cruelly.

Don't respond or retaliate. Sometimes a reaction is exactly what aggressors are looking for because they think it gives them power over you, and you don't want to empower a bully. As for retaliating, getting back at a bully turns you into one – and can

588 http://www.connectsafely.org/tips-to-help-stop-cyberbullying/ (last accessed on 1 December 2016).

turn one mean act into a chain reaction. If you can, remove yourself from the situation. If you can't, sometimes humour disarms or distracts a person from bullying.

Save the evidence. The only good news about bullying online or on phones is that it can usually be captured, saved, and shown to someone who can help. You can save that evidence in case things escalate.

Tell the person to stop. This is completely up to you – don't do it if you don't feel totally comfortable doing it, because you need to make your position completely clear that you will not stand for this treatment any more. You may need to practice beforehand with someone you trust, like a parent or good friend.

Reach out for help – *especially* if the behaviour is getting to you. You deserve backup. See if there's someone who can listen, help you process what's going on and work through it – a friend, relative or maybe an adult you trust.

Use available tech tools. Most social media apps and services allow you to block the person. Whether the harassment is in an app, texting, comments or tagged photos, do yourself a favour and block the person. You can also report the problem to the service. That probably won't end it, but you don't need the harassment in your face, and you'll be less tempted to respond. If you're getting threats of physical harm, you should call your local police (with a parent or guardian's help) and consider reporting it to school authorities.

Protect your accounts. Don't share your passwords with anyone – even your closest friends, who may not be close forever – and password-protect your phone so no one can use it to impersonate you.

If someone you know is being bullied, take action. Just standing by can empower an aggressor and does nothing to help. The best thing you can do is try to stop the bullying by taking a stand against it. If you can't stop it, support the person being bullied. If the person's a friend, you can listen and see how to help. Consider together whether you should report the bullying. If you're not already friends, even a kind word

can help reduce the pain. At the very least, help by not passing along a mean message and not giving positive attention to the person doing the bullying**.**

Additional advice for parents

Educate yourself. Be sure you know what cyber bullying is, and the warning signs that your child may be a victim. Educate yourself with regard to the prevention of cyber bullying, such as how to place password protected restrictions on your child's electronic devices.

Know that you're lucky if your child asks for help. Most young people don't tell their parents about bullying online or offline. So if your child is losing sleep or doesn't want to go to school or seems agitated when on his or her computer or phone, ask why as calmly and open-heartedly as possible. Feel free to ask if it has anything to do with mean behaviour or social issues. But even if it does, don't assume it's bullying. You won't know until you get the full story, starting with your child's perspective.

Work with your child. There are two reasons why you'll want to keep your child involved. Bullying and cyber bullying usually involve a loss of dignity or control over a social situation, and involving your child in finding solutions helps him or her regain that. The second reason is about context. Because the bullying is almost always related to school life and our kids understand the situation and context better than parents ever can, their perspective is key to getting to the bottom of the situation and working out a solution. You may need to have private conversations with others, but let your child know if you do, and report back. This is about your child's life, so your child needs to be part of the solution.

Respond thoughtfully, not fast. What parents don't always know is that they can make things worse for their kids if they act rashly. A great deal of cyber bullying involves somebody getting marginalized (put down and excluded), which the bully thinks increases his or her power or status. If you respond publicly or if your child's peers find out about even a discreet meeting with school authorities, the

marginalization can get worse, which is why any response needs to be well thought out.

More than one perspective needed. Your child's account of what happened is likely completely sincere, but remember that one person's truth isn't necessarily everybody's. You'll need to get other perspectives and be open-minded about what they are. Sometimes kids let themselves get pulled into chain reactions, and often what we see online is only one side of or part of the story.

What victims say helps most is to be heard – really listened to – either by a friend or an adult who cares. That's why, if your kids come to you for help, it's so important to respond thoughtfully and involve them. Just by being heard respectfully, a child is often well on the way to healing.

The ultimate goal is restored self-respect and greater resilience in your child. This, not getting someone punished, is the best focus for resolving the problem and helping your child heal. What your child needs most is to regain a sense of dignity. Sometimes that means standing up to the bully, sometimes not. Together, you and your child can figure out how to get there.

One positive outcome we don't often think about (or hear in the news) is resilience. We know the human race will never completely eradicate meanness or cruelty, and we also know that bullying is not, as heard in past generations, "normal" or a rite of passage. We need to keep working to eradicate it. But when it does happen and we overcome it – our resilience grows. It's not something that can be "downloaded" or taught. We grow it through exposure to challenges and figuring out how to deal with them. So sometimes it's important to give them space to do that and let them know we have their back.

Helpful websites

Cyberbullying Research Centre http://cyberbullying.org/
NoBullying.com http://nobullying.com/what-is-cyberbullying/
Stopbullying.gov http://www.stopbullying.gov/cyberbullying/index.html

Stopcyberbullying.org http://stopcyberbullying.org/

ConnectSafely.org http://www.connectsafely.org/tips-to-help-stop-cyberbullying/

Australian Office of Children's eSafety Commissioner: https://esafety.gov.au/education-resources/classroom-resources

6.6 Suggested future research

After concluding with suggested insertions in paragraph 11 of the Guidelines for the consideration of governing bodies and paragraph 4A of the Regulations for Safety Measures at Public schools, a policy document on the Guidelines for the regulation of cyber bullying in schools was developed. Guidelines were also developed as to what should be included in a school Code of conduct for learners and an Information brochure on cyber bullying was compiled for distribution in schools. In answering my research question, I realised that I answered one question but have ended up with many more which should be answered through future research. It emerged from this study that the following areas or topics require more research:

- How learners can use technology to abuse or cyber bully their parents.
- The impact of culture as a contextual factor in cyber bullying.
- Practical programmes that can be implemented in schools to teach learners about cyber bullying and the values of human dignity and respect.
- Should the mass media such as newspapers or the radio be included in the definition of cyber bullying?
- Another question relating to this factor is against whom a complaint can be laid in instances of cyber bullying? Will it be the bully, the school, the educators or the internet service provider?
- It is unclear whether this group dimension of cyber bullying relates to the age of the bullies, or to the nature of social media, or to both. This is a topic for further research.
- Research on how to address the dehumanising element of cyber bullying and teach learners compassion so as to promote Ubuntu.
- At what age will a child have legal capacity to give consent for parents to institute claims or actions against cyber bullies?

Several other questions, unrelated to cyber bullying came to the fore from the data:

- How do learners (children) use social media to mislead parents with regard to their whereabouts? (Although this has no relation to cyber bullying, it could be and interesting social study.)
- Clearer guidelines regarding the protection of the dignity of educators need to be determined.
- A future recommendation for research is to establish guidelines for educators in successfully using social media as a teaching tool, without being subjected to these kinds of attacks from learners.

6.7 Conclusion

Cyber bullying is a severe threat to the well-being of learners. It offers unique challenges to schools in the regulation thereof, and in the protection of learners. There is a duty on the state, and thus on schools to protect learners against the negative consequences of cyber bullying, and the impact of being cyber bullied has on the quality of education that learners receive. Although South Africa has laws in place to protect learners against bullying, there is no specific provision for cyber bullying in schools. In this research, a thorough study was done on the nature of cyber bullying, as well as the current legal framework available for the regulation of cyber bullying in South Africa. A case study was conducted in a South African school to determine the current problems that the participant school experience with regard to cyber bullying, and how the school is handling those problems.

The unique contribution of this research is a recommended law and policy framework for the regulation of cyber bullying in South African schools in the form of:

- an insertion in paragraph 11 of the Guidelines for the consideration of governing bodies
- an insertion in paragraph 4A of the Regulations for Safety Measures at Public schools
- the setting of guidelines for the regulation of cyber bullying in schools
- the drawing up of draft provisions for schools' Codes of conduct for learners
- the compilation of information brochure on cyber bullying

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Appendix A

INFORMATION LETTER FOR SCHOOL PRINCIPAL, SCHOOL COUNSELLORS, DISCIPLINE OFFICER AND LIFE ORIENTATION EDUCATOR

DEVELOPING A LAW AND POLICY FRAMEWORK TO REGULATE CYBER BULLYING IN SOUTH AFRICAN SCHOOLS

My name is Riana Hills. I am presently studying towards a Doctorate of Law. My study focuses on regulation of cyber bullying in schools.

I have received permission to send you this letter to invite you to participate in this research project. Once you have read the letter, you can decide whether you want to participate or not. Should you agree to participate, I will interview you regarding the occurrence of cyber bullying in your school, and how you address the problem. I would also like to study the Code of conduct of the school.

I will protect your identity and your responses will be kept confidential. Your name and contact details will be kept in a separate file from any data that you supply. In any publication emerging from this research, you will be referred to by a pseudonym. I will remove any references to personal information that might allow someone to identify you. Once the research has been completed, the findings will be presented in a published dissertation.

Please know that your participation in this research project is voluntary. Should you wish to withdraw at any stage, or withdraw any unprocessed data you have supplied during the course of the study, you will be free to do so.

If you would like to participate, please indicate that you have read and understood this information by signing the accompanying consent form and return it to me.

Should you require any further information, do not hesitate to contact me.

Ms CA Hills

mienica@unisa.ac.za

083 4154914

Appendix B

Informed Consent
Project: DEVELOPING A LAW AND POLICY FRAMEWORK TO REGULATE CYBER BULLYING IN SOUTH AFRICAN SCHOOLS

Researcher: CA Hills

Supervisor: Prof CA Waschefort and Prof Susanna A. Coetzee

I ……. agree to participate in the project named above. The details of the research purpose have been explained to me. An information letter has been given to me to keep.

I give consent to the following: (Tick to indicate your selection)

My participation:

Yes No

The possible future use of the findings to inform government:

Yes No

---------- ----------

Participant signature Date

Appendix C

For administrative use only:
Reference no: D2016 / 350
enquiries: Diane Buntting 011 843 6503

GAUTENG PROVINCE
EDUCATION
REPUBLIC OF SOUTH AFRICA

GDE RESEARCH APPROVAL LETTER

Date:	**8 December 2015**
Validity of Research Approval:	**8 February 2016 to 30 September 2016**
Name of Researcher:	**Hills C.A.**
Address of Researcher:	**12 Villa Rustico; 284 Gouws Avenue; Raslouw Ext. 5; Centurion; 0157**
Telephone / Fax Number/s:	**083 415 4914**
Email address:	**mienica@unisa.ac.za**
Research Topic:	**Developing a law and policy framework to regulate cyber bullying in South African schools**
Number and type of schools:	**SIX Secondary Schools**
District/s/HO	**Tshwane South and Tshwane West**

Re: Approval in Respect of Request to Conduct Research

This letter serves to indicate that approval is hereby granted to the above-mentioned researcher to proceed with research in respect of the study indicated above. The onus rests with the researcher to negotiate appropriate and relevant time schedules with the school/s and/or offices involved. A separate copy of this letter must be presented to the Principal, SGB and the relevant District/Head Office Senior Manager confirming that permission has been granted for the research to be conducted. However participation is VOLUNTARY.

The following conditions apply to GDE research. The researcher has agreed to and may proceed with the above study subject to the conditions listed below being met. Approval may be withdrawn should any of the conditions listed below be flouted.

CONDITIONS FOR CONDUCTING RESEARCH IN GDE

1. *The District/Head Office Senior Manager/s concerned, the Principal/s and the chairperson/s of the School Governing Body (SGB.) must be presented with a copy of this letter.*
2. *The Researcher will make every effort to obtain the goodwill and co-operation of the GDE District officials, principals, SGBs, teachers, parents and learners involved. Participation is voluntary and additional remuneration will not be paid;*

2015/12/8

Office of the Director: Education Research and Knowledge Management ER&KM)
9th Floor, 111 Commissioner Street, Johannesburg, 2001

Appendix D

Dear Parent or Guardian

I am a faculty member in the *College of Law at the University of South Africa*. I am conducting a research project on the regulation of cyber bullying in schools. I request permission for your child to participate.

The study consists of a confidential questionnaire regarding your child's views on cyber bullying, and whether they have been a victim of this type of bullying. The project will be explained in terms that your child can understand, and your child will participate only if he or she is willing to do so. Only I will have access to information from your child. At the conclusion of the study, children's responses will be reported as group results only.

Participation in this study is voluntary. Your decision whether or not to allow your child to participate will not affect the services normally provided to your child by the school. Your child's participation in this study will not lead to the loss of any benefits to which he or she is otherwise entitled. Even if you give your permission for your child to participate, your child is free to refuse to participate. If your child agrees to participate, he or she is free to end participation at any time. You and your child are not waiving any legal claims, rights, or remedies because of your child's participation in this research study.

Should you have any questions or desire further information, please e-mail me at mienica@unisa.ac.za. Keep this letter after tearing off and completing the bottom portion and return to Life Orientation educator at school.

This study has been approved by the Unisa ethics committee.

Sincerely,

CA Hills
Unisa

Please indicate whether or not you wish to allow your child to participate in this project by checking one of the statements below, signing your name and returning it to the life orientation educator. Sign both copies and keep one for your records.

_____ I grant permission for my child to participate in CA Hill's study on cyber bullying in schools.

_____ I do not grant permission for my child to participate in CA Hill's study on cyber bullying in schools.

_____ _____

Signature of Parent/Guardian | Printed Parent/Guardian Name

_____ _____

Printed Name of Child | Date

Appendix E

ASSENT TO PARTICIPATE IN RESEARCH

DEVELOPING A LAW AND POLICY FRAMEWORK TO REGULATE CYBER BULLYING IN SOUTH AFRICAN SCHOOLS

1. My name is Riana Hills and I am a student and lecturer at the University of South Africa.

2. I am asking you to take part in a research study because I am trying to learn more about cyber bullying in schools.

3. If you agree to be in this study, I will ask you to fill in an anonymous questionnaire.

4. I do not believe that you will be hurt or upset by being in this study. If you take part in the study and believe that you have been hurt or upset in any way, you may stop being in the study. I will not tell anyone else the things you tell me about cyber bullying or anything you tell me about yourself or any other person.

5. This study probably will help you, but if you participate in this study, it will teach me important ways to help other children like you in the future.

6. Please talk this over with your parents before you decide whether or not to participate. Your parent gave permission for you to take part in this study. Even though your parent said "yes," you can still decide not to do this.

7. If you don't want to be in this study, you don't have to participate. Remember, being in this study is up to you and no one will be upset if you don't want to participate or even if you change your mind later and want to stop.

8. You can ask any questions that you have about the study. If you have a question later that you didn't think of now, you can call me at 083 415 4914 or e-mail me at mienica@unisa.ac.za. You may call me at any time to ask questions about the study.

9. Signing your name at the bottom means that you agree to be in this study.

_____

Signature of Subject

_____ _____

Printed Name of Subject Date

Appendix F

UNISA college of law

COLLEGE OF LAW RESEARCH ETHICS REVIEW COMMITTEE

Date: 2016/10/19

Reference: C.A Mienie

Applicant: C.A. Mienie

Open Rubric

Dear Ms C.A.Mienie

DECISION: ETHICS APPROVAL

Name	C.A.Mienie
Proposal	Developing a law and policy framework to regulate cyber bullying in South African schools
Qualification	LLD

Thank you for the application for research ethics clearance by the College of Law Research Ethics Review Committee for the above mentioned research. **Final approval is granted.**

The application was reviewed in compliance with the Unisa Policy on Research Ethics.

The proposed research may now commence with the proviso that:

1. *The researcher will ensure that the research project adheres to the values and principles expressed in the Unisa Policy on Research Ethics which can be found at the following website:*

   http://www.unisa.ac.za/cmsys/staff/contents/departments/res_policies/docs/Policy_Research%20Ethics_rev%20app%20Council_22.06.2012.pdf

2. *Any adverse circumstances arising in the undertaking of the research project that is relevant to the ethicality of the study, as well as changes in the methodology, should be communicated in writing to the College of Law Ethical Review Committee.*

University of South Africa
Preller Street, Muckleneuk Ridge, City of Tshwane
PO Box 392, Unisa, 0003, South Africa
www.unisa.ac.za/law

An amended application could be requested if there are substantial changes from the existing proposal, especially if those changes affect any of the study-related risks for the research participants

3. *The researcher will ensure that the research project adheres to any applicable national legislation, professional codes of conduct, institutional guidelines and scientific standards relevant to the specific field of study.*

Note:

The reference number (top right corner of this communique) should be clearly indicated on all forms of communication (e.g. Webmail, E-mail messages, letters) with the intended research participants, as well as with the URERC.

Kind regards

PROF B W HAEFELE
CHAIR PERSON: RESEARCH ETHICS
REVIEW COMMITTEE
COLLEGE OF LAW

PROF R SONGCA
EXECUTIVE DEAN:
COLLEGE OF LAW