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**THE LEGAL FRAMEWORK REGULATING CYBERBULLYING AMONG CHILDREN
IN SOUTH AFRICA**

SUBMITTED BY

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Abstract

The proliferation of information and communication technology, including digital media, has revolutionized social interaction in contemporary society. Individuals now rely on the internet for a diverse range of activities from education, work, to entertainment, communication and access to information. Modern technology has changed the way in which people communicate and has introduced several new platforms for social interaction. While the digital transformation of society is welcomed, the expansion of the internet has given rise to new forms of criminal behaviour. Children are particularly vulnerable to cyber threats and the increase of internet usage among children present several challenges including malware infection, cyberbullying, online sexual abuses, identity theft and cyber terrorism. Though all critical and worth examining to spotlight the downside of children's interaction with the internet, this study is framed and concerned with cyberbullying against children. Cyberbullying has become prevalent among children and has a detrimental impact on the wellbeing of children with far reaching negative consequences on a child's growth, development and self-esteem. The prevalence of the use of social media and access to the internet for children poses great risks for children, making them vulnerable to the act of cyberbullying. This study examines the emergence of cyberbullying in South Africa and the existence and sufficiency of appropriate legislative frameworks which address cyberbullying. This study critically analyses whether legislation has been able to keep pace with the advancing technology in order to provide sufficient relief to victims of cyberbullying. This study further examines the extent to which legislative remedies provide children with protection from cyberbullying and the impact on various constitutional values, including the right to privacy, freedom of speech and human dignity through the lens of the best interest of the child.

List of abbreviations

ACRWC	African Charter on the Rights and Welfare of the Child
AU	African Union
AUP	Acceptable Use Policy
BoR	Bill of Rights
CC Act	Cybercrimes Act
Constitution	Constitution of the Republic of South Africa
ECTA	Electronic Communications and Transactions Act
FPA	Film and Publications Act
GC	General Comment
ISP	Internet Service Provider
ITC	Information and communication technology
NGO	Non-governmental Organisation
OHCHR	Office of the United Nations High Commissioner for Human Rights
PHA	Protection from Harassment Act
Schools Act	South African Schools Act 84 of 1996
SAPS	South African Police Services
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child
WHO	World Health Organisation

Table of contents

1	Chapter 1: Introduction and background to cyberbullying _____	8
1.1	Background _____	8
1.2	Problem statement and justification of the study _____	11
1.3	Objectives of the study _____	15
1.4	Research Questions _____	16
1.5	Limitation of the study _____	16
1.6	Literature Review _____	17
1.7	Methodology _____	21
1.8	Structure of this dissertation _____	21
2	Chapter 2: Defining cyberbullying and its detrimental impact on children _____	22
2.1	Introduction _____	22
2.2	Definition of terms _____	23
2.2.1	Bullying: Traditional bullying _____	23
2.2.2	Cyberbullying _____	25
2.2.3	Key differences Between Traditional Bullying and Cyberbullying _____	26
2.2.4	Cyberaggression _____	27
2.3	The psychological and physiological effects of bullying _____	28
2.4	The effect on academic progression _____	31
2.5	International Case Study _____	32
2.6	South African Case Study _____	33
2.7	Cyberbullying in the era of Covid-19 _____	36
2.8	Conclusion _____	38
3	Chapter 3: South African law and policy framework on cyberbullying _____	40
3.1	Introduction _____	40
3.2	The Constitution of the Republic of South Africa _____	40
3.3	South African Common Law _____	42
3.3.1	Crimen iniuria _____	43
3.3.2	Criminal defamation _____	44
3.3.3	Extortion _____	44
3.3.4	Assault _____	45
3.4	South African Schools Act 84 of 1996 _____	45
3.5	Electronic Communications and Transactions Act 25 of 2002 _____	49
3.6	The Children's Act 38 of 2005 and the Children's Amendment Act of 2007 _____	50
3.7	Protection from Harassment Act 17 of 2011 _____	54
3.8	Films and Publication Act 65 of 1996 _____	56

3.9	Films and Publications Amendment Act 11 of 2019 _____	56
3.10	Cybercrimes Act 19 of 2022 _____	58
3.11	The National Child Care and Protection Policy 2019 _____	62
3.12	Conclusion _____	64
4	Chapter 4: An Analysis of International Law _____	66
4.1	Introduction _____	66
4.2	The United Nations Convention on the Rights to the Child (1989) _____	68
4.3	General comment No. 25 (2021) on children’s rights in relation to the digital environment _____	71
4.4	The African Charter on the Rights and Welfare of the Child (1990) _____	75
4.5	The African Union Convention of Cyber Security and Personal Data Protection (2014)78	
4.6	The African Declaration on Internet Rights and Freedoms (2013) _____	81
4.7	Conclusion _____	83
5	Chapter 5: Findings & Recommendations _____	85
5.1	Introduction _____	85
5.2	Discussion: _____	86
5.3	Recommendations: _____	88
6	Bibliography _____	93

1 Chapter 1: Introduction and background to cyberbullying

1.1 Background

“The teacher showed us a sheet of paper and said we could spit on it, stamp on it, crumple it – but not tear it. Then she asked us to try and straighten it out again, but it was impossible to smooth out all the creases. Then she said this is what it’s like when someone gets bullied. There should be a teacher who goes into all classes and does this from primary 1 to primary 7 – right up until upper secondary. And they need to do it more than once”.¹

11-year-old-boy

The use of the internet across the African continent has experienced a significant surge, reaching approximately 570 million users by 2022, a figure more than double compared to 2015.² While this increase in internet usage is a positive development, it brings forth numerous safety risks and challenges, particularly concerning the wellbeing of children in Africa.

The age of digital communication has brought with it many beneficial advancements, from the rapid dissemination of information to the seamless interaction between people across different geographical locations.³ However, this digital revolution has also fostered a darker side, the emergence and proliferation of cyberbullying.⁴ This thesis, titled "The Legal Framework Regulating Cyberbullying among Children in South Africa," explores the prevailing legislative mechanisms, their limitations and possible improvements within the context of South African children.

In a perfect society, interactions between people would be respectful, kind and polite, taking into consideration the values and rights entrenched in the Constitution of South Africa⁵,

¹ UN Special Representative of the Secretary-General on Violence Against Children: *2016 Background Paper On Protecting Children From Bullying And Cyberbullying*.

² <https://www.statista.com/topics/9813/internet-usage-in-africa/> (Accessed 30 October 2022).

³ N Selwyn 'The digital native – myth and reality' (2009) 61 *Aslib Proceedings* 368.

⁴ C Li *et al* 'Traditional bullying and cyberbullying in the digital age and its associated mental health problems in children and adolescents: a meta-analysis' (2022) *European Child & Adolescent Psychiatry* 1.

⁵ The Constitution of the Republic of South Africa, 1996.

based on the principles of human dignity, equality and freedom, known as the cornerstones of the South African democracy.⁶

Bullying in society, particularly in respect of children, is not a recent development. Notwithstanding, in light of the expeditious advancement of technology and diverse manifestations of social media, a novel phenomenon has arisen denoted as cyberbullying.⁷ Throughout history, bullying has been a prevalent aspect of childhood, perceived and accepted as a common occurrence.⁸ It was only in the past two decades that this prevailing notion faced significant questioning, leading to a growing recognition of its serious implications and the necessity for heightened attention to the issue.⁹

Over the years and as reflected in several scholarly literature, physical bullying amongst and against children has posed a major impact and threat to children's wellbeing.¹⁰ The emergence and heightened prevalence of internet and technology usage by children, particularly during the COVID-19 pandemic, have brought significant attention to the distressing impact of online bullying within the context of child interactions.¹¹

The school environment is a cornerstone of children's social development, necessitating the establishment of robust legal frameworks to ensure quality education and protect the rights and well-being learners. In South Africa, where children spend a substantial portion of their time in school, the significance of schools in shaping children's experiences and interactions cannot be overstated.¹²

⁶ A De Wet 'Cyberbullying, schools and the Protection from Harassment Act: Shaping school policy and practice towards the protection of learner' (2015) 20 *South African Education Law Association* 2.

⁷ J Burgess & C McLoughlin 'Investigating cyberbullying: Emerging research and e-safety strategies within families and communities' (2011) 6 *Communities, Children and Families Australia* 3.

⁸ A El Asam & M Samara 'Cyberbullying and the Law: A Review of Psychological and Legal Challenges' (2016) 65 *Computers in Human Behavior* 127.

⁹ El Asam & M Samara (n 8 above) 127.

¹⁰ L Arseneault 'Annual Research Review: The persistent and pervasive impact of being bullied in childhood and adolescence: implications for policy and practice' (2018) 59 *Journal of Child Psychology and Psychiatry* 405.

¹¹ D Mui Hung Kee *et al* 'Cyberbullying on social media under the influence of COVID-19' (2022) 41 *Global Business and Organizational Excellence* 18.

¹² DM Smit 'Cyberbullying in South African and American schools. A legal comparative study' (2015) 35(2) *South African Journal of Education* 4.

Within this practical context, the issue of cyberbullying emerges as a pertinent concern. As schools serve as primary social settings where children interact, they also become arenas where cyberbullying incidents can occur. The digital landscape extends the boundaries of traditional bullying, presenting new challenges for educators and policymakers to address.

The present discourse shall centre on the mounting vulnerability of children to the occurrences of cyberbullying. Evidently, we will assess whether the existing legislative framework is effective in addressing cyberbullying and its ability to provide sufficient protection to victims from their perpetrators. This evaluation aims to determine whether prosecuting authorities have successfully kept pace with the continuously evolving technological landscape or have encountered challenges in doing so.¹³

In 2018, Ipsos conducted a survey revealing that South Africa had the highest incidence of cyberbullying globally among the 28 surveyed countries, which included Sweden, Italy, Saudi Arabia, Germany, Canada, India and the United States.¹⁴ The survey revealed that 54% of South African parents know a child in their community who has been a victim of cyberbullying. This percentage significantly exceeds the worldwide average, which stands at 37%, highlighting a notable disparity in the incidence of cyberbullying between South Africa and the rest of the globe.¹⁵

The focus of this research is to delve into the current legislative mechanisms in place to combat cyberbullying among children in South Africa. Children represent a particularly vulnerable group to cyberbullying, given their extensive use of digital platforms and their limited experience navigating the intricacies of the online environment.¹⁶ It is crucial to understand whether there are legislative provisions intended to shield children from cyberbullying. Cyberbullying frequently involves one child bullying another, introducing a layer of complexity to the matter. Following this understanding, a thorough analysis of the

¹³F Cassim, 'Formulating adequate legislation to address cyber-bullying: Has the law kept pace with advancing technology?' (2013) 26 *South African Computer Journal* 1

¹⁴ 'Global Views on Cyberbullying' 27 June 2018 <https://www.ipsos.com/en/global-views-cyberbullying> (Accessed on 24 March 2024)

¹⁶ R Brewer *et al* 'Young People, the Internet, and Emerging Pathways into Criminality: A Study of Australian Adolescents' (2018) 12 *International Journal of Cyber Criminology* 115.

effectiveness of these provisions will be undertaken to highlight potential areas that could benefit from enhancements or improvements.

Cyberbullying represents a critical public health concern that significantly impacts the psychological maturation of adolescents, potentially leading to enduring effects that can extend well into adulthood.¹⁷ In a study examining the correlation between cyberbullying victimization and the onset of depression and suicidal thoughts in adolescents, the evidence suggested that adolescents who endure cyberbullying are 2.5 times more susceptible to contemplating suicide compared to their non-bullied peers.¹⁸ The research underscores the evident risk of depressive symptoms and the consideration of suicide among those affected, highlighting the imperative for the development and implementation of effective interventions to mitigate the impact of cyberbullying.¹⁹

Therefore, the primary objective of this thesis is to critically analyse the existing legal framework's strengths and weaknesses regarding cyberbullying among children in South Africa. By examining the current legislation, relevant policies and their implementation, we aim to identify potential areas of improvement. This research seeks to shed light on the practical realities of combating cyberbullying and offer recommendations for enhancing legal measures to better protect children in the digital age.

1.2 Problem statement and justification of the study

Despite the increasing prevalence of cyberbullying among children in South Africa, there is a concerning ambiguity regarding the adequacy in the current legal frameworks designed to address and mitigate this issue.²⁰ This dissertation seeks to examine the extent to which South African laws provide effective measures against cyberbullying and protect the rights and well-being of minors in digital spaces. It will scrutinize the existing legislation for gaps, challenges in implementation and alignment with international standards.

¹⁷ C Maurya et al 'The effects of cyberbullying victimization on depression and suicidal ideation among adolescents and young adults: a three year cohort study from India' (2022) 22 *BMC Psychiatry* 1.

¹⁸ C Maurya (n 17 above) 1.

¹⁹ C Maurya (n 17 above) 1.

²⁰ L Cililiers 'Perceptions and experiences of cyberbullying amongst university students in the Eastern Cape province, South Africa' (2021) 17 *The Journal for Transdisciplinary Research in Southern Africa* 1.

The problem is both legal and social, with far-reaching consequences affecting the health and well-being of minors.²¹ Tragically, there have been instances where cyberbullying has led to children taking their own lives.²² Such dire outcomes underscore the urgency for a resilient and responsive legal framework that can adapt to rapid technological changes and the shifting dynamics of youth aggression online. Without proper legal redress and social interventions, the irreparable damage inflicted by cyberbullying on minors is likely to persist.

Numerous scholarly studies over the past decades have focused on the phenomenon of bullying among children in schoolyard settings. With the advent of digital communication, there has been a discernible escalation in malevolent acts committed by children against other children on online platforms, adversely impacting their emotional well-being.²³ A study conducted in a rural high school in Limpopo involved interviews with 80 students.²⁴ Findings revealed that these students reported experiences of suicidal ideation, diminished academic performance and significant emotional distress as consequences of cyberbullying.²⁵ This alarming trend raises serious concerns, as global cyberbullying rates indicate that victimisation and perpetration are on the rise.²⁶

The adverse impact of cyberbullying on the physical and psychological welfare, as well as the developmental trajectory, of children is readily apparent. This phenomenon carries the potential for lasting and even fatal consequences for the affected children.²⁷ Consequently, it becomes of utmost importance to conduct a comprehensive evaluation of the adequacy of existing legal frameworks in addressing and preventing such occurrences, with a specific focus on safeguarding the well-being of children.

²¹ C Maurya (n 17 above) 1.

²² "Cyberbullying: SA has 4th highest global death rate among teens Roodepoort record 15 April 2021 1.

²³ B Isik & N Ozdemir 'How does cyberbullying affect the values of university youth?: Its' analysis in terms of education and mental health' (2019) 6(1) *New Trends and Issues Proceedings on Humanities and Social Sciences* 1.

²⁴ P Farhangpour *et al* 'Emotional and academic effects of cyberbullying on students in a rural high school in the Limpopo province, South Africa' (2019) 21(1) *South African Journal of Information Management* 7.

²⁵ P Farhangpour *et al* (n 24 above) 7.

²⁶ C Zhu *et al* "Cyberbullying Among Adolescents and Children: A Comprehensive Review of the Global Situation, Risk Factors, and Preventive Measures" (2021) 9 *Frontiers in Public Health* 9.

²⁷ T Blumenfeld *et al* 'The knowledge base of South African educators regarding Cyberbullying in schools' (2023) *Preprints* 3.

Cyberbullying poses significant emotional, psychological and even physical risks to children.²⁸ As technology continues to evolve, so do the tactics employed by cyberbullies. Understanding the legal framework surrounding cyberbullying becomes essential to safeguarding the wellbeing and mental health of children in South Africa.

Children have the right to a safe and nurturing environment. The study will explore how cyberbullying impacts their rights to privacy, dignity and protection from harm. Identifying legal gaps and weaknesses in the current framework will help propose more effective measures to protect children's rights.

For effective prevention and intervention strategies, it is crucial for parents, educators, policymakers and law enforcement to be aware of the existing legal provisions and their effectiveness in dealing with cyberbullying cases. This study will serve as a valuable resource to raise awareness and promote compliance with relevant laws.

The primary concern at hand pertains to the alarming prevalence of cyberbullying incidents targeting children, which have resulted in rampant victimization and harassment to the extent that child-victims have expressed a desire to take their own lives.²⁹ This grave issue has garnered substantial media coverage, as a number of young learners have tragically committed suicide in the wake of cyberbullying incidents.³⁰ A global survey by YouGov revealed South Africa has the fourth highest rate of cyberbullying worldwide.³¹ This is particularly relevant for academic inquiry into the area of cyberlaw and policy, particularly in terms of addressing the escalating issue of cyberbullying and its impact on the safety of children.

This dissertation centres on the extent to which South African legislation explicitly addresses the issue of cyberbullying, while concurrently evaluating the efficacy of the legal safeguards in place to shield children from the deleterious effects of cyberbullying. Patchin and Hinduja

²⁸ KA Albin 'Bullies in a Wired World: The Impact of Cyberspace Victimization on Adolescent Mental Health and the Need for Cyberbullying Legislation in Ohio' (2012) 25 *Journal of Law and Health* 167.

²⁹ "Cyberbullying: SA has 4th highest global death rate among teens *Roodepoort record* 15 April 2021 1.

³⁰ "Cyberbullying: SA has 4th highest global death rate among teens *Roodepoort record* 15 April 2021 1.

³¹ <https://wingu-academy.com/the-devastating-effects-of-cyberbullying-in-south-africa/> (Accessed 23 March 2023).

correctly stated “as technology evolves, so do many of the problems faced by those who have access to it”.³²

One of the major concerns in South Africa is whether existing legislation is sufficient to address the issue of cyberbullying. The introduction of various social media platforms have created tools for children to voice their opinions on numerous topics and have created a new hierarchy in terms of popularity of children whereby learners earn a ranking among their peers based on the amount of likes they receive on a photo, the amount of followers they may have on Instagram and the amount of interaction and attention received on their posts. This has led to a new platform for social engagement among children, leading to a competitive landscape centred on prominent social media visibility. Regrettably, this digital arena has also opened doors for perpetrators to employ bullying tactics, further exacerbating the situation.

A study examining the correlation between the brain studies of children and psychology revealed that the teenage brain is not yet fully developed, as compared to the adult brain.³³ The frontal lobe, an important region of the brain for complex decision making, reasoning and self-control, is not completely developed and does not complete maturing until the emerging adult years of 18-25.³⁴ Consequently, most children who are victims of violence and harassment through various online platforms are too young to effectively handle the intimidation and humiliation and might act on suicidal impulse as they are driven by emotions more than reasoning.³⁵ As a result the negative outcomes of cyberbullying may manifest in both physical and psychological forms, including increased stress, alcohol abuse and suicidal thoughts.³⁶

³² Unpublished: JE Vines ‘An embedded case study of the proposed Megan Meier Cyberbullying Prevention statute & the proposed Tyler Clementi Higher Education Anti-Harassment statute’ unpublished PhD thesis, Clemson University, 2015 1.

³³ R Cohen-Almagor ‘Social Responsibility on the Internet: Addressing the Challenge of Cyberbullying’(2018) 39 *Aggression and Violent Behavior* 11.

³⁴ R Cohen-Almagor (n 23 above) 12.

³⁵ As above.

³⁶ F Radebe & M Kyobe ‘The Response of Social Crime Prevention Police to Cyberbullying Perpetrated by Youth in Rural Areas of South Africa’ (2021) 18 *International Journal of Environmental Research and Public Health* 1-2.

Other manifestations of cyberbullying have been noted which include problematic behavioural patterns often manifesting as decreased academic performance, use of harmful substances, criminal engagement of children, substance abuse, anger, anxiety and suicide.³⁷

Consequently, there is a duty on the State to provide the necessary tools to prevent, address and ensure such practices are discouraged and alert children of the serious consequences related to cyberbullying incidents.

It is imperative to scrutinize the prevailing legal infrastructure to ascertain whether the concern of cyberbullying receives adequate consideration within South Africa's domestic legislative framework, and to what degree legal recourses furnish children with efficacious safeguards and avenues for seeking remedy.

1.3 Objectives of the study

The first objective of this research is to demonstrate the extent to which cyberbullying is prevalent in the South African context and to establish the effect it has on the development and progression of the child. Secondly, this dissertation ascertains whether the present domestic legal framework addresses the issue of cyberbullying and provides children with adequate protection and redress. This study illustrates the need for specific cyberbullying legislation to ensure children are adequately protected from the harmful impact of cyberbullying. Moreover, this study conducts an assessment to determine if South Africa has harmoniously synchronized with global standards by adhering to international legal frameworks concerning cyberbullying. Recommendations will be made for the improvement of South African laws to guarantee adequate protection and relief for children from the act of cyberbullying, to ensure the best interest of children are of paramount importance in all matters concerning the child during their interaction with the internet.

³⁷ B Isik & N Ozdemir 'How does cyberbullying affect the values of university youth?: Its' analysis in terms of education and mental health' (2019) 6(1) *New Trends and Issues Proceedings on Humanities and Social Sciences* 1.

1.4 Research Questions

The central question this thesis aims to answer is whether the existing legal framework on cyber interactions between children is effective in regulating cyber-bullying in South Africa. In addressing these questions, this thesis intends to answer other related questions which include:

1. What are the challenges and gaps in the current legal framework that may hinder effective enforcement and protection against cyber-bullying incidents among children?
2. What standards in terms of legal protection do we find in international law?
3. How can the legal framework be strengthened or revised to better protect children from cyber-bullying, considering the evolving nature of technology and online platforms?

These constitute the principal inquiries that this thesis seeks to examine. Supplementary and ancillary queries have been intermittently raised and addressed throughout the unfolding chapters.

1.5 Limitation of the study

This research primarily centres on the phenomenon of cyberbullying among minors in South Africa, recognizing their heightened vulnerability to such incidents. The focus on minors is justified due to the prevalence of cyberbullying within this demographic. However, it is important to acknowledge that while this study will extensively explore the rights of the victim, it will not delve into the protection of the rights of the perpetrator engaging in cyberbullying activities. The latter aspect constitutes a potential avenue for future research and is beyond the immediate scope of this dissertation.

Furthermore, this dissertation will not conduct a comparative analysis of foreign legislations specifically addressing cyberbullying protections for minors. Instead, it will employ a method of comparison by referencing international policies and conventions ratified by South Africa.

By doing so, the study aims to assess whether South Africa's approach to addressing cyberbullying aligns with established international standards and norms.

In addition, this dissertation does not encompass an analysis of case law concerning cyberbullying, as it is an emergent field with scant judicial precedents available for the period of 2020-2022, the timeframe of the literature review. The absence of substantial court cases on this topic reflects the novelty of cyberbullying in legal discourse, necessitating reliance on available research and literature for this study. Recognizing this gap, the dissertation identifies a significant opportunity for future research to explore the legal dimensions of cyberbullying as they are shaped by forthcoming judicial decisions and the development of case law.

1.6 Literature Review

Cassim wrote about the heightened detrimental impact of cyberbullying when compared to conventional schoolyard bullying, affecting not only the victims but also extending its repercussions to their families and friends.³⁸ In her analysis, Cassim delves into the origins of the internet, initially designed with adults in mind, but increasingly adopted by children, thereby necessitating a critical examination of the safety and well-being of young digital users.³⁹

Cassim contends that the shift from conventional bullying to the digital sphere has rendered it more convenient for aggressors to target their victims, owing to the anonymity and technological accessibility at their disposal. This, in turn, has facilitated an environment where perpetrators can more readily engage in harassing behaviour against their targets.⁴⁰

Cassim makes a significant observation regarding the insufficiency of adequate legislation in South Africa aimed at addressing the issue of cyberbullying. This dearth of comprehensive legal frameworks could potentially serve as an unintended incentive for perpetrators to engage in such behaviour. Another noteworthy point highlighted by her

³⁸ Cassim (n 13 above) 20.

³⁹ Cassim (n 13 above) 2.

⁴⁰ Cassim (n 13 above) 2.

pertains to the challenges faced by law enforcement and prosecution authorities in effectively navigating the evolving landscape of technology, particularly in addressing reported instances of cyberbullying. Additionally, she identifies a gap within the existing legislative measures, underscoring the necessity for a more accurate and effective approach to addressing the complexities of cyberbullying in South Africa.⁴¹

The insights and analyses provided by Cassim bear considerable importance for the present study, as they contribute to the assessment of South African legislation's alignment with the rapid advancements in digital technology. Her evaluation seeks to determine whether the legal framework in South Africa adequately adapts to the changing technological landscape.⁴² Subsequent to Cassim's examination, The Cybercrimes Act No. 19 of 2022⁴³ was enacted, prompting our scrutiny to determine whether the implementation of this Act has addressed her apprehension regarding the inadequacy of legislation in South Africa targeted at combating cyberbullying.

Du Toit⁴⁴ examines the impact of cyberbullying on learners, schools and the education environment and laments that urgent response is required. She further examines the existing legislative framework in assessing the balancing act required between the learners' constitutional right to freedom of speech and expression as well as the protection of vulnerable learners' right to equality, dignity and privacy.⁴⁵

Du Toit highlights the significant role of the school setting as a primary social arena for children and emphasises the important influence educational institutions have on the psychological and educational growth of a child.⁴⁶ She dives into the nature of cyberbullying together with the differentiating feature, being the anonymity aspect and discusses consequences of cyberbullying such as low self-esteem, family problems, academic challenges, school violence and delinquent behaviour.⁴⁷

⁴¹ Cassim (n 13 above) 3.

⁴² Cassim (n 13 above) 15.

⁴³ Act 19 of 2022.

⁴⁴ T Du Toit, 'Cyberbullying in South African and American schools: A legal comparative study' (2015) 35 *South African Journal of Education* 1.

⁴⁵ Du Toit (n 44 above) 5.

⁴⁶ Du Toit (n 44 above) 1.

⁴⁷ Du Toit (n 44 above) 2.

Du Toit discusses the far reaching consequences of cyberbullying and provides an analysis of South Africa's legislative framework relevant to cyberbullying and is pertinent to the present study as she discusses the challenges and gaps in the current legal framework that may hinder effective enforcement and protection against cyber-bullying incidents among children.⁴⁸ She further investigates means in which cyberbullying could be halted to give effect to the constitutional values entrenched in the Constitution of South Africa.⁴⁹ This study will draw valuable insights from Du Toit's discussion which identifies South Africa's legislation with respect to cyberbullying to be fragmented and relies on various pieces of legislation, common law definitions and civil law remedies.⁵⁰

Hills recognized the deficiencies and gaps within South Africa's legal framework in directly addressing cyberbullying.⁵¹ Hills' observations are in alignment with our research problem, making her insights particularly relevant to this study. In her research, she meticulously formulated a law and policy framework aimed at effectively regulating cyberbullying within school environments.⁵² Hills examined the differences between traditional bullying and cyberbullying and noted whilst both forms of bullying have certain elements in common, the nature of cyberbullying makes it an extremely harmful form of bullying due to unique characteristics of cyberbullying.⁵³ The characteristics she describes include the speed at which content can spread to a large audience and the ease of dissemination, the anonymity cyberbullying can provide to the perpetrator and the mere fact that cyberbullying can take place anywhere but the negative impact can still be seen in the school environment, i.e. the learner can be bullied at home online or virtually but the consequences can be experienced by the learner at school.⁵⁴

Hills argues the unique characteristics of cyberbullying demand a separate approach for addressing it within school environments compared to the strategies used for traditional bullying. However, Hills also emphasizes the existence of various challenges that can hinder

⁴⁸ Du Toit (n 44 above) 8.

⁴⁹ Du Toit (n 44 above) 2.

⁵⁰ Du Toit (n 44 above) 8.

⁵¹ Unpublished: CA Hills 'Developing a law and policy framework to regulate cyber bullying in South African schools' unpublished Phd thesis, University of South Africa, 2017 8.

⁵² Hills (n 51 above) 216.

⁵³ Hills (n 51 above) 41.

⁵⁴ Hills (n 51 above) 41.

schools from effectively handling this phenomenon. These challenges encompass the inherent anonymity associated with cyberbullying, the possibility of students possessing a more advanced technological understanding than their educators, the adaptability of bullies in altering their online identities, the underreporting of cyberbullying incidents and the obstacles faced by law enforcement authorities in tracing the origins of bullies due to the existing technological and procedural gaps within our law enforcement systems.⁵⁵

Hills suggests the most effective method to tackle cyberbullying in schools is through adhering to the 'whole school approach' which identifies bullying as a systematic problem and therefore the approach to address this should not be targeted at bullies and victims individually but rather through a whole-school context.⁵⁶ Hills indicates intervention should not be limited to punishment and rehabilitation of the victim and bully but interventions should concentrate on prevention strategy, curriculum, social skills, mentoring and training on cyberbullying.⁵⁷ Hills asserts that students ought to be informed about the potential legal penalties and repercussions linked with cyberbullying. As a result, Hills suggests that the conventional approaches to managing cyberbullying should be modified in order to effectively oversee and control instances of cyberbullying.⁵⁸

Hills' research holds particular relevance to the current study, as it offers valuable insights that can inform strategies for addressing the identified gaps in the current legal framework in South Africa.

This research will draw inspiration from Hills observations to addressing cyberbullying in schools to make recommendations of how best children can be educated, informed and aware of the risks associated with cyberbullying in applying a preventative approach to cyberbullying.⁵⁹

⁵⁵ As above.

⁵⁶ Hills (n 51 above) 49.

⁵⁷ Hills (n 51 above) 49.

⁵⁸ Hills (n 51 above) 50.

⁵⁹ Hills (n 51 above) 216.

1.7 Methodology

This research is conducted using a doctrinal research approach. A doctrinal research approach methodology refers to a comprehensive and analytical examination or investigation into legal rules, doctrines, principles and concepts.⁶⁰ This method involves a careful and systematic examination, analysis and evaluation of legal rules, principles and philosophies, as well as how they relate to each other.⁶¹

This research approach involves a careful evaluation of laws and decision-making processes, along with their underlying policies.⁶² Doctrinal or theoretical legal research is characterized by its exploration of the legal framework within a specific domain, aiming to define the existing laws, the development and analysis.⁶³

This method has been chosen for the research, based on its suitability to investigate what the law is in the area of cyberbullying and study the analysis of the law in this field, its development and application. The materials, both primary and secondary, that would be used to respond to the research questions and objective, will be obtained through desktop (internet) and library source. These will include, but not limited to, legal instruments and academic literature relevant to cyberbullying, and particularly in the context of South Africa.

1.8 Structure of this dissertation

This dissertation is composed of five chapters. The first chapter provides the context and general introduction to the subject matter. This chapter delves into the research issues, primary purpose and specific goals of the study and underscores the methodology implemented.

The second chapter delves into the definition of cyberbullying and the profound ramifications of cyberbullying. It highlights the adverse impacts on victims and emphasizes the significant

⁶⁰ RA Ngwoke et al 'A critical appraisal of doctrinal and Non-doctrinal legal research methodologies in contemporary times' (2023) 3(1) *International Journal of Civil Law and Legal Research* 9.

⁶¹ RA Ngwoke et al (n 60 above) 9.

⁶² As above.

⁶³ As above.

detriment it poses to a child's mental health, academic advancement and holistic development. This analysis seeks to offer a detailed insight into the detrimental effects of online harassment on a child's growth while underscoring the urgency for targeted legislative action. The chapter aims to shed light on the interplay between the fallout of cyberbullying on child development and the presence or lack of adequate legal measures.

The third chapter examines the current domestic framework relevant to the issue of cyberbullying. A thorough examination is conducted on South Africa's prevailing legal framework with respect to cyberbullying. The chapter endeavours to ascertain the adequacy of the nation's extant measures in confronting this emergent challenge. The overarching objective is to critically evaluate the legislative approach, gauging its effectiveness in both addressing the incidence of cyberbullying and ensuring appropriate recourse for its victims.

Chapter four features an analysis of international instruments and policies relevant to cyberbullying. The chapter evaluates South Africa's legal stance on cyberbullying in comparison to global standards, with particular focus on conventions concerning cybercrimes and children's rights. The objective is to critically assess the alignment of South Africa's provisions with these international frameworks.

Chapter five consolidates the pivotal arguments and research conclusions drawn throughout the study. This chapter presents a summary of the key arguments, research findings and provides recommendations for improving the South African domestic legal framework with respect to cyberbullying.

2 Chapter 2: Defining cyberbullying and its detrimental impact on children

2.1 Introduction

The previous chapter set out the background and outlined the scope of this study. This chapter offers an overarching exploration of the subject of cyberbullying. Within this section, we will explore the diverse definitions of both bullying and its digital counterpart,

cyberbullying, to gain a comprehensive understanding of its essence and characteristics. Subsequently, we will examine the consequences of cyberbullying on children. The value of this section is to provide justification for the need of legislation regulating cyberbullying by highlighting the consequences of the failure to have legislation in place to protect children from the harmful impact of cyberbullying.

Therefore, we shall examine the repercussions of cyberbullying by reviewing both domestic and global case studies of cyberbullying incidents, including its prevalence during the Covid-19 pandemic.

Furthermore, this chapter highlights the effects of cyberbullying on its victims to illustrate the detrimental impact of cyberbullying on various aspects of a child's development, including their mental and emotional well-being, academic progression and overall growth. The purpose of this analysis is to provide a comprehensive understanding of the harmful effects of cyberbullying. Consequently, this chapter demonstrates that should we fail to address the protection gaps related to cyberbullying, the harm shall continue.

2.2 Definition of terms

2.2.1 Bullying: Traditional bullying

Bullying is characterised by Swedish-Norwegian psychologist Dan Olweus as being a repetitive act done with intent to harm, between two individuals where a power imbalance exists.⁶⁴ A student therefore experiences bullying or victimisation when he or she is exposed to negative actions on the part of one or more students, repeatedly and over time.⁶⁵ From this Olweus' definition we can extract three essentialia, namely, intention, repetition and a power imbalance.

⁶⁴ D Olweus, 'School bullying: Development and some important challenges' (2013) 9(1) Annual review of clinical psychology 757.

⁶⁵ D Olweus (n 67 above) 755.

Olweus is described as a pioneer in identifying school bullying as a form of aggressive behaviour relevant to research and argued that bullying in schools is a harmful behaviour as opposed to the public opinion which indicated bullying is an acceptable right of passage.⁶⁶

Bullying, as defined by Olweus, is when a student faces negative behaviour from peers regularly over an extended period of time.⁶⁷ This means the actions are done on purpose and keep happening. Additionally, there's an unequal power dynamic where the bullied student finds it hard to stand up for themselves.⁶⁸

Intention has long been a topic of contention amongst academics studying the phenomenon of aggression as the bully is generally not questioned as to their intention.⁶⁹ Olweus, however, explains that intention can be garnered from an analysis and understanding of the context.⁷⁰ Olweus implements what can ultimately be described as tacit *dolus eventualis*, namely can it be implied or assumed that the bully is aware that their behaviour will cause unwanted harm or discomfort to the victim.⁷¹

Repetition does not solely imply continuous acts of bullying but can also mean bullying on two or more occasions.⁷² Olweus indicated that adding this element to the definition of bullying helped identify the intent behind the behaviour though he did not consider it an essential criterion.⁷³

The criteria of power imbalance, in favour of the bully, may be associated with objective, physical factors, such as physical strength, the difference in numbers, as well as factors such as popularity and mental health.⁷⁴ Another important factor is how the student

⁶⁶ NCZ Andrews *et al* 'Bullying and the Abuse of Power' (2023) *International journal of bullying prevention : an official publication of the International Bullying Prevention Association*, 3.

⁶⁷ D Olweus (n 67 above) 755.

⁶⁸ As above.

⁶⁹ D Olweus (n 67 above) 757.

⁷⁰ As above.

⁷¹ As above.

⁷² As above.

⁷³ As above.

⁷⁴ D Olweus (n 67 above) 758.

interprets the intent behind the behaviour they experience, especially if it's perceived as harmful or problematic for them.⁷⁵

It is therefore evident that, from the above definition of bullying, three criteria are required to fulfil the definition of bullying, namely repetitiveness, intentional harm-doing, and a power imbalance in favour of the perpetrator.

The definition of bullying encapsulates essential elements that distinguish it from isolated incidents of conflict or aggression among peers. Repetitiveness underscores the persistence of negative behaviours over time, indicating a pattern rather than isolated events. Intentional harm-doing emphasizes the deliberate nature of the actions, distinguishing them from unintentional or accidental behaviours. Finally, the presence of a power imbalance highlights the differential in social status, influence, or authority between the perpetrator and the victim, which enables the bullying behaviour to persist.

Understanding these criteria is crucial for identifying and addressing bullying effectively within school settings. By recognizing repetitive, intentional, and power-imbalanced behaviours, educators and policymakers can implement targeted interventions and support mechanisms to prevent and mitigate instances of bullying, fostering safer and more inclusive environments for all students.

For the purposes of this study, it is crucial to differentiate between direct and indirect bullying. Direct bullying encompasses physical actions like hitting, kicking or damaging the victim's personal property, while indirect bullying involves acts such as circulating false rumours about the victim in their absence.⁷⁶

2.2.2 Cyberbullying

Langos argues that the term cyberbullying has been difficult to define, whereas to date a universal definition has not been agreed upon.⁷⁷ The majority of scholars concur that

⁷⁵ As above.

⁷⁶ C Langos 'Cyberbullying: The Challenge to Define' (2012) 15 *Cyberpsychology, Behavior, And Social Networking* 285.

⁷⁷ C Langos (n 79 above) 285.

cyberbullying can be characterized as a deliberate, aggressive action conducted by an individual or group through electronic means, persistently targeting a victim who is unable to adequately defend themselves.⁷⁸

Olweus defines cyberbullying as bullying performed via electronic forms of contact or communication such as cell phones or the internet.⁷⁹ This specific definition, whilst on the face off is simple, incorporates the three bullying criterion and determines that cyberbullying meets all of them and is accordingly, bullying in its specific form.⁸⁰

Other researches have advocated for expansive definitions that centre on the technology used, encompassing forms such as "bullying through email, instant messaging, in a chat room, on a website, or through a text message sent to a cell phone."⁸¹

Similar to traditional bullying, cyberbullying can be categorized into direct and indirect forms. Direct cyberbullying involves the aggressor targeting the victim directly through methods like instant messaging or other electronic communications.⁸² This is confined to situations where the bully communicates solely with the victim. Indirect cyberbullying, on the other hand, happens when the aggressor shares harmful content about the victim on public platforms like Facebook, dedicated websites, blogs or other widely accessible online space.⁸³

2.2.3 Key differences Between Traditional Bullying and Cyberbullying

The most significant differences between traditional bullying and cyberbullying is that with traditional bullying, it is limited to the physical contact with the bully, whereas in instances of cyberbullying the acts of bullying may continue once the victim has gone home, insofar as the perpetrator continues the act online. Cyberbullying can happen at any time and at

⁷⁸ D Wunmi Grigg 'Cyber-Aggression: Definition and Concept of Cyberbullying'(2010) 20 *Australian Journal of Guidance & Counselling* 143.

⁷⁹ D Olweus (n 67 above) 765.

⁸⁰ D Olweus (n 67 above) 765.

⁸¹ A Alexandra et al 'Defining cyberbullying: A multifaceted definition based on the perspectives of emerging adults (2020)2 *International journal of bullying prevention* 9.

⁸² C Langos (n 79 above) 286.

⁸³ C Langos (n 79 above) 286.

any location, there is no reprieve from it. Bullies accordingly have easy access to their victims.⁸⁴

Cyberbullying further offers the bully full anonymity and as a result, an absolute lack of consequences and concern for the perception of others.⁸⁵ The aforementioned has further resulted in opportunistic children and teenagers who would not generally engage in bullying doing so.⁸⁶ Cyberbullying presents intricate challenges, as it is difficult to contain. Comments, photos, videos and related media can be distributed widely with ease, within a short period of time, thus intensifying the perceived severity on the victim. Increased visibility and access to the content shared amplifies the humiliation experienced by the victim.⁸⁷

Finally, the use of various social media platforms allow bullies to reach a significantly larger audience than traditional bullying both in terms of those who see the acts of bullying⁸⁸ and those who experience it.⁸⁹

2.2.4 Cyberaggression

The term 'cyberaggression' is referred to extensively in the UN Committee on the Rights of the Child, General Comment No. 25 on children's rights in relation to the digital environment and therefore it is essential to understand the meaning.⁹⁰ The Committee on the Rights of the Child released General Comment No. 25 to inform states how to uphold the human rights of children in a digital environment and bridges the rights outlined in the UN Convention on the Rights of the Child from the pre-digital era to their application in addressing contemporary challenges arising from digitization.⁹¹

⁸⁴ LK Wats *et al* 'Cyberbullying in higher education: A literature review' (2017) 69 *Computers in Human Behavior* 269.

⁸⁵ LK Wats *et al* (n 87 above) 270.

⁸⁶ RS Tokunaga, 'Following you home from school: A critical review and synthesis of research on cyberbullying victimization' (2010) 26 *Computers in human behavior* 279.

⁸⁷ T Du Toit, 'Cyber Bullying Dilemma: A case for Ubuntu' (2019) 2.

⁸⁸ IK Peter & F Petermann, 'Cyberbullying: A concept analysis of defining attributes and additional influencing factors' (2018) 86 *Computers in human behaviour* 358.

⁸⁹ As Above.

⁹⁰ UN Committee on the Rights of the Child, General Comment 25.

⁹¹ As above.

While General Comment does not explicitly define the term cyberaggression, it can be understood from the context of the General Comment that cyberaggression encompasses various forms of digitally facilitated violence and sexual exploitation and abuse.⁹² This can occur within a child's trusted circle, including by family members, friends, or intimate partners, particularly among adolescents.⁹³ Examples of cyberaggression include bullying, threats to reputation, the non-consensual creation or sharing of sexualized content such as images or text, solicitation, coercion, and the promotion of self-harming behaviours such as cutting, suicidal behaviour, or eating disorders.⁹⁴ Grigg contends that the term "cyberaggression" encompasses a wider range of behaviors than those defined strictly as cyberbullying.⁹⁵

Another definition of cyberaggression suggests that it pertains to instances of general "peer-to-peer" aggression that take place online.⁹⁶ Such instances may be isolated incidents or occur infrequently. However, there is no power differential between the parties involved and further, no intention to cause harm or distress.⁹⁷

Schoffstall & Cohen however defined cyberaggression as "intentional behaviour aimed at harming another person through computers, cell phones, and other electronic devices, and perceived as aversive by the victim".⁹⁸ It is understood that both cyberbullying and cyberaggression describe harmful and intentional behaviour through electronic devices which negatively impact the victim.

2.3 The psychological and physiological effects of bullying

Studies have highlighted the detrimental effects of bullying on children's emotional wellbeing and have determined that cyberbullying negatively impacts a child's mental and physical

⁹² General Comment No 25 (art 81)..

⁹³ As above.

⁹⁴ As above.

⁹⁵ D Grigg 'Cyberaggression: Definition and Concept of Cyberbullying' (2010) 20 *Australian Journal of Guidance and Counselling* 143.

⁹⁶ <https://www.igi-global.com/dictionary/cyber-aggression/6573> (accessed 22 March 2023).

⁹⁷ As above.

⁹⁸ A Bullo and PJ Schulz 'Parent-child Communication, Social Norms, and the Development of Cyber Aggression in Early Adolescence' (2022) 51, *Journal of youth and adolescence* 1777.

health, with lasting implications for their overall development and growth.⁹⁹ Victims often face diminished acceptance within their social circles, particularly among classmates, resulting in loneliness and social isolation for children.¹⁰⁰

Studies consistently demonstrate the negative effects of bullying on the emotional health of children and adolescents.¹⁰¹ Children who are subjected to cyberbullying behaviour are reported to struggle with depression and anxiety, emotional suffering, thoughts and attempts of self-harm, self-image concerns and diminished physical health.¹⁰² Moreover, these children are prone to encountering legal issues such as committing a crime and may engage in substance abuse when compared to children who have not been victimized by cyberbullying.¹⁰³

Victims display symptoms of depression and anxiety,¹⁰⁴ and further suffer from loneliness, low self-esteem and difficulty cultivating and maintaining interpersonal relationships.¹⁰⁵

Research found that children who are victims of bullying were more likely to use alcohol and drugs as well as exhibit behavioural issues and carry weapons at school.¹⁰⁶

A research study was conducted to determine the frequency of cyberbullying among students in grades 7 - 9 who attend private schools in the Gauteng province.¹⁰⁷ The investigation thoroughly examined several facets of cyberbullying, including the anonymity of the perpetrators, the availability of programs within the schools to prevent cyberbullying,

⁹⁹ H Cowie 'Cyberbullying and its impact on young people's emotional health and well-being' (2013) 37(5) *The psychiatrist* 167 and I Kwan et al 'Cyberbullying and Children and Young People's Mental Health: A Systematic Map of Systematic Reviews' (2020) 23(2) *Cyberpsychology, Behavior, And Social Networking* 72.

¹⁰⁰ H Cowie (n 102 above) 167.

¹⁰¹ T Vaillancourt *et al* 'Cyberbullying in Children and Youth: Implications for Health and Clinical Practice' (2017) 62(6) *The Canadian Journal of Psychiatry* 370 and E William *et al* 'Adult Psychiatric Outcomes of Bullying and Being Bullied by Peers in Childhood and Adolescence' (2013) 70(4) *Jama Psychiatry* 9 and K Rigby *Peer Harassment in School The Plight of the Vulnerable and Victimized* (2001) 322.

¹⁰² T Vaillancourt (n 104 above) 370.

¹⁰³ As above.

¹⁰⁴ As above.

¹⁰⁵ M Robin *et al*, 'Psychological, Physical, and Academic Correlates of Cyberbullying and Traditional Bullying' (2013) 53(1) *Journal of Adolescent Health* s14.

¹⁰⁶ As above.

¹⁰⁷ Unpublished: A Liebenberg 'The Prevalence of Cyber bullying in Gauteng private schools among grade 7 to 9 learners' unpublished MSc thesis, University of the Witwatersrand 2003 1.

and the presence of educational systems in place to safeguard students from the detrimental effects of cyberbullying.¹⁰⁸

As discussed in Chapter 1, the anonymity afforded by the digital realm presents a significant challenge in prosecuting and identifying instances of cyberbullying. However, the study conducted in Gauteng schools yielded enlightening results, indicating that a notable proportion of victims were cognizant of the identity of their cyberbullies, with a striking 85% of victims being aware of the identity of their perpetrators. Conversely, all perpetrators in the study were aware of the identity of their victims.¹⁰⁹ These findings underscore the need for targeted measures to combat cyberbullying, including measures aimed at enhancing the ability of law enforcement agencies to detect and prosecute perpetrators of cyberbullying.¹¹⁰

The analysis of the study's results evaluated the impact of cyberbullying by determining the victims' reactions to the bullying. The findings revealed that the effect of cyberbullying on the victims was sadness, with 35% of the victims reporting feeling sad as a result of this behaviour. Other identified consequences included fear of returning to the school environment, depression and feelings of hopelessness among the students.¹¹¹

The study also discovered that cyberbullying often took place within the homes of both victims and perpetrators, and that cell phones were the primary means of committing this act. It was found that revenge was a common motivation behind these actions.¹¹² In addition, the study revealed that when students were aware of a classmate who was being cyberbullied, 70% of them did not report the incident.¹¹³ Holfeld and Grabe indicate that, despite children reporting instances of cyberbullying, the support provided was found to be ineffective by children. As a result, learners might perceive that reporting such incidents does not benefit them and therefore do not report instances of cyberbullying.¹¹⁴

It is important to note that 40% of learners were unaware of any programmes at their schools

¹⁰⁸ Liebenberg (n 110 above) 1.

¹⁰⁹ Liebenberg (n 110 above) 44.

¹¹⁰ Liebenberg (n 110 above) 44.

¹¹¹ As above.

¹¹² Liebenberg (n 110 above) 44.

¹¹³ Liebenberg (n 110 above) 48.

¹¹⁴ Liebenberg (n 110 above) 48.

regarding cyberbullying awareness initiatives. The study confirmed, in most instances, learners did not reach out for assistance from schools for cyberbullying related incidents and only 28% of learners indicated they spoke to their parents about cyberbullying.¹¹⁵

In addition to the psychological effects of bullying, traditionally termed "emotional" effects, children who are bullied also experience physiological consequences and face heightened risks to their physical wellbeing.¹¹⁶ Victims of bullying have been recorded to suffer more frequently from stomach pains, headaches, tension, fatigue and bedwetting.¹¹⁷

2.4 The effect on academic progression

Victims of bullying have often been recorded as having higher absentee rates, lower standardised test scores and grades and an overall dislike of school.¹¹⁸ There is an obvious causal link between the need to seek reprieve from traditional bullying by way of avoidance of the physical area in which same takes place as well as a negative association with the area resulting in both absenteeism and a dislike of school.¹¹⁹ In respect of cyberbullying, given that this can take place anywhere, the causal link may relate more to the psychological effect resulting in a mental or physical inability to attend school.¹²⁰

A further causal link can be drawn between both types of bullying and lower standardised test scores and grades when the psychological and physiological effects are brought into play.¹²¹ It is clear that both mental and physical health significantly influence a child's academic performance. Consequently, it is imperative that our legal framework specifically addresses bullying and cyberbullying. Failing to address these protection gaps will perpetuate the harm experienced by the affected children.

¹¹⁵ Liebenberg (n 110 above) 50.

¹¹⁶ R Kowalski et al 'Psychological, Physical, and Academic Correlates of Cyberbullying and Traditional Bullying' (2013) 53 *The Journal of adolescent health* s13-s14.

¹¹⁷ As above.

¹¹⁸ As above.

¹¹⁹ T Vaillancourt (n 104 above) 371.

¹²⁰ T Vaillancourt (n 104 above) 370.

¹²¹ As above.

2.5 International Case Study

This international case study aims to highlight the serious outcomes of cyberbullying as observed in the United States. South Africa can learn from these events rather than experiencing them first hand. This section intends to underscore the damage arising from online hostility directed at children and to encourage the South African legal system to consider these foreign instances. This is to ensure that appropriate safeguards are established and preventive strategies are implemented to deter similar incidents.

In 2006, a young girl named Megan Meier from Missouri tragically ended her own life after being harassed online on her Myspace account by someone named Josh.¹²² Later, it was revealed that the person known as "Josh" had been fabricated by the mother of one of Megan's friends to target her.¹²³ The events leading up to and cause of Megan Meier's suicide came to light in *United States v Drew* (2009) 259 F 449.¹²⁴

Megan Meier attended Fort Zumwalt West Middle School where she befriended a group of girls who eventually turned on her and began to bully her.¹²⁵ Megan Meier's parents eventually moved schools and proceeded to open a MySpace account whereafter she received a friend request from an alleged sixteen-year-old boy named Josh Evans.¹²⁶ Josh Evans, however, was in fact Lori Drew, the mother of one of the girls' who had bullied Megan Meier at her previous school.¹²⁷ Lori was assisted by her daughter, Sarah Drew and Ashley Grills, an eighteen-year-old employee of Lori Drew's.¹²⁸

Lori Drew created a fake MySpace profile under the name "Josh Evans" to engage and establish a relationship with Megan Meier. Subsequently, posing as Josh Evans, she conveyed to Megan that he no longer had affection for her and suggested the world would

¹²² <https://fox2now.com/news/megan-meier-mom-still-helping-after-online-bullying-led-to-st-charles-girls-2006-death/> (Accessed 5 April 2023).

¹²³ Cassim (n 13 above) 6.

¹²⁴ *United States v Drew* (2009) 259 F 449.

¹²⁵ R Cohen-Almagor 'Cyberbullying, moral responsibility, and social networking: Lessons from the Megan Meier tragedy' (2020) 16(1) *European Journal of Analytic Philosophy* 83.

¹²⁶ As above.

¹²⁷ *United States vs Drew* 259 F.R.D. 449 (C.D. Cal. 2009).

¹²⁸ R Cohen-Almagor (n 128 above).

be better off without her. After Megan's death, her father opened her Myspace account where he saw a message from Josh Evans which read:

“Everybody in O’Fallon knows how you are. You are a bad person, and everybody hates you. Have a shitty rest of your life. The world would be a better place without you.”¹²⁹

Following these several distressing messages from this fabricated account, Megan Meier tragically took her own life. Despite the circumstances, no criminal charges were successful in connection to Megan's death, as Lori Drew's actions did not clearly violate existing laws.¹³⁰ This event sheds light on the dangerous and extensive repercussions of cyberbullying.¹³¹ Additionally, it is clear that the methods of harassment and bullying are ever-changing. As such, the need for legislatures to continuously revise legislation to keep it in sync with the rapid evolution of technology is apparent.¹³²

This relevance of the Megan Meier case study underscores the severe consequences of cyberbullying leading to the irreversible loss of life. It highlights the pressing need to implement anti-cyberbullying awareness programs, policies and legislation to shield children from this detrimental form of harassment and abuse.

2.6 South African Case Study

Despite the widespread occurrence of cyberbullying in South African schools,¹³³ such incidents often go unreported and unnoticed until they culminate in the tragic demise of the victim, at which point they garner media and public attention.¹³⁴

¹²⁹ <https://www.meganmeierfoundation.org/megans-story> (Accessed 20 September 2022)

¹³⁰ As above.

¹³¹ JP Meredith ‘Combating Cyberbullying: Emphasizing Education over Criminalization’ (2010) 63 *Federal Communications Law Journal* 339.

¹³² JP Meredith (n 134 above) 340.

¹³³ ‘More than half of SA's children have been cyberbullied, survey finds’ Times Live (2021) <https://www.timeslive.co.za/news/south-africa/2021-03-10-more-than-half-of-sas-children-have-been-cyberbullied-survey-finds/> (Accessed 10 March 2023)

¹³⁴ N Jabulani & LM Edward ‘The whole-school approach to manage cyberbullying: lessons from South African schools (2021) 20(1) *Journal of Educational Studies* 55.

The untimely death of fifteen-year-old Lufuno Mavhunga, a student at Mbilwi Secondary School in Limpopo, has gained significant attention due to the circumstances surrounding her suicide.¹³⁵ Lufuno was the victim of physical assault, which ultimately led to an act of cyberbullying that contributed to her decision to end her own life.¹³⁶

A student recorded a video of the physical assault of Lufuno Mavhunga, which was subsequently disseminated on several social media platforms, including Instagram and Facebook.¹³⁷ In an attempt to protect herself from the ongoing aggression and harassment by the perpetrator, who employed both traditional bullying and cyberbullying tactics, Lufuno blocked the individual from her Instagram and Facebook pages.¹³⁸

The video of the incident reveals that other students were encouraging the perpetrator as the bully physically assaulted Lufuno.¹³⁹ Lois Law indicates that the school's principal was made aware of the bully's previous instances of aggressive behaviour towards Lufuno but failed to address it.¹⁴⁰ Furthermore, it is claimed that on the day of the physical assault, no efforts were made by those in positions of authority to intervene or contact Lufuno parents or guardians.¹⁴¹ The inaction displayed by adults, particularly the principal, in this situation is alarming. It may deter children from reporting incidents of bullying and cyberbullying if they believe they will not receive the necessary support. This sentiment was emphasised earlier in the chapter where children articulated their reasons for not reporting cyberbullying incidents.¹⁴²

The child responsible for the assault has been charged with the criminal offense of assault and will be tried according to the provisions outlined in the Child Justice Act of 2008.¹⁴³

¹³⁵ 'Pupil who beat Lufuno Mavhunga filled with regret, says her mom' *Times Live* 3 May 2021 <https://www.timeslive.co.za/news/south-africa/2021-05-03-pupil-who-beat-lufuno-mavhunga-filled-with-regret-says-her-mom/> (accessed 10 March 2023).

¹³⁶ L Lois 'Bullying in schools' *Family Digest* 39 May 2021, South African Catholic Bishops Conference, Parliamentary Liaison Office 1 <http://www.cplo.org.za/wp-content/uploads/2021/05/Family-Digest-39-Bullying-in-Schools-by-Lois-Law.pdf> (Accessed 13 March 2023)

¹³⁷ As Above.

¹³⁸ As above.

¹³⁹ As above.

¹⁴⁰ As above.

¹⁴¹ As above.

¹⁴² Liebenberg (n 110 above) 48.

¹⁴³ As above.

This lamentable occurrence distinctly illustrates the severity of the issue concerning cyberbullying, whereby the persistent torment and maltreatment endured by the victim ultimately led to her death. Consequently, the exigency for the enactment of explicit legal provisions and policy frameworks pertaining to bullying and particularly cyberbullying is undeniably heightened.

In a separate incident, a thirteen-year-old girl from Pretoria tragically ended her life after a private photo of her was circulated on the social media platform Whatsapp, among her fellow students, leading to online aggression towards her. The victim had reported the incident to her teachers and expressed fear of returning to school due to the anticipated continuation of violence and harassment by her peers¹⁴⁴.

It is unknown at this time the specific content of the photograph in question, however, it has been suggested that it may have been a personal or intimate image of the student. The mother of the student met with the school principal to address the matter after the student informed her teachers of the issue. Despite these efforts, the student ultimately took their own life.¹⁴⁵

It is evident that the school did not take proactive measures to address and resolve the incidents of violence against the victims.¹⁴⁶ Schools have a crucial role in preventing, addressing and disciplining instances of cyberbullying. It is incumbent upon schools to protect their students and this responsibility will be further examined in the present dissertation.

The tragic incident above is a clear demonstration of the gravity of the problem with respect to cyberbullying where the culmination of the harassment and abuse suffered by the child results in children taking their own life. The need for specific legislation and policy regulating bullying and specifically cyberbullying becomes increasingly apparent.

¹⁴⁴ <https://www.cybersmile.org/news/13-year-old-pretoria-girl-kills-herself-after-being-cyberbullied> (Accessed 15 August 2022)

¹⁴⁵ As above.

¹⁴⁶ As above.

2.7 Cyberbullying in the era of Covid-19

The Covid-19 pandemic has significantly altered many aspects of daily life, including employment, education and the global economy. Its impact has been felt universally, affecting individuals of all ages and backgrounds. Lockdown measures, introduced to curb the virus's spread, led to widespread isolation, causing economic challenges for many nations and increased feelings of anxiety and loneliness among individuals.¹⁴⁷

In South Africa, the disruption of school and social routines has resulted in a shift to online learning and heightened feelings of social anxiety and loneliness.¹⁴⁸ This has been further aggravated by an increased reliance on digital platforms for social and educational purposes, particularly during the enforced "social distancing" phase.¹⁴⁹

Through the use of the internet, individuals and entities were able to continue conducting a substantial number of tasks as society rapidly adapted to the new reality brought about by the Covid-19 pandemic.¹⁵⁰ To ensure continuity organizations made an effort to provide their employees and students with suitable electronic and mobile devices, while also facilitating speedy internet access.¹⁵¹

Network providers seized the opportunity to enhance their business by ensuring uninterrupted connectivity and network coverage to their clients. In response to the financial challenges imposed by Covid-19 restrictions and isolation requirements, business owners adapted to the changing needs of consumers by adopting innovative online business models.¹⁵²

While the existence of the internet during this challenging period was greatly appreciated, along with the increased screen time, came several risks and challenges for children and

¹⁴⁷ SE Adewoye 'Adolescent cyberstanders' experience of cyberbullying in the era of Covid-19 in South Africa' (2022) 14 *International Journal of Emotional Education* 37.

¹⁴⁸ As above.

¹⁴⁹ B Chipangura 'Securing the cybersafety of South African online high school learners beyond COVID-19' (2022) 18(1) *The Journal for Transdisciplinary Research in Southern Africa* 1.

¹⁵⁰ N Donthu & A Gustafsson 'Effects of COVID-19 on business and research' (2020) *Journal of Business Research* 285.

¹⁵¹ N Donthu & A Gustafsson (n 153 above) 285.

¹⁵² N Donthu & A Gustafsson (n 153 above) 286.

learners. Adolescents prone to bullying tactics were provided with another platform with greater opportunity to inflict aggressive online towards victims.¹⁵³

Adewoye indicates that adolescents are the most “frequent” and “fast-growing” users of the internet and information technology, thus, it is for this reason that they are at a greater risk to fall victim to the risks and harms associated with cyberbullying.¹⁵⁴

The research study observed a significant rise in cyberbullying cases in South Africa during the Covid-19 period. Various forms of online harassment, including offensive messages, cyberstalking and trolling were reported.¹⁵⁵ This increase was not unique to South Africa as eleven European countries also witnessed a similar trend, with forty-nine percent of participants facing cyberbullying during the lockdown.¹⁵⁶

A different study indicated one in four adolescents in the United States of America encountered online harassment during the pandemic.¹⁵⁷ The various research findings indicate that victims of cyberbullying exhibited emotions of isolation, loneliness, peer rejection and a reduced sense of self-confidence.¹⁵⁸ Additionally, the study revealed that victims reported experiencing sentiments of sadness, fearfulness, social withdrawal, emotional exhaustion and mood fluctuations.

Research often focuses on the effects of cyberbullying on victims, overlooking the consequences faced by the perpetrators, who also exhibit anger, social anxiety, poor social skills and low self-esteem.¹⁵⁹

Furthermore, the impact of cyberbullying on classmates and learners who witness this behaviour is important to note. If learners who are bystanders to cyberbullying are adequately trained and equipped, they may report incidents to teachers and persons in authority within school settings and prevent the escalation of such behaviour and the severe

¹⁵³ SE Adewoye (n 150 above) 37.

¹⁵⁴ As above.

¹⁵⁵ As above.

¹⁵⁶ As above.

¹⁵⁷ As above.

¹⁵⁸ SE Adewoye (n 150 above) 38.

¹⁵⁹ SE Adewoye (n 150 above) 38.

consequences of cyberbullying.¹⁶⁰ It is clear from this study that during the pandemic there was an increase in online harassment and bullying towards children who were victims of cyberbullying.¹⁶¹ The need for legislation to specifically address online harassment and cyberbullying targeting children becomes increasingly apparent.

2.8 Conclusion

This chapter has discussed the concepts of both bullying and cyberbullying and explored the various definitions of these key concepts. In addition, this chapter dissected the harmful impacts of cyberbullying on the growth and development of the child to demonstrate the dangers associated with cyberbullying to validate the need and existence for specific legislation to regulate and prevent occurrences of cyberbullying.

The various case studies discussed in this section highlighted the shortcomings of schools, educators and principals in responding promptly to protect the lives of impacted children. These studies underscore the urgency of establishing legal safeguards for child victims of cyberbullying. Furthermore, these studies illuminate the gaps in school policies where strict duties were not imposed on schools to treat bullying with the gravity it deserves. The inadequate response from schools to address cyberbullying has led to potential criminal repercussions for the aggressors. Thus, it is evident that legal interventions often come too late, only after tragic outcomes have transpired. This emphasizes the pressing need for early intervention and proactive measures to effectively mitigate the detrimental effects of cyberbullying.

The tragic incidents of child suicides linked to cyberbullying highlight the deficiencies in our legal framework pertaining to online harassment. These events emphasize the pressing necessity for legal reform to address the gaps in early intervention and prevention measures to deter cyberbullying incidents effectively.

This in-depth analysis provided in this chapter not only sheds light on the complexities of cyberbullying but also underscores the urgent need for strong and clear laws. The Covid-19

¹⁶⁰ SE Adewoye (n 150 above) 47.

¹⁶¹ SE Adewoye (n 150 above) 45.

pandemic intensified our reliance on the internet, bringing its own challenges and elevated risks. Given that the digital landscape is constantly evolving, our legal systems must be progressive and proactive.

In the following chapter, we will examine the South African legal framework to evaluate its efficacy in tackling the issue of cyberbullying, especially considering its harmful and dangerous nature. We aim to understand if the existing laws adequately regulate and mitigate the occurrences of this pressing concern.

3 Chapter 3: South African law and policy framework on cyberbullying

3.1 Introduction

In the preceding chapter, the harmful impact and consequences of cyberbullying were discussed, with particular emphasis of the effect on children with respect to their mental health, physical health and academic progression. It was noted that there have been instances where children have chosen to end their lives due to the distress caused by cyberbullying.

It is evident that the current framework in South Africa should be examined to determine whether appropriate measures have been implemented to address the issue of cyberbullying, as effective protection of these human rights should emanate from the state.¹⁶²In this chapter the South African legal framework pertaining to cyberbullying shall be discussed.

3.2 The Constitution of the Republic of South Africa

The Constitution of the Republic of South Africa of 1996¹⁶³, (hereinafter referred to as, “the Constitution”) is the supreme law of the land, any law of conduct inconsistent with it is invalid.¹⁶⁴ The Constitution is particularly relevant in this study as the rights to dignity and equality are violated in a cyberbullying scenario.¹⁶⁵

Chapter 2 of the Constitution contains the Bill of Rights which is the cornerstone of the South African democracy. Section 7(2) of the Constitution directs the state to respect, protect, promote and fulfil the rights contained in the Bill of Rights. The Bill of Rights encompasses several rights which are relevant to the issue of cyberbullying, namely, the right to human

¹⁶² Hills (n 51 above) 76.

¹⁶³ The Constitution of the Republic of South Africa, 1996.

¹⁶⁴ S2 of the Constitution.

¹⁶⁵ D Khan ‘The impact of Covid-19 on cyberbullying: A delictual claim for emotional harm?’ (2021) *De Jure Law Journal* 565.

dignity,¹⁶⁶ the right to life,¹⁶⁷ the right to freedom and security of the person,¹⁶⁸ the right to privacy and security¹⁶⁹ and the right to freedom of expression.¹⁷⁰ However, it is evident that a delicate balancing of these acts is required, between the right to freedom of expression and the former rights mentioned, which poses possible challenges on the bullies right to freedom of expression.

Consequently, a balancing act is required between the rights of the victim and the rights of the bully.¹⁷¹ While the bully's right to freedom of expression is protected by the Constitution, it must not infringe on the victim's right to human dignity and privacy.¹⁷² Du Doit suggests that when examining a cyberbullying related incident, it is important to note whether the ultimate goal of the bully is to negatively impact and undermine the victim's dignity.¹⁷³

Section 14 of the Constitution guarantees the right to privacy, however section 32 of the Constitution guarantees the right of access to information that is held by another person and this is required for the exercise or protection of any rights.¹⁷⁴ The principles found in these provisions are particularly relevant in the school environment, where for example information can be accessed for the protection of the rights of a child where for instance a bully may have offensive photos or videos of a victim on their personal cell phone or social media which they are circulating in an attempt to harass or undermine the victim.¹⁷⁵ It is important to note that not all rights are absolute, thus all rights can be limited in terms of the general limitation clause contained in Section 36 of the Constitution.

Furthermore, section 9 of the Constitution contains the equality clause which states that no person may unfairly discriminate directly or indirectly against anyone one on grounds of

¹⁶⁶ S10 of the Constitution.

¹⁶⁷ S11 of the Constitution.

¹⁶⁸ S12 of the Constitution.

¹⁶⁹ S14 of the Constitution.

¹⁷⁰ S16 of the Constitution.

¹⁷¹ DM Smit 'Cyberbullying in South African and American schools. A legal comparative study' (2015) 35(2) *South African Journal of Education* 6.

¹⁷² T Du Toit, 'Cyber Bullying Dilemma: A case for Ubuntu' (2019) 13.

¹⁷³ As above.

¹⁷⁴ S32 of the Constitution.

¹⁷⁵ DM Smit (n 174 above) 7.

race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.¹⁷⁶

In addition to these rights, section 28(1)(d) affords children protection from maltreatment, neglect, abuse or degradation. These rights are particularly relevant with respect to cyberbullying which may amount to maltreatment or abuse of a learner. Section 28(2) contains the best interests of the child principle which provides that a child's best interests are of paramount importance in every matter concerning the child.¹⁷⁷ The nature and act of any bullying incident is contrary to the best interest of the child principal and adversely impacts the well-being and development of the child.¹⁷⁸

The Constitution however does not explicitly mention bullying but identifies any form of maltreatment, neglect, abuse or degradation against children as a direct violation of their rights. Thus, cyberbullying may be interpreted to fall within the ambit of these categories to align with the Constitution's objective to protect children from all types of harm.

Public schools bear the responsibility to uphold the Constitution and safeguard learners from cyberbullying, especially when such incidents primarily originate within the school premises.¹⁷⁹ The provisions in the Constitution however require legislation and policies to respect, protect and uphold these rights.

3.3 South African Common Law

The South African common law can be used by victims to find relief from the act of cyberbullying by remedies found in criminal law or civil law however it has been challenged whether these remedies provide victims with sufficient relief.¹⁸⁰ The Constitution provides that when interpreting any legislation, and when developing the common law, every court must promote the spirit, purport and objects contained in the Bill of Rights.¹⁸¹ This is

¹⁷⁶ S9 of the Constitution.

¹⁷⁷ S28(2) of the Constitution.

¹⁷⁸ T Du Toit (n 175 above) 13.

¹⁷⁹ CA Hills (n 51 above) 107.

¹⁸⁰ Cassim (n 13 above) 19.

¹⁸¹ S39 of the Constitution.

particularly relevant to understand when discussing the common law remedies available as the courts may develop the common law, upholding the values entrenched in the Bill of Rights.¹⁸²

Until recently, South Africa lacked explicit legislation related to cybercrimes and the response to cyberbullying would depend on whether the bullying act was considered a contravention of existing criminal, common or civil law provisions.¹⁸³ However, the Cybercrimes Act No. 19 of 2022 has been recently enacted in South Africa, addressing the problem of cybercrime comprehensively.¹⁸⁴ This legislation will be examined in extensive detail in a subsequent section of this chapter. Criminal law responses to cyberbullying include *crimen iniuria*, criminal defamation, extortion and assault and shall be discussed below.

3.3.1 *Crimen iniuria*

Crimen iniuria is defined as the unlawful, intentional and serious violation of the dignity or privacy of another.¹⁸⁵ Consequently, if the violation of the dignity or privacy of the victim is considered serious, the bully could be guilty of *crimen iniuria*.¹⁸⁶ Two tests are applied in order to establish whether a person's dignity has been violated, namely a subjective and objective test.¹⁸⁷ It should be established that the victim is cognisant and aware of the perpetrators' transgressing behaviour and the victim feels humiliated by the actions of the perpetrator.¹⁸⁸ It is important to note that it is not required that the perpetrator's behaviour or actions are made known to a third party other than the victim to qualify as *crimen iniuria*.

¹⁸² S39 of the Constitution.

¹⁸³ CA Hills (n 51 above) 114.

¹⁸⁴ Act 19 of 2022.

¹⁸⁵ CR Snyman, *Criminal Law* (2014) 461.

¹⁸⁶ CA Hills (n 51 above) 119.

¹⁸⁷ C Badenhorst 'Legal responses to cyber bullying and sexting in South Africa' (2011) 10 *Centre for Justice and Crime Prevention*, 8.

¹⁸⁸ As above.

3.3.2 Criminal defamation

Criminal defamation is defined as the unlawful and intentional publication of matter concerning another person which tends to injure his reputation.¹⁸⁹ The elements of this crime are the publication of defamatory allegations concerning another unlawfully and intentionally.¹⁹⁰

From this definition it is evident that criminal defamation is directly relevant to cyberbullying, which is commonly characterised by the distribution of defamatory allegations, photos, videos and rumours of children on various internet platforms. In order to qualify as criminal defamation, it is important to distinguish it from civil defamation, which is also a form of iniuria and differs from other forms of iniuriae, in that it is not a person's bodily integrity that is injured or their dignity, but specifically their reputation which has suffered damage as a result of the perpetrators actions.¹⁹¹ Criminal defamation includes both defamation in writing as well as verbal defamation and it is required that the defamatory remarks or conduct are made known to a third party other than the victim concerned.¹⁹²

3.3.3 Extortion

Snyman defines extortion as a crime committed 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 her to hand over the advantage.¹⁹³ Relevant to cyberbullying, extortion is committed where a person intentionally and unlawfully threatens to electronically distribute information or images of another person, which may compromise the other person in question.¹⁹⁴ An example of this could be one learner threatening to post sensitive images of another learner on social media, should the former fail to provide the answers to their examination assignment.

¹⁸⁹ Snyman (n 188 above) 467.

¹⁹⁰ Snyman (n 188 above) 467.

¹⁹¹ Snyman (n 188 above) 467.

¹⁹² Badenhorst (n 136 above) 8.

¹⁹³ Snyman (n 134 above) 417.

¹⁹⁴ Badenhorst (n 190 above) 10.

3.3.4 Assault

Assault is defined as any unlawful and intentional act or omission which results in another person's bodily integrity being indirectly or directly impaired or which inspires a belief in another person that such impairment of her bodily integrity is immediately to take place.¹⁹⁵ Any act of cyberbullying where the perpetrator threatens the victim with personal violence or inspires the belief in the victim that personal violence may be imminent falls within the ambit of assault. A subjective test is applied to determine whether the victim believed that the perpetrator intended or was able to carry out the threat.¹⁹⁶

3.4 South African Schools Act 84 of 1996

The school environment is considered one of the most important social settings in which children function¹⁹⁷, consequently a strong legal instrument is required to ensure children are provided with a progressively high quality of education whilst the rights and well-being of all learners, parents and educators are protected. Conservatively speaking, the South African child spends on average at least 6 hours per day at school, 199 school days in a year. About 54% of the year is thus spent at school, interacting with other learners and children. Therefore, it is imperative that schools ensure the learning environment is purposeful and disciplined.¹⁹⁸

The South African Schools Act establishes a standardized framework for the structuring and governance of South African schools and regulates the conduct of learners.¹⁹⁹ Section 8 of this Act contains the Code of Conduct which requires the governing body of a public school to regulate the discipline at the school through drafting and adopting this Code of Conduct for learners to allow for a purposeful and disciplined school environment which is dedicated

¹⁹⁵ Snyman (n 188 above) 447.

¹⁹⁶ Badenhorst (n 190 above) 8.

¹⁹⁷ DM Smit 'Cyberbullying in South African and American schools. A legal comparative study' (2015) 35(2) *South African Journal of Education* 4.

¹⁹⁸ I Moodley 'Cyber bullying: A legal framework for South African educators' (2012) 27 *Southern African Public Law* 540.

¹⁹⁹ Act 84 of 1996.

to the improvement and maintenance of the quality of the learning process.²⁰⁰ Where a learner has acted in contravention of the Code of Conduct, a formal disciplinary hearing may be held by the schools' governing body which may result in either the suspension or expulsion of the learner.²⁰¹

Although the Act makes provision for formal disciplinary proceedings to address instances where a learner has contravened the Code of Conduct it fails to provide schools with guidance on preventive measures and practical strategies that could be put into place to address a learner's contravention of the Code of Conduct without a formal disciplinary hearing.²⁰² It is noteworthy that the Schools Act lacks a specific definition for cyberbullying, potentially complicating efforts to address these issues effectively in educational settings.²⁰³ Establishing clear definitions is essential for understanding and addressing such behaviours.

To address this gap, it is advisable for schools to define cyberbullying within their respective Codes of Conduct. Additionally, implementing awareness campaigns can serve as proactive measures to educate and inform students about the detrimental consequences of bullying and cyberbullying. By taking these steps, schools can better equip students to recognize and prevent these behaviours, thereby addressing the issue more effectively.

Moodley argues that the current South African school legislation addresses the issue of traditional bullying, however in instances where learners make use of information technology to bully other learners, the Act remains silent.²⁰⁴

Hills suggests that in order to ensure discipline at schools, it is imperative that a policy regarding cyberbullying is contained in the Code of conduct for learners.²⁰⁵ She further explores an interesting discussion with respect to schools and the legal position surrounding the schools' ability to discipline learners for off-campus cyberbullying if it has included it in

²⁰⁰South African Schools Act sec 8.

²⁰¹ MJ Reyneke & L Jacobs 'Can legal remedy be used to address bullying and cyberbullying in South African schools?' (2018) 71(1) *Polish journal of educational studies* 67.

²⁰² As Above.

²⁰³ MJ Reyneke & L Jacobs (n 204 above) 71.

²⁰⁴ I Moodley (n 201 above) 540.

²⁰⁵ CA Hills (n 51 above) 131.

the Code of Conduct for learners. Hills indicates that if all parties have agreed to the disciplinary measures for off-campus cyberbullying, schools should have the authority to discipline students, provided their code of conduct supports such measures.²⁰⁶

Cyberbullying may harm learners both psychologically and emotionally and may equate to abusive behaviour within the ambit of this definition. Section 28 of the Constitution provides for the protection of children's rights, section 28(1)(d) states that every child has the right to be protected from maltreatment, neglect, abuse or degradation.

The act of cyberbullying constitutes a violation of the children's rights contained in section 28 of the Constitution, with specific reference to a child's right to protection from abuse or degradation in the context of cyberbullying. It is established that schools play an important role in the development and education of the child and it becomes increasingly relevant to ensure sufficient policies regarding cyberbullying are inserted into the Code of Conduct in South African schools in a uniform and consistent manner.

The Department of Basic Education has developed a guideline from various Acts amongst others, including the South African Schools Act²⁰⁷, The Films and Publications Act²⁰⁸, The Electronic Communications and Transactions Act,²⁰⁹ applicable to schools in South Africa titled, Guidelines on e-Safety in schools which applies to all learners, teachers and school management, which also includes School Governing Bodies.²¹⁰ This Guideline is designed to aid parents and guardians in their efforts to ensure the online safety of their children.²¹¹

Cyberbullying is defined in the Guideline as "harassing, humiliating or threatening someone in cyberspace, by sending them nasty emails, posting malicious information, fake profiles or embarrassing photographs or comments on social networking sites."²¹²

²⁰⁶ As above.

²⁰⁷ Act No. 84 of 1996.

²⁰⁸ Act No. 65 of 1996.

²⁰⁹ Act No. 36 of 2005.

²¹⁰ The Department of Basic Education: Guidelines on e-Safety in Schools: Educating towards responsible, accountable and ethical use of ICT in education 4.

²¹¹ As above.

²¹² Guidelines on e-Safety in Schools (n 181 above)10 -11.

The guideline states that bullying using digital means is still regarded as bullying and carries serious consequences according to the Acceptable Use Policy of the School.²¹³

The Guideline emphasizes the importance of imparting appropriate behaviour and fostering critical thinking skills of children to ensure their safety and legal compliance while navigating the internet.²¹⁴

Furthermore, the Guideline recommends strategies for managing ICT access in schools and suggests that schools set up a specialized team within the School Safety Committee to formulate their own Acceptable Use Policy.²¹⁵ This Policy should define penalties imposed for violation of the agreement and must be read and signed by every learner and parent or guardian. The school should keep signed copies and ensure all signatories have easy access to the Policy, which is clearly visible to learners in classrooms.²¹⁶ Additionally, the AUP should align with the penalties outlined in the existing Code of Conduct, which should be adopted by all public schools.²¹⁷

Through initiatives such as the AUP, schools acknowledge the pervasive role of technology in children's lives.²¹⁸ Schools bear the dual responsibility of integrating technology into the curriculum as a valuable learning instrument but are also required to equip learners to be discerning, responsible and ethical contributors in the digital era.²¹⁹ Through the implementation of such policies and guidelines, schools can educate students about the detrimental consequences of cyberbullying, thereby deterring children from engaging in these acts.

²¹³ Guidelines on e-Safety in Schools (n 181 above) 18.

²¹⁴ Guidelines on e-Safety in Schools (n 181 above) 18.

²¹⁵ Guidelines on e-Safety in Schools (n 181 above) 24.

²¹⁶ As above.

²¹⁷ As above.

²¹⁸ As above.

²¹⁹ As above.

3.5 Electronic Communications and Transactions Act 25 of 2002

The Electronic Communication and Transactions Act 25 of 2002²²⁰ was enacted to provide for the facilitation and regulation of electronic communications and transactions and to prevent abuse of information systems.

One of the objectives of the Act is to promote legal certainty and confidence in respect of electronic communications and transactions and it is apparent the focus of the Act is to protect data messages.²²¹ A data message is defined in the Act as data generated, sent, received or stored by electronic means and includes voice or a store record.²²² Data is defined as electronic representations of information in any form.²²³ This aspect is particularly pertinent to the study as the concept of data encompasses various electronic mediums, such as text messages, images, videos, voice messages, and other forms of electronic communication, commonly utilized by children. This holds particular significance in the realm of cyberbullying, as individuals engaging in such behaviour often employ data and data messages to harass or intimidate their victims.

Section 15 of the Act addresses the admissibility and evidential weight of data messages in legal proceedings and establishes that electronic data messages cannot be discounted solely due to their electronic nature during legal proceedings.²²⁴ Even if a data message differs from its original form, it remains admissible as evidence if it represents the best available evidence. Consequently, data messages warrant appropriate consideration as evidentiary material. Assessing the reliability of a data message involves considering factors such as its creation, storage, maintenance, and the identification of the sender.

This section can be applied to cyberbullying cases, providing a framework for presenting electronic evidence in court to address cyberbullying matters brought before the court .

²²⁰ Act 25 of 2002.

²²¹ T Du Toit (n 33 above)14.

²²² Act 25 of 2002 sec 1(a).

²²³ As above.

²²⁴ Act 25 of 2002 secs 15(1),(2) &(3).

Chapter 13 of the Act is titled Cybercrime and addresses the issues of unauthorised access to, interception of, or, interference with data. Section 86 (3) of the Act stipulates that any person unlawfully who creates, sells, distributes or possesses devices or software primarily intended to bypass data security or engages in activities concerning passwords or access codes with the aim to unlawfully use such items in violation of this section is guilty of an offence.²²⁵

Relevant to cyberbullying, any abuse of electronic communications and systems to degrade or humiliate another child would fall within the ambit of this Act. The bully may access the data of the victim to intimidate or harass the victim concerned.²²⁶ It can therefore be argued that victims of cyberbullying can rely on chapter 13, whereby cyberbullying will amount to a cybercrime for purposes of the Act.²²⁷

3.6 The Children’s Act 38 of 2005 and the Children’s Amendment Act of 2007

The Children’s Act 38 of 2005²²⁸ aims to give effect to certain rights contained in the Constitution, including care and protection of children. The concept of bullying is found in section 1 of the Children’s Act 38 of 2005²²⁹ where abuse is defined in the Act.²³⁰ The objects of the Act include the protection of children from maltreatment, neglect, abuse or degradation as well as the provision of structures that aim to promote the monitoring of sound physical, psychological, intellectual, emotional and social development of children.²³¹ These objectives are particularly relevant in addressing cyberbullying, which can be considered a form of abuse.

²²⁵ Act 25 of 2002 sec 86.

²²⁶ T Du Toit (n 44 above)14.

²²⁷ Cassim (n 13 above) 17.

²²⁸ Act 38 of 2005.

²²⁹ Act 38 of 2005 sec 1.

²³⁰ A De Wet (n 6 above) 10.

²³¹ Act 38 of 2005 secs 2(a)-(e).

Abuse is defined in the Act as intentional harm to a child, encompassing physical assault, sexual abuse, bullying by peers, exploitative labour practices and actions causing psychological or emotional distress.²³² While the Children's Act does not explicitly address bullying or cyberbullying, certain sections may be considered applicable in a broader context, given that the Act aims to protect children from harm, abuse, neglect, and exploitation. Some of the potentially relevant sections which may be interpreted to address cyberbullying shall be discussed.

Section 6 of the Act²³³ contains the General Principles emphasising that any decision or action regarding a child must uphold the child's rights as defined in the Bill of Rights and prioritize the child's best interests, respect their inherent dignity, ensure fair treatment and recognize their developmental needs, including the importance of age-appropriate play and activities.

This section states that the best interests of the child are of paramount importance in all matters concerning the care, protection, and well-being of the child. The impact of bullying or cyberbullying on the child's well-being could be considered under this provision in providing a holistic approach to the protection of children by recognizing the best interests of the child as a guiding principle in considering the child's physical, emotional, and psychological well-being. Cyberbullying has the potential to cause significant emotional and psychological harm to a child.

Section 7(l)(i) and (ii) of the Children's Act²³⁴ emphasizes the child's right to protection from abuse and neglect, highlighting the necessity to shield the child from physical or psychological harm that may arise from maltreatment, abuse, degradation, or exposure to violence and harmful behaviours directed at the child.

This section highlights the child's right to be protected from maltreatment, neglect, abuse, or degradation. Depending on the severity and nature of the bullying or cyberbullying, it could potentially fall within the scope of abuse or degradation. Cyberbullying can result in significant emotional and psychological harm to a child, which can be considered a form of

²³² Act 38 of 2005 sec 1.

²³³ Act 38 of 2005 sec 6(2).

²³⁴ Act 38 of 2005 secs 7(l)(i) and 7(l)(ii).

emotional abuse. By recognizing cyberbullying as a potential form of abuse, appropriate steps can be taken to protect children from such harmful online behaviour.

Section 1(1)(a) of the Act describes abuse towards a child as deliberate infliction of harm or ill-treatment and includes exposing the child to behaviour that may cause psychological or emotional harm.²³⁵

Based on the aforementioned definition of abuse, cyberbullying may be construed as a manifestation of bullying, encompassing actions directed towards a child that possess the capacity to inflict psychological or emotional harm. Consequently, cyberbullying falls within the scope of the definition of abuse.

The Children's Amendment Act²³⁶ includes mandatory reporting of child abuse in section 110 of the Act. Section 110 of the Act²³⁷ requires professionals such as educators and healthcare practitioners to report cases of suspected abuse or neglect to designated child protection organizations, the provincial department of social development or a police official. If cyberbullying is seen as a form of emotional abuse, these reporting requirements could be applied to ensure that appropriate action is taken to protect the child and address the behaviour.

Sections such as 6 and 7 of the Children's Act²³⁸ and section 110 of the Children's Amendment Act²³⁹, which focus on the best interests of the child, the child's right to protection from abuse and neglect and the reporting of suspected abuse or neglect, respectively, provide a framework for protecting children from various forms of harm including potential emotional abuse caused by cyberbullying.

Despite the possible relevance of certain provisions within the Children's Act, it is important to note that the Children's Act does not provide specific guidance or provisions tailored to address cyberbullying directly. To effectively tackle the issue of cyberbullying, it is

²³⁵ Act 38 of 2005 sec 1(1)(a).

²³⁶ Act 41 of 2007.

²³⁷ Act 41 of 2007 sec 110.

²³⁸ Act 38 of 2005 secs 6 and 7.

²³⁹ Act 41 of 2007 sec 110.

recommended that the Children's Act is amended and revised to focus explicitly on the prevention, intervention and penalization of cyberbullying. This would provide a comprehensive and effective legal framework allowing for a more targeted approach to addressing cyberbullying and ensuring the protection and well-being of children in the digital age.

Chapter 8 of the Children's Amendment Act²⁴⁰ addresses prevention and early intervention programmes which focus on prevention and early intervention services aimed at ensuring that children grow up in safe and nurturing environments. Although the chapter does not explicitly mention emotional abuse or cyberbullying, its provisions can be interpreted in the broader context of protecting children from various forms of harm, including emotional abuse with specific reference to cyberbullying.

Section 144 of the Act Children's Amendment Act²⁴¹ addresses purposes of Prevention and Early Intervention programmes and states that prevention and early intervention programmes may include promoting the well-being of children and the realisation of their full potential.

This could include measures to protect children from emotional abuse which shall stunt the early childhood development and diminish the well-being of the child resulting in a child being unable to meet their full potential and thus may be interpreted to include measures to protect children from cyberbullying, in efforts to ensure the protection of the well-being of children.

Section 145 of the Act Children's Amendment Act²⁴² makes reference to a Strategy for securing prevention and early intervention programmes. In terms of this section the Minister is required to collaborate with other stakeholders in ensuring a comprehensive strategy aimed at securing the provision of prevention and early intervention programmes to families, parents, care-givers and children in South Africa. The strategy may include guidelines or protocols for identifying, addressing and preventing emotional abuse, which could potentially cover cyberbullying.

²⁴⁰ Act 41 of 2007.

²⁴¹ Act 41 of 2007 sec 144.

²⁴² Act 41 of 2007 sec 145.

Section 146²⁴³ refers to the Provision of prevention and early intervention programmes whereby the identification of children in need of prevention and early Intervention services is discussed. This section focuses on the identification of children who require prevention and early intervention services, which could be interpreted to include children experiencing emotional abuse or cyberbullying. It encourages collaboration between various role players such as social workers, educators, and healthcare professionals to identify and refer children in need of these services.

From the above discussion however, it is evident that the Children's Act and the Children's Amendment Act does not explicitly address cyberbullying and only describes bullying in the definition of abuse in the Children's Act²⁴⁴. However, the Act's broader provisions related to the best interests of the child, protection from abuse and neglect and prevention and early intervention services can be interpreted and applied to address cyberbullying to some extent.

3.7 Protection from Harassment Act 17 of 2011

The Protection from Harassment Act 17 of 2011²⁴⁵ seeks to afford victims of harassment an effective remedy against harassment.²⁴⁶ What makes this Act particularly relevant to cyberbullying is the way in which it addresses harassment, in both the physical form and online through the use of the internet. The act also provides victims of harassment relief through a protection order which is valid for up to 5 years, to ensure the protection of the victim's rights.²⁴⁷

Harassment is defined in the Act as actions that a person knows or should know might harm or make someone reasonably fear harm.²⁴⁸ This includes unwarranted following, observing, or approaching someone, unwanted verbal, electronic, or other types of communication, delivering objects or messages to someone without their consent or engaging in sexual harassment.

²⁴³ Act 41 of 2007 sec 126.

²⁴⁴ Act 38 of 2005 sec 1.

²⁴⁵ Act 17 of 2011.

²⁴⁶ Protection from Harassment Act 17 of 2011.

²⁴⁷ Protection from Harassment Act 17 of 2011 sec 9.

²⁴⁸ Protection from Harassment Act 17 of 2011 sec 1.

It is evident that from the above definition of harassment, cyberbullying may fall within the ambit of harassment for purposes of this Act. The Act further defines harm as any conduct that causes mental, physical, psychological or economic harm.²⁴⁹ Therefore, harassment encompasses harmful behaviour, as opposed to merely unwanted behaviour.²⁵⁰ What is important to note from the definition of harassment in the Act, is the action of harassment carried out need not be repetitive. In defining cyberbullying, the repetitive act was considered a component of the act of cyberbullying which is carried out.²⁵¹

In cases where a student experiences bullying or targeted victimization on a single occasion, it can be challenging to establish that the student has been subjected to harassment. However, by removing the requirement for repeated instances from the definition of harassment, it becomes possible to take preventative measures earlier on, rather than having to address the harmful behaviour once it has already occurred.²⁵²

An important achievement of the Act is its attempts to cover all forms of harassment, including harassment that takes place electronically and could include cyberbullying.

One of the difficulties with the Act is the challenge in enforcing legal remedies against the perpetrator, who may also be a minor. A victim may approach the Harassment Court for a protection order against the bully, and need not be legally represented. This makes the process of seeking justice somewhat easier, as the proceedings in the Harassment Court are less formal compared to those in a traditional court.²⁵³ Based on the preceding analysis, it is evident that the Protection from Harassment Act may offer recourse to victims of cyberbullying.

²⁴⁹ As above.

²⁵⁰ A De Wet (n 6 above) 6.

²⁵¹ As Above.

²⁵² As Above.

²⁵³ MJ Reyneke & L Jacobs (n 204 above) 76.

3.8 Films and Publication Act 65 of 1996

The Films and Publications Act²⁵⁴ aims to regulate the distribution of certain publications and the exhibition and distribution of certain films, in addition to the imposition of age restrictions that are consistent with the fundamental rights outlined in the Constitution of South Africa.²⁵⁵

Child pornography, as defined in the Schedule 1 of the Act, refers to any image or description of an individual under the age of 18 years engaged in sexual activities, assisting in such activities, or depicted in a context that can be used for sexual exploitation.²⁵⁶

Section 27 of the Act²⁵⁷ creates offences for the possession of certain publications and films and states that where a person who knowingly produces, imports or is in possession of a publication which contains a visual presentation as contained in schedule 1 of the Act which addresses, among others, the visual presentation of a person under the age of 18 participating or engaging in sexual conduct.

Minors may create, possess and distribute child pornography through texting and revenge pornography. This conduct is criminalised by Section 24B(1) of the Act²⁵⁸ and any person who breaches this is guilty of a criminal offence. This is particularly relevant in the context of cyberbullying, where revenge porn amongst children is common. It is evident that through the provisions of this section, cyberbullying is addressed insofar as it relates to any images which fall within the ambit of the definition of child pornography.

3.9 Films and Publications Amendment Act 11 of 2019

²⁵⁴ Act No. 65, 1996.

²⁵⁵ As above.

²⁵⁶ As above.

²⁵⁷ Films and Publications Act 65 of 1996 sec 27.

²⁵⁸ Films and Publications Act 65 of 1996 sec 24.

The Films and Publications Amendment Act²⁵⁹ aims to regulate the creation, distribution and possession of films, games and publications. While the Act does not explicitly address cyberbullying as its primary focus, it contains provisions related to online content that can be seen as indirectly addressing cyberbullying especially when it comes to the distribution of harmful content.

Section 18F of the Act²⁶⁰ addresses the prohibition against the distribution of private sexual photographs and films and states that no person may expose, through any medium, including the internet, and social media, a private sexual photograph or film if the disclosure is made without the consent of the individuals who appear in the photograph or film and with the intention of causing that individual harm.

It is apparent that section 18 of the Act criminalizes the distribution of private sexual photographs and films without the subject's consent, which is often a component of cyberbullying. This provision provides a legal avenue for victims to seek justice when their private images or videos are shared without their consent as part of cyberbullying or harassment.

The Act also provides definitions for the terms 'harm' which is particularly relevant when discussing cyberbullying and defines harmful as "any act which emotional, psychological or moral distress to a person, whether it be through a film, game or publication through any on or offline medium, including through the internet and 'harm' has the corresponding meaning".²⁶¹

From the above it is evident that Act²⁶² prohibits the distribution of content that amounts to hate speech or harmful content. While not explicitly addressing cyberbullying, this provision discourages the online distribution of content that might be part of a cyberbullying campaign or have a harmful impact on the targeted individuals.

²⁵⁹ Films and Publication Amendment Act 11 of 2019

²⁶⁰ Amendment Act 11 of 2019 sec 18F

²⁶¹ Amendment Act 11 of 2019 sec (1)(j).

²⁶² Amendment Act 11 of 2019 sec (1)(j).

Section 18E of the Act²⁶³ places a liability on internet service providers and holds them responsible for any prohibited content hosted on their platforms if they fail to take necessary measures to prevent access to such content. Although this section does not specifically address cyberbullying, it can be argued that it encourages internet service providers to monitor and regulate content on their platforms, which may help combat cyberbullying by removing harmful content more effectively.

Section 18E²⁶⁴ outlines the process for handling complaints about unclassified, prohibited, or potentially prohibited content in relation to online services, including those offered by commercial and non-commercial online distributors. Any person can submit a complaint to the Board about such content available online.²⁶⁵ If the board or compliance officers find merit in the complaint or determine that the content is prohibited or unclassified, the matter is referred to the board. The board may in turn, following due process, issue take-down notices for the prohibited content. In the case of non-commercial online distributors, take-down notices are issued according to the procedure outlined in Section 77 of the Act.²⁶⁶

While the Films and Publications Amendment Act does not explicitly target cyberbullying, Section 18E²⁶⁷ indirectly contributes to addressing the issue by placing a duty on ISPs to comply with take-down notices for prohibited content. This can help reduce the availability of harmful content online, including content related to cyberbullying, by encouraging ISPs to monitor and regulate content on their platforms.

3.10 Cybercrimes Act 19 of 2022

The Cybercrimes Act No. 19 of 2022 was assented to on 26 May 2021 and came into force on 1 December 2021.²⁶⁸ The Cybercrimes Act advocates for a comprehensive, national approach to establishing and maintaining cybersecurity.

²⁶³ Amendment Act 11 of 2019 sec 18E.

²⁶⁴ Amendment Act 11 of 2019 sec 18E.

²⁶⁵ Amendment Act 11 of 2019 sec (1)(j).

²⁶⁶ Amendment Act 11 of 2019 sec 77.

²⁶⁷ Amendment Act 11 of 2019 sec 18E.

²⁶⁸ Act 19 of 2022.

The Act establishes offenses and criminalises the disclosure of harmful data messages. It also regulates the investigation of cybercrimes and requires the reporting of such crimes. Additionally, the Act addresses cooperation with foreign states in the detection, prevention, mitigation and investigation of cybercrimes, aligning South Africa with international policies on cybercrime.²⁶⁹

Chapter 2 of the Act addresses cybercrimes, malicious communications, sentencing as well as orders to protect victims from the harmful effect of malicious communications.

Section 5 of the Act²⁷⁰ addresses the unlawful interference with data or computer programmes and creates an offence for anyone who unlawfully and intentionally interferes with data or a computer program. Interference includes deletion, alteration, damaging, rendering the data or program useless, obstructing its lawful use, or denying access to it in a computer storage medium or system.²⁷¹

Section 8 of the Act addresses the issue of cyber fraud. It states that any person who, with the intention to defraud, makes a misrepresentation using data or a computer program that could potentially harm another person, is guilty of the offense of cyber fraud.²⁷² For purposes of the Act, data is defined as electronic representation or information in any form.²⁷³ It is important to note, the definition of data contained in the Cybercrimes Act upholds the definition contained in the Electronic Communications and Transactions Act.²⁷⁴

The definition of data contained in the Cybercrimes Act could be interpreted to include electronic images, videos and related media on various social media platforms. This is particularly relevant to cyberbullying, where offenders create fake social media accounts in the name of another person to bully, intimidate or harass the victim. Another example is where a fake account is made in the name of a learner who is not involved in the bullying act and this is used to harass or humiliate another learner.

²⁶⁹ As above.

²⁷⁰ Cybercrimes Act 19 of 2022 sec 5.

²⁷¹ As above.

²⁷² Cybercrimes Act 19 of 2022 sec 8.

²⁷³ Cybercrimes Act 19 of 2022 sec 8.

²⁷⁴ Electronic Communications and Transaction Act 25 of 2002 sec 1(a).

According to Section 9 of the Act, cyber forgery occurs when a person, with the intention to defraud, creates false data that could potentially harm another person. Such an individual is guilty of the offense of cyber forgery.²⁷⁵ Furthermore, the Act addresses the issue of cyber extortion in Section 10. This pertains to individuals who intentionally and unlawfully commit or threaten to commit an offense through the unlawful interception or interference of data in order to gain an advantage over another person or to coerce them into performing or refraining from performing a particular act.²⁷⁶ For instance, a bully may engage in this act by leveraging sensitive information, such as photos, videos, or embarrassing information, of the victim and threatening to make it public unless the victim accedes to the bully's demands, such as providing answers to homework questions or assignments or allowing the bully to copy the victim's work.

Part 2 of the Cybercrimes Act addresses the issue of malicious communication. A group of persons is defined as, “characteristics that identify an individual as a member of a group”, which characteristics include without limitation, race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth or nationality’.²⁷⁷ Violence for the purposes of this chapter is defined in the Act as bodily harm.²⁷⁸

Pursuant to Section 14 of the Cybercrimes Act, it is a criminal offense to use electronic communication with the intent to incite damage to the property of an individual or group or to incite violence against a group of persons.²⁷⁹

Section 15²⁸⁰ of the Act is specifically relevant in addressing cyberbullying and reads as follows:

A person commits an offence if they, by means of an electronic communication service, unlawfully and intentionally discloses a data message, which—

(a) threatens a person with -

²⁷⁵ Cybercrimes Act 19 of 2022 sec 9.

²⁷⁶ Cybercrimes Act 19 of 2022 sec 10.

²⁷⁷ Cybercrimes Act 19 of 2022 sec 13.

²⁷⁸ As above.

²⁷⁹ Cybercrimes Act 19 of 2022 sec 14.

²⁸⁰ Cybercrimes Act 19 of 2022 sec 15.

- (i) damage to property belonging to that person or a related person; or
 - (ii) violence against that person or a related person; or
- (b) threatens a group of persons or any person forming part of, or associated with, that group of persons with—
- (i) damage to property belonging to that group of persons or any person forming part of, or associated with, that group of persons; or
 - (ii) violence against the group of persons or any person forming part of, or associated with, that group of persons,
- and a reasonable person in possession of the same information, with due regard to all the circumstances, would perceive the data message, either by itself or in conjunction with any other data message or information, as a threat of damage to property or violence to a person or category of persons contemplated in paragraph (a) or (b), respectively.

In the context of interpreting this section with respect to cyberbullying, it can be inferred that any individual who uses social media to threaten or harm someone or damage their property is committing a criminal offence. An example of this type of conduct would be a bully threatening physical harm to the victim through messages or comments on social media platforms, such as Instagram, Facebook, Snapchat or WhatsApp.

It is noteworthy that the Act does not provide explicit definitions for terms such as "cybercrime" or "cyberbullying," but rather establishes various offenses that may be punishable by fines, imprisonment for up to 15 years or both.²⁸¹

Burger-Smidt has characterized the Cybercrimes Act as a "world-class piece of legislation,"²⁸² but she has also acknowledged the challenges that come with enforcing and implementing the Act. While the adoption of the Cybercrimes Act represents progress in aligning South Africa's laws with international standards, there is a need for further work on strategies to facilitate effective enforcement and implementation.

²⁸¹ Cybercrimes Act 19 of 2022 sec 19.

²⁸² A Moyo "Top-notch Cyber Crimes Act ultimately fails to deliver" ITWEB Security Summit <https://www.itweb.co.za/content/PmxVEMKEyOovQY85> (Accessed 15 October 2022)

3.11 The National Child Care and Protection Policy 2019

The National Child Care and Protection Policy is a comprehensive framework developed by the South African government to protect children's rights, promote their well-being and ensure a safe environment for their growth and development.²⁸³ The policy aims to create an integrated approach to child care and protection, involving government departments, civil society organizations, communities and schools.²⁸⁴

This policy establishes a nationwide framework for delivering child care and protection programs and services that are essential for advancing the National Development Plan and Sustainable Development Goals while fulfilling South Africa's international, regional and national child rights obligations.²⁸⁵

The Policy addresses various forms of abuse, neglect and exploitation, including cyberbullying, as part of its broader focus on child protection. It is important to note that the policy is not a legally binding document, it however serves as a guideline for schools and other institutions to develop and implement strategies, programs and interventions to protect children from harm.

Furthermore, the policy defines violence as all forms of physical or mental injury or abuse, neglect or negligent treatment, violence, exploitation, including sexual abuse. It is evident that cyberbullying may be interpreted to fall within the ambit of this definition.²⁸⁶

The Department of Communications and Digital Technologies together with the Films and Publication Board, play a vital role in protecting children from sexual exploitation in media content and educating South African society to make informed choices²⁸⁷. With specific reference to cyberbullying, the department is responsible for:

²⁸³ The National Child Care and Protection Policy, 8.

²⁸⁴ The National Child Care and Protection Policy, 8.

²⁸⁵ The National Child Care and Protection Policy, 8.

²⁸⁶ The National Child Care and Protection Policy, 17.

²⁸⁷ The National Child Care and Protection Policy, 61.

- i. Developing and monitoring the implementation of policies and legislation that empower and protect children in the ITC space, positively impacting their well-being.²⁸⁸
- ii. Guaranteeing cyber protection and digital security for children.²⁸⁹
- iii. Assisting in capitalizing on the prospects of the Fourth Industrial Revolution with an emphasis on heightening children's knowledge of online safety.
- iv. Executing the Comprehensive Child Online Protection Program which consists of school-centred online safety awareness sessions, e-parenting workshops targeting parents, projects led by learners and the Child Online Counselling Program in collaboration with ChildLine SA.²⁹⁰

It is evident that the department's initiatives and responsibilities play a crucial role in addressing cyberbullying by ensuring a safe online environment for children, raising awareness about online safety, and providing support for affected individuals.

With specific respect to cyberbullying, the Policy can be used by schools as a foundation for creating a safe and supportive environment for students and schools may enforce the policy in the following ways:

- i. Schools may develop clear policies and procedures on cyberbullying. This may entail school governing bodies establishing guidelines which expressly define cyberbullying and outline the consequences for such behaviour by providing a reporting mechanism for students, teachers and parents.
- ii. Schools are urged to promote awareness and education on cyberbullying and are encouraged to introduce cyberbullying prevention and digital citizenship education into their curriculum, ensuring that students, teachers and parents are well informed about the risks and consequences associated with online behaviour.
- iii. Schools can implement support systems and interventions for students who have experienced cyberbullying such as counselling services, peer support programs and restorative justice practices²⁹¹.

²⁸⁸ The National Child Care and Protection Policy, 62.

²⁸⁹ The National Child Care and Protection Policy, 62.

²⁹⁰ The National Child Care and Protection Policy, 62.

²⁹¹ The National Child Care and Protection Policy, 28.

- iv. Schools are encouraged to work closely with parents, law enforcement agencies and community organizations to create a unified approach to preventing and addressing cyberbullying.

While the National Child Care and Protection Policy is not a legally enforceable document, it can serve as an essential guideline for schools to develop and implement measures to combat cyberbullying. By adhering to the policy's principles and working collaboratively with various stakeholders, schools can contribute to creating a safer and more supportive environment for children, addressing the complex issue of cyberbullying in a comprehensive and effective manner.

3.12 Conclusion

This chapter focused on the current domestic legal framework that can be used to address the issue of cyberbullying. The common law in South Africa was scrutinised and while it is evident that certain common law remedies may be used to address cyberbullying, it is evident that these laws have not kept pace with the advancing technological requirements in order to effectively provide redress and protection to victims of cyberbullying.

The recently enacted Cybercrimes Act has garnered attention and commendation for bringing South Africa into conformity with international standards regarding cybercrimes and cybersecurity. It is possible to interpret certain provisions of the Act as applicable to the issue of cyberbullying and as a result, it may serve as a legal tool for addressing this issue however it fails to directly address the issue of cyberbullying.

The Children's Act, which defines child abuse, has been discussed in relation to its potential use in addressing instances of cyberbullying. The School's Act has also been analysed, as it acknowledges the crucial role that schools play in the education and development of children. In light of this, it is increasingly important to implement uniform and consistent policies on cyberbullying in the Code of Conduct for schools in South Africa.

In conclusion, the Cybercrimes Act in South Africa is a piece of legislation that primarily focuses on tackling various forms of cybercrime such as unauthorized access to computer

systems, theft of data and cyber fraud. While it does not directly target cyberbullying as its main focus, the Act has provisions that can be seen as indirectly addressing the issue.

The Cybercrimes Act criminalizes malicious communication that incites damage to property or violence, or that intimidates, encourages harm, discriminates against a person or group of persons. Although not explicitly mentioning cyberbullying, these provisions can help deter and punish individuals who engage in harmful online behaviour that might constitute cyberbullying in certain cases.

However, it is essential to note that the Cybercrimes Act is not specifically designed to address cyberbullying and the Protection from Harassment Act remains the primary legislation in South Africa that directly tackles harassment, including cyberbullying. The Films and Publications Amendment Act also contains provisions that can indirectly contribute to combating cyberbullying by regulating and removing harmful online content.

The South African Schools Act, together with the Code of Conduct, serves as an essential tool for managing cyberbullying occurrences in schools. When a child breaches the Code of Conduct, they may face a formal disciplinary overseen by the school's governing body. To strengthen the efficacy of anti-cyberbullying campaigns and awareness in schools, it is imperative to incorporate a cyberbullying policy within the Code of Conduct. This inclusion will facilitate comprehensive education on the dangers of cyberbullying and encourage responsible internet usage by children.

While the Schools Act provides a framework for formal disciplinary actions in cases where students violate the Code of Conduct, it does not offer guidance on preventive measures or practical strategies to deter cyberbullying incidents. Consequently, it is imperative that the Code of Conduct includes a comprehensive cyberbullying policy, coupled with appropriate sanctions, to enhance awareness and educate students.

The National Child Care and Protection Policy serves as a pivotal framework for schools to develop and implement strategies aimed at safeguarding children from the detrimental effects of cyberbullying. This policy equips schools to formulate clear policies and procedures, enabling school governing bodies to establish specific guidelines for defining, preventing, reporting and correcting cyberbullying incidents.

The Department of Basic Education's Guidelines on e-Safety in schools serves as an important resource for managing ICT access in schools. This Guideline can be instrumental in guiding educators, parents and relevant stakeholders to enact and implement effective measures to educate learners about the detrimental effects of cyberbullying. Policies such as the Acceptable Use Policy, if correctly implemented, will guide children to practice safe and responsible internet practices while holding them accountable for any failure to do so. The implementation of these policies represents a significant step forward for South African schools, aligning them with the swift technological advancements of the digital age.

In summary, while the Cybercrimes Act in South Africa does not directly address cyberbullying, it offers some protection against certain online behaviours that may overlap with cyberbullying. For a more comprehensive approach to combating cyberbullying, the Protection from Harassment Act and the Films and Publications Amendment Act, along with the Cybercrimes Act, should be considered collectively. To ensure online safety and address cyberbullying in South Africa, it is imperative to adopt a holistic strategy involving specific legislation explicitly addressing cyberbullying, education and awareness campaigns to various stakeholders including educators, learners and parents as to create a safer online environment and effectively protect individuals from cyberbullying in South Africa.

4 Chapter 4: An Analysis of International Law

4.1 Introduction

Cyberbullying or electronic aggression has been characterized as a significant public health concern and increasingly daunting international crisis which is psychologically and emotionally destructive.²⁹²

In the previous chapter, the current South African framework relevant to cyberbullying was studied in order to assess whether measures have been put in place to address the issue

²⁹² P Ferrara & F Villani 'Cyberbullying a modern form of bullying: let's talk about this health and social problem' (2018) 44(1) *Italian journal of pediatrics* 3.

of cyberbullying. Section 233 of the Constitution is particularly relevant with respect to the application of international law and provides that in the interpretation of any legislation, courts are required to prefer any reasonable interpretation of legislation that is consistent with international law.²⁹³

Since the end of apartheid, South Africa has achieved notable advancements in the acknowledgment and protection of children's rights. The adoption of a child-friendly Constitution and the ratification of the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child are three major accomplishments in this regard.²⁹⁴

International human rights treaties are legally binding agreements between states that establish rights and obligations under international law.²⁹⁵ A state's signature on a treaty signifies its intention to become a party to the treaty.²⁹⁶ While signature does not legally bind the state, states are required to refrain from actions that would undermine the purpose of the treaty.²⁹⁷ Once a state ratifies a treaty, it becomes a formal party to the treaty and is bound by international law to respect the rights and fulfil the duties outlined in the treaty.²⁹⁸

In assessing whether South Africa's legal framework relevant to cyberbullying is in harmony with international norms and standards, it is imperative to study international law conventions specifically dealing with cybercrimes and children's rights.²⁹⁹ In this chapter international law related to cyberbullying shall be critically analysed.

²⁹³ The Constitution of the Republic of South Africa, 1996.

²⁹⁴ S Rosa & M Dutschke 'Child rights at the core: A commentary on the use of international law in South African court cases on children's socio-economic rights' (2006) A Project 28 Working Paper (2006) Cape Town: Children's Institute, University of Cape Town 1.

²⁹⁵ S Rosa & M Dutschke (n 298 above) 3.

²⁹⁶ S Rosa & M Dutschke (n 298 above) 3.

²⁹⁷ S Rosa & M Dutschke (n 298 above) 3.

²⁹⁸ S Rosa & M Dutschke (n 298 above) 3.

²⁹⁹ L Kamer, Internet usage in Africa – Statistics & facts https://www.statista.com/topics/9813/internet-usage-in-africa/#topicHeader_wrapper (Accessed 1 December 2022)

4.2 The United Nations Convention on the Rights to the Child (1989)

The United Nations Convention on the Rights of the Child³⁰⁰ entered into force on 2 September 1990 after being ratified by 20 states and was the first instrument which codified the rights of children.³⁰¹ Africa interestingly comprised half of the first 20 states who signed this convention.³⁰² Today, the CRC is the most globally accepted and widely ratified human rights treaty in history as it is currently signed by 196 states, with only one state that has not ratified this treaty.³⁰³

What distinguishes the UNCRC from other treaties is the speed in which it came into force. The UNCRC came into operation faster than any other previous human rights treaties, after the strong ratification and acceptance it received from the State Parties.³⁰⁴

This demonstrates the significance of child protection and the commitment of States to uphold the rights of children. However, it is worth noting that the rights contained in various international law instruments are not very meaningful if they cannot be correctly enforced and implemented.

The UNCRC affirms that the child should grow up in an atmosphere of happiness, love and understanding. From discussions in earlier chapters, it is evident that effects of cyberbullying on a child's emotional and mental well-being are far reaching, resulting in depression, self-harm and robbing the child of a happy childhood experience.

The UNCRC recognises the need for a child to be brought up in the spirit of the ideals contained in the charter of the United Nations, specifically peace, dignity, tolerance, freedom, equality and solidarity.³⁰⁵ With specific reference to cyberbullying, it is the dignity of the child which is violated through acts of cyberbullying. Children who are vulnerable to

³⁰⁰ UN Convention on the Rights of the Child.

³⁰¹ U Kilkelly & T Liefard 'Legal implementation of the UNCRC: lessons to be learned from the constitutional experience of South Africa' (2019) 52 *De Jure* 11.

³⁰² AT Mbise 'The diffusion of the United Nations Convention on the Rights of the Child (UNCRC) more than the African Charter on the Rights and Welfare of the Child (ACRWC) in Africa: The influence of coercion and emulation' (2017) 60(5) *International Social Work* 1234.

³⁰³ As above.

³⁰⁴ As above.

³⁰⁵ UN Convention on the Rights of the Child, preamble.

victimization and having their dignity tainted may experience negative mental health outcomes.³⁰⁶ Some possible psychiatric consequences of falling victim to cyberbullying include depression, suicide, mood disorders, adjustment reactions and anxiety disorders.³⁰⁷

Article 3 of the UNCRC contains the best interest principle and states that in all actions concerning children, the best interests of the child shall be a primary consideration. Therefore, any practices that pose a threat or harm to a child's growth and development are not consistent with the principle of the best interests of the child.³⁰⁸ Furthermore, any practices which limit a child's participation directly infringe on the best interest principle and may stunt the child's growth and development.³⁰⁹ Consequently, the best interests of the child principle should serve as the foundation for legal reform concerning cyberbullying regulation in member states.³¹⁰

Article 16 of the UNCRC is particularly relevant to cyberbullying and indicates that no child shall be subjected to arbitrary or unlawful interference with their privacy, family home or any unlawful attacks on their honour or reputation. Cyberbullying, which involves using technology to harass, threaten, humiliate, or otherwise hassle a victim, is a specific attack on a child's reputation as the bully seeks to diminish or destroy the victim's reputation.³¹¹

As a result, article 16 of the UNCRC obligates member states to implement necessary legislation and policies to ensure the safety of all learners in South African schools, with the aim of safeguarding the honour and reputation of children in these educational settings.³¹²

Article 19 of the Convention on the Rights of the Child imposes a duty on state parties to adopt appropriate legislative, social and educational measures to protect children from all

³⁰⁶ P Korenis & SB Billick 'Forensic implications: Adolescent sexting and cyberbullying' (2014) 85(1) *Psychiatric quarterly* 99.

³⁰⁷ As above.

³⁰⁸ Kaime, T 'The Convention on the Rights of the Child and the cultural legitimacy of children's rights in Africa: Some reflections' (2005) 5(2) *African Human Rights Law Journal* 232.

³⁰⁹ As above.

³¹⁰ Unpublished: NI Hlazo 'The legal remedies to protect minors against cyberbullying in South Africa' unpublished Master's thesis, Nelson Mandela University, 2018 25.

³¹¹ N Paunović 'Cyberbullying of children: Challenges of victim support' (2018) 21(2) *Temida* 255.

³¹² T Du Toit 'Cyber Bullying Dilemma: A case for Ubuntu' (2019) 23.

forms of physical or mental violence, abuse, neglect, maltreatment or exploitation while in the care of parents, legal guardians or other caregivers.³¹³

The Committee on the Rights of the Child, General Comment No. 13, on the right of the child to freedom from all forms of violence³¹⁴, aims to implement measures to eradicate violence against children by putting an end to practices which jeopardize the development of children.³¹⁵ Article 21 of General Comment 13³¹⁶ defines mental violence as psychological maltreatment, mental abuse, verbal abuse and emotional abuse or neglect. It further provides a definition for cyberbullying in article 21(g) which reads as follows:

*(g) Psychological bullying and hazing by adults or other children, including via information and communication technologies (ICTs) such as mobile phones and the Internet.*³¹⁷

It is evident from the above definition, by encompassing psychological bullying and hazing perpetrated by both adults and peers, the definition acknowledges the diverse forms of harm experienced by children. Moreover, the emphasis on information and communication technologies such as mobile phones and the internet highlights the significant role of digital platforms in facilitating cyberbullying. This analysis underscores the complex nature of cyberbullying, emphasizing the need to address its psychological dimensions and the influence of technology across different age groups in legislation, policy and awareness initiatives.

To comply with the General Comment ³¹⁸ governments must review and revise their domestic legislation to create a comprehensive policy on child rights to ensure that all forms of violence against children are eradicated. Perpetrators of cyberbullying should also be met with effective and appropriate sanctions.³¹⁹

³¹³ United Nations Convention on the Rights of the Child.

³¹⁴ General Comment No.13 (2011).

³¹⁵ As above.

³¹⁶ General Comment No. 13 (art 21).

³¹⁷ General Comment No. 13 (art 21).

³¹⁸ As above.

³¹⁹ General Comment No. 13 (art 41 (d)).

4.3 General comment No. 25 (2021) on children's rights in relation to the digital environment

General Comment No. 25 on children's rights in relation to the digital environment, issued by the United Nations Committee on the Rights of the Child outlines the steps that State parties should take in order to enforce the Convention.³²⁰ It offers direction on legislative, policy, and other measures that must be implemented to ensure that States parties comply fully with their responsibilities under the Convention and its Optional Protocols.³²¹ This guidance takes into account the opportunities, risks and challenges involved in promoting, respecting, protecting and fulfilling the rights of all children in the digital environment.³²²

General Comment No. 25 emphasizes the importance of considering the digital environment when interpreting the Convention on the Rights of the Child.³²³ In the context of cyberbullying, the General Comment offers several key insights and mechanisms for countries to address the issue of cyberbullying. Given that South Africa has ratified the CRC, the General Comment is applicable in its efforts to tackle cyberbullying.

General Comment No. 25 also discusses cyberaggression as one of the key risks children face in the digital world.³²⁴ Cyberaggression is closely related to cyberbullying as both involve harmful online behaviours that target and negatively impact individuals, particularly children.³²⁵

Article 12 of the General Comment addresses the issue of the best interest of the child which is a dynamic notion that demands evaluation suitable for this particular context.³²⁶ Although the digital environment was not initially created with children in mind it now holds considerable importance in the lives of children who have access to the internet for education and entertainment purposes.³²⁷

³²⁰ UN Committee on the Rights of the Child, General Comment No 25.

³²¹ General Comment No 25.

³²² As above.

³²³ General Comment No 25 (art 7).

³²⁴ General Comment No 25 (art 14).

³²⁵ General Comment No 25 (art 25).

³²⁶ General Comment No 25 (art 12).

³²⁷ General Comment No 25 (art 12).

In addressing cyberbullying, States Parties should guarantee that, in every action relating to the provision and regulation of the digital domain, the best interests of each child remain a primary consideration.³²⁸

Article 13³²⁹ indicates that State Parties should engage national and local entities responsible for ensuring the realization of children's rights in such initiatives. In contemplating the child's best interests, they must consider all children's rights, encompassing their rights to obtain access and convey information, to be shielded from harm and to have their opinions accorded appropriate consideration. Moreover they must guarantee transparency in evaluating a child's best interests and the standards employed, which can contribute to addressing cyberbullying effectively.³³⁰

Section C of the General Comment³³¹ addresses the right to life, survival and development. The digital environment increasingly plays an essential role in children's development and may be crucial for their life and survival, especially during crisis situations such as the Covid-19 pandemic. States Parties should undertake all suitable measures to shield children from threats to their right to life, survival and development.³³²

Risks related to violent and sexual content, cyber-aggression, harassment, sexual exploitation abuse and the promotion or incitement of suicide or life-threatening activities, including those carried out by criminals or armed groups labelled as terrorist or violent extremist are eminent.³³³ States parties should recognize and address the emerging risks that children encounter through their online activities, by paying attention to their opinions on the specific hazards they face, which can contribute to effectively combating cyberbullying by including children in awareness campaigns.³³⁴

³²⁸ General Comment No 25 (art 12).

³²⁹ General Comment No 25 (art 13).

³³⁰ As above.

³³¹ General Comment No 25 (art 14).

³³² General Comment No 25 (art 14).

³³³ As above.

³³⁴ General Comment No 25 (art 18).

Article 15³³⁵ places an emphasis on stating that the use of digital devices should not be detrimental to the growth and development of the child. Utilizing digital devices should not cause harm or replace face-to-face interactions among children or between children and their parents or caregivers.

States parties must focus on the impact of technology during the formative years of life of the child when brain development is most rapid and the social environment, especially relationships with parents and caregivers, plays a critical role in shaping children's growth.³³⁶

Parents, caregivers, educators and other stakeholders should receive training and guidance on the proper use of digital devices, considering research on the effects of digital technologies on children's development, particularly during the vital neurological growth periods of early childhood and adolescence.³³⁷ This approach effectively addresses cyberbullying in a proactive manner by encouraging responsible use of digital devices and fostering positive interactions from an early age.³³⁸

States are urged to protect children from all forms of violence, abuse and harassment, including cyberbullying, in the digital environment.³³⁹ To achieve this, countries should establish effective laws, policies and procedures to prevent and respond to such incidents.³⁴⁰

The General Comment highlights the importance of safeguarding children's privacy which can be associated with cyberbullying.³⁴¹ States should develop data protection regulations that adhere to legal and ethical standards in the collection, processing and sharing of children's data.³⁴² The General Comment emphasizes that children's freedom of expression

³³⁵ General Comment No 25 (art 15).

³³⁶ General Comment No 25 (art 15).

³³⁷ As above.

³³⁸ As above.

³³⁹ General Comment No 25 (art 14).

³⁴⁰ General Comment No 25 (art 34).

³⁴¹ General Comment No 25 (art 21).

³⁴² General Comment No 25 (art 39).

in the digital environment should be balanced with respecting the rights and reputations of others which is essential and particularly relevant in addressing cyberbullying.³⁴³

Article 104³⁴⁴ The General Comment urges states parties to ensure that digital literacy is incorporated into school curriculum, starting from preschool and continuing throughout all school years, and assess the effectiveness of these educational approaches. The curriculum should cover the knowledge and skills needed to safely use various digital tools and resources.³⁴⁵ Additionally, the school curriculum should teach critical thinking and guidance on finding reliable information sources and identifying misinformation or biased content, including topics on sexual and reproductive health, human rights and children's rights in the digital environment with a specific emphasis on the available cyberbullying support and remedies.³⁴⁶

Furthermore, the school curriculum should raise awareness among children about potential negative consequences to risks relating to cyber aggression, sexual exploitation, abuse and other forms of online violence.³⁴⁷ The curriculum should incorporate teaching children coping strategies to minimize harm, ways to protect their personal data and methods to develop social and emotional skills and resilience. By addressing these aspects, the curriculum taught will contribute to tackling cyberbullying in schools at grass root levels.³⁴⁸

Focusing on cyberaggression, the General Comment emphasizes the need to acknowledge and address the multiple forms of online harm that children may encounter, including cyberbullying. It also highlights the importance of including children in the process of recognizing and managing these risks.³⁴⁹

To combat cyberaggression and cyberbullying, state parties should adopt comprehensive strategies encompassing educational programs, legislation and policies. For instance,

³⁴³ General Comment No 25 (art 54).

³⁴⁴ General Comment No 25 (art 104).

³⁴⁵ As above.

³⁴⁶ As above.

³⁴⁷ General Comment No 25 (art 84).

³⁴⁸ General Comment No 25 (art 104).

³⁴⁹ As above.

incorporating digital literacy education into school curriculum will teach children about responsible online behaviour to avoid occurrences of online bullying.³⁵⁰

In conclusion, the General Comment No. 25's mention of cyberaggression is pertinent for studying cyberbullying as it underlines the need to address the various forms of online harm that impact children.³⁵¹ It urges state parties to implement comprehensive measures to protect children's rights in the digital environment including initiatives to prevent and tackle cyberbullying.³⁵²

General Comment No. 25 is relevant to South Africa, as it offers valuable guidance on interpreting children's rights in the digital environment and suggests mechanisms for addressing cyberbullying. By implementing effective legislation, policies and education programs involving multiple stakeholders, South Africa can create a safer digital environment for children and protect them from cyberbullying and its harmful consequences.

4.4 The African Charter on the Rights and Welfare of the Child (1990)

The African Charter on the Rights and Welfare of the Child³⁵³ was adopted in 1990 and represents an extensive regional framework that articulates the rights of children and establishes universal principles and standards within the African context.³⁵⁴

The four guiding provisions highlighted in the Charter which are relevant to the current study are contained in articles 3³⁵⁵, non-discrimination, article 4³⁵⁶, the best interests of the child, article 5³⁵⁷, survival and development and article 7³⁵⁸, freedom of expression. These specific articles hold significant relevance to the concept of a child's privacy within the digital sphere.

³⁵⁰ As above.

³⁵¹ General Comment No 25 (art 14).

³⁵² General Comment No 25 (art 23).

³⁵³ The African Charter on the Rights and Welfare of the Child

³⁵⁴ OM Sibanda 'Towards a more effective and coordinated response by the African union on Children's privacy online in Africa' (2022) 6 *African Human Rights Yearbook* 161.

³⁵⁵ The African Charter on the Rights and Welfare of the Child (art 3)

³⁵⁶ The African Charter on the Rights and Welfare of the Child (art 4)

³⁵⁷ The African Charter on the Rights and Welfare of the Child (art 5)

³⁵⁸ The African Charter on the Rights and Welfare of the Child (art 7)

Consequently, the principles embedded within these provisions ought to be meticulously considered in any measures that may influence the privacy of children online.³⁵⁹

Furthermore Article 10³⁶⁰ of the Charter addresses the protection of privacy and stipulates that every child is entitled to protection from arbitrary or unlawful interference with his privacy, family life, home, or correspondence, as well as safeguards against attacks on their honour and reputation. This protection is balanced by the acknowledgment that parents or legal guardians retain the authority to conduct reasonable supervision over their children's behaviour.³⁶¹ This section can be interpreted to address cyberbullying, which can be characterised as an unlawful interference on a child's privacy and an attack on a child's honour and reputation.

The inclusion of the term 'correspondence' in Article 10 is particularly relevant in the context of digital communication and the present study. It suggests a safeguarding of children's communicative exchanges on the internet from any unauthorized intrusions. The implication is that any permissible intrusions should be strictly regulated by law to ensure protection against such interference or attacks.³⁶²

Additionally, the reference to 'unlawful attacks on honour and reputation' underscores the need for legal protections against any forms of verbal, oral, or media-based actions that could detrimentally affect a child's reputation.³⁶³

Therefore, it can be deduced that state signatories to the Charter have a duty to ensure that internet service providers and online platforms uphold the privacy of child internet users.³⁶⁴ Furthermore, the role of parents and guardians as outlined in Article 10 merits discussion in relation to online privacy for children. It grants parents or guardians the right to exercise reasonable supervision over their children's online activities.³⁶⁵ This underscores the importance of parental involvement in monitoring and guiding children's behaviour in digital

³⁵⁹ OM Sibanda (n 358 above) 161.

³⁶⁰ The African Charter on the Rights and Welfare of the Child (art 7)

³⁶¹ As above.

³⁶² OM Sibanda (n 358 above) 161.

³⁶³ OM Sibanda (n 358 above) 161.

³⁶⁴ OM Sibanda (n 358 above) 161.

³⁶⁵ OM Sibanda (n 358 above) 161.

spaces, aligning with the broader objective of safeguarding children's rights and well-being in the digital age.³⁶⁶

While the provisions outlined in the Charter regarding privacy are noteworthy, their application in the online sphere raises concerns regarding the adequacy of protecting children's digital privacy rights.³⁶⁷ Despite the escalating usage of the internet among children, Charter lacks explicit mention of the digital environment within Article 10, leaving the extension of privacy rights to the online realm merely implied. This ambiguity may lead to varied interpretations and hinder effective implementation.³⁶⁸

The evolving landscape of the internet introduces new challenges which the Charter fails to address comprehensively.³⁶⁹ The absence of consideration for emerging digital technologies and associated privacy issues underscores a significant gap in safeguarding children's online privacy effectively.³⁷⁰ This deficiency can be attributed to the historical context in which the Children's Charter was drafted in 1990, predating the widespread adoption of the internet and the subsequent complexities it introduces to children's rights, including online privacy.³⁷¹

In conclusion, while the African Charter on the Rights and Welfare of the Child lays a foundational framework for protecting children's rights, including privacy, its limitations in addressing the complexities of the digital environment and bullying underscore the imperative for revisiting and updating its provisions to ensure robust safeguards for children's online privacy rights.

³⁶⁶ OM Sibanda (n 358 above) 161.

³⁶⁷ OM Sibanda (n 358 above) 164.

³⁶⁸ As above.

³⁶⁹ As above.

³⁷⁰ As above.

³⁷¹ OM Sibanda (n 358 above) 164.

4.5 The African Union Convention of Cyber Security and Personal Data Protection (2014)

The use of the internet has surged on the African continent, with reports indicating around 570 million users as of 2022.³⁷² This amount has more than doubled compared to 2015.³⁷³ While the growing use of the internet is welcomed, it poses several safety risks and challenges to children in Africa.

Cyber-attacks are a recurrent challenge in an African context which may be attributed to infrastructural, legal and policy loopholes.³⁷⁴ An “SA Kids Online Study” released by UNICEF revealed that more than 95% of children in South Africa have regular access to the internet.³⁷⁵ While this access can be beneficial, it also exposes children to potential online violence, exploitation and abuse risks.³⁷⁶

The African Union Convention on Cybersecurity and Personal Data Protection was adopted by the 23rd Ordinary Session of the African Union in June 2014. This convention represents the African Union's efforts to address the various challenges arising from the rapid expansion of the information and communication technology sector in Africa.³⁷⁷

The African Union Convention on Cyber Security and Personal Data Protection (also known as the Malabo Convention) is a regional instrument that aims to establish a legal framework for cybersecurity and personal data protection within the African Union member states.³⁷⁸ While the Convention is relevant to South Africa as a member of the African Union, South Africa has not yet ratified the Malabo Convention. Section 231 of the Constitution governs

³⁷² <https://www.statista.com/topics/9813/internet-usage-in-africa/> (Accessed 30 October 2022).

³⁷³ As above.

³⁷⁴ HO Quarshie & M Odoom 'Fighting cybercrime in Africa' (2012) 2(6) *Computer Science and Engineering* 100.

³⁷⁵ <https://www.unicef.org/southafrica/press-releases/one-third-children-south-africa-risk-online-violence-exploitation-and-abuse> (Accessed 30 October 2022)

³⁷⁶ UNICEF, 8 February 2022 'One third of children in South Africa at risk of online violence, exploitation and abuse' 8 February 2022 <https://www.unicef.org/southafrica/press-releases/one-third-children-south-africa-risk-online-violence-exploitation-and-abuse> (Accessed 2 December 2022).

³⁷⁷ KM Ball 'African Union convention on cyber security and personal data protection' (2017) 56(1) *International Legal Materials* 167.

³⁷⁸ The Preamble of the African Union Convention on Cyber Security and Personal Data Protection 2014.

the application of international law within South Africa and specifies the conditions under which an international agreement becomes binding on the Republic of South Africa.³⁷⁹ This occurs upon the agreement's approval through a resolution passed by both the National Assembly and the National Council of Provinces.³⁸⁰

Regarding cyberbullying, although the Malabo Convention primarily concentrates on cybercrime and personal data protection, it includes provisions that support a human rights approach to addressing issues such as data protection and the dissemination of personal data, which often occurs in cases of cyberbullying. Article 8 of the convention emphasizes the enhancement of fundamental rights and public freedoms, particularly safeguarding data to ensure that all forms of data processing uphold fundamental freedoms and penalize any breaches of privacy.³⁸¹

Furthermore, article 14 outlines the fundamental principles governing the processing of personal data and prohibits processing that reveals sensitive information such as racial or ethnic origin, religious beliefs, sexual life, and genetic data.³⁸² These measures aim to uphold principles of privacy and data protection, which are crucial in combating cyberbullying and safeguarding children's rights online.³⁸³

The Malabo Convention recognises the need to define guidelines to hinder the recurrence of cybercrimes in Member States of the African Union by formulating a policy for the creation of new offenses specific to ITC and adopting appropriate sanctions and criminal liability systems.³⁸⁴ The Convention has been signed by 14 African states, but it has only been ratified by 13 countries on the continent, excluding South Africa.³⁸⁵

Article 25 of the African Union's Convention on Cybersecurity pertains to the establishment

³⁷⁹ S231 of the Constitution.

³⁸⁰ As above.

³⁸¹ African Union Convention on Cyber Security (art 8).

³⁸² African Union Convention on Cyber Security (art 14).

³⁸³ As above.

³⁸⁴ The Preamble of the African Union Convention on Cyber Security and Personal Data Protection 2014.

³⁸⁵ List of countries which have signed, ratified/ acceded to the African Union Convention on Cybersecurity and personal data protection, 25 March 2022 [https://au.int/sites/default/files/treaties/29560-sl-AFRICAN UNION CONVENTION ON CYBER SECURITY AND PERSONAL DATA PROTECTION 0.pdf](https://au.int/sites/default/files/treaties/29560-sl-AFRICAN%20UNION%20CONVENTION%20ON%20CYBER%20SECURITY%20AND%20PERSONAL%20DATA%20PROTECTION%200.pdf) (Accessed 28 March 2023).

of laws against cybercrime.³⁸⁶ It obligates member states to adopt legal measures that criminalize actions that could compromise the confidentiality, integrity, availability and viability of information and communication technology systems. These member states are however required to also implement measures to prosecute individuals who commit these offenses. These measures implemented by the State must not violate the fundamental rights of its citizens, including the freedoms of expression, privacy and fair trial.³⁸⁷

Article 28 of the AU Convention on Cybersecurity requires the regional harmonization of legislative measures to address cybercrime through mutual legal assistance, exchange of information and international cooperation with the goal of responding to cyberthreats and improving cybersecurity through dialogue, international, intergovernmental and regional partnerships.³⁸⁸

Article 29(3) of the Convention is specifically relevant in addressing issues related to cyberbullying and requires State Parties to take the required legislative or regulatory measures to criminalise offences related to the creation and dissemination of child pornography.³⁸⁹ In addition, it criminalises the usage of computer systems to threaten to commit an offence against another or insult based on race, colour, national or ethnic origin, descent, religion and political opinions, among other grounds of discrimination.³⁹⁰

Consequently, article 29(3)³⁹¹ requires state parties to protect learners from cyberbullying and the harmful impacts associated therewith. Signatories to this Convention have a duty to ensure that a legal framework is established in accordance with the provisions of the Convention to safeguard the constitutional rights of children and provide guidance to state parties on the creation and implementation of relevant policies.³⁹²

The African Union Convention on Cybersecurity represents a crucial development and significant effort to the protection of human rights related to cybersecurity in Africa. However,

³⁸⁶ African Union Convention on Cyber Security (art 25).

³⁸⁷ As above.

³⁸⁸ African Union Convention on Cyber Security (art 28).

³⁸⁹ African Union Convention on Cyber Security (art 29(3)).

³⁹⁰ African Union Convention on Cyber Security (art 29(3)(f)).

³⁹¹ As above.

³⁹² T Du Toit, 'Cyber Bullying Dilemma: A case for Ubuntu' (2019) 23.

the implementation of these provisions may be a challenging issue, due to resource constraints in several African states.

While South Africa has not yet ratified the Malabo Convention, it is still worth discussing its potential influence on efforts to address cyberbullying in the country. While it does not explicitly target cyberbullying, the principles and provisions within the Convention can contribute to a safer digital environment, which can indirectly help combat cyberbullying.

The Convention promotes cooperation among member states in the areas of information sharing, capacity building and technical assistance to combat cyber threats. This collaboration could facilitate the sharing of best practices and resources in addressing cyberbullying and other online harms.³⁹³

Furthermore, the Convention calls for member states to adopt appropriate measures to protect the rights and interests of citizens, particularly children and other vulnerable groups, in the digital environment. Implementing policies in line with the Convention could encourage the development of strategies to protect children from cyberbullying and other online risks.³⁹⁴

If South Africa were to ratify the Malabo Convention, it could potentially complement and strengthen the existing national legal frameworks in addressing cyberbullying. The Convention could also promote regional cooperation and harmonization of cybersecurity and data protection policies, which could be beneficial in the fight against cyberbullying across borders within the African Continent.

4.6 The African Declaration on Internet Rights and Freedoms (2013)

The protection of human rights and freedoms on the Internet is a critical issue that requires urgent attention in the digital age. The African continent faces a pressing need to address the issue of protecting human rights and freedoms on the Internet, which has led to the

³⁹³ African Union Convention on Cyber Security (art 24(2)).

³⁹⁴ African Union Convention on Cyber Security (art 26(1)(b)).

creation of the African Declaration on Internet Rights and Freedoms.³⁹⁵ This document aims to address the pressing concerns surrounding the safeguarding of rights and liberties online in Africa.

The accelerated expansion of technology and internet infrastructure on the continent has led to a proliferation of internet access across Africa. Millions of people on the continent use the internet for a variety of purposes, including social and economic development, politics, governance and research. As the internet plays an increasingly significant role in the African society, it is crucial to ensure that the rights and freedoms of internet users are protected.³⁹⁶

The African Declaration on Internet Rights and Freedoms is grounded in a number of well-established human rights documents from Africa, including the African Charter on Human and Peoples' Rights (1981), the Windhoek Declaration on Promoting an Independent and Pluralistic African Press (1991), the African Charter on Broadcasting (2001), the Declaration of Principles on Freedom of Expression in Africa (2002), and the African Platform on Access to Information Declaration (2011). These documents serve as the foundation for the Declaration and provide a basis for its provisions.³⁹⁷

As is prevalent in other areas of the globe, a number of African nations are implementing policies, regulations, or laws to regulate and, in certain instances, control the internet. This shift from a low regulatory internet environment to a heavily regulated one is currently underway in numerous African countries.³⁹⁸ While the African Declaration has been endorsed by 47 countries,³⁹⁹ The African Commission has not yet adopted a resolution to support this regional instrument. However, this instrument is a step in the right direction for African states and may guide African states in decision making and policy development relevant to the protection of human rights on the internet.⁴⁰⁰

³⁹⁵ African Declaration on Internet Rights and Freedoms 2013.

³⁹⁶ As above.

³⁹⁷ <https://africaninternetrights.org/en/about> (Accessed 5 April 2023)

³⁹⁸ The African Declaration on Internet Rights and Freedoms 2013.

³⁹⁹ African Declaration on internet rights and freedoms <https://africaninternetrights.org/en/endorsements> (Accessed 5 April 2023).

⁴⁰⁰ Unpublished: NI Hlazo 'The legal remedies to protect minors against cyberbullying in South Africa' unpublished Master's thesis, Nelson Mandela University, 2018 42.

4.7 Conclusion

From this chapter it is clear that the protection of human rights, particularly with regard to the rights of children online is a global concern.⁴⁰¹ The increase in the number of instruments and international treaties regulating cybercrimes demonstrates global efforts to align with the ever-evolving nature of online communication and the risks which emanate through the use of the internet.

It's imperative to highlight that continental instruments, such as the AU Convention on Cybersecurity, addresses child pornography as a cybercrime. This underscores Africa's commitment to safeguarding children's rights. While there may be obstacles concerning effective enforcement due to implementation limitations, these legal instruments provide a comprehensive guideline and benchmark for ensuring the protection of minors against online offenses, especially cyberbullying.

Upon thorough examination of both global and continental mechanisms addressing cyberbullying, South Africa's introduction of the Cybercrimes Act represents a pivotal step in aligning its domestic legal framework with international benchmarks. Nonetheless, there is a clear necessity for more precise legislation targeting cyberbullying, which might be addressed in future amendments to the Act.

The implementation of the Cybercrimes Act imposing imprisonment as one of the forms of punishment is praiseworthy.⁴⁰² While criminal law remedies are unable to provide victims with compensation for the damages sustained due to a bully's actions, the emphasis should be placed on deterrence and preventive strategies through incorporating education and awareness of cyberbullying related consequences into the school curriculum. Should this strategy be implemented from an early age, children will be educated about the severe

⁴⁰¹ As above.

⁴⁰² D Khan 'The impact of Covid-19 on cyberbullying: A delictual claim for emotional harm?' (2021) *De Jure Law Journal* 565.

repercussions and detrimental effects of engaging in cyberbullying activities and this may serve as discouragement to bullies who carry out these acts.

5 Chapter 5: Findings & Recommendations

5.1 Introduction

The purpose of this research was to evaluate whether South Africa had sufficient legal mechanisms in place to adequately protect minors from the harmful impact of cyberbullying and to assess the compatibility of these laws with relevant international instruments. This chapter presents a summary of the research findings and offers recommendations accordingly.

From this study, it is clear that cyberbullying is a growing problem in South Africa, with harmful effects on children's development and well-being. It has been demonstrated that acts of cyberbullying have resulted in death and suicide, which are irreparable tragedies that cannot be undone by any form of punishment, imprisonment or fines. The loss of a child's life due to bullying is a devastating and irreversible consequence.

Cyberbullying infringes upon numerous constitutional rights, including the right to human dignity, the right to freedom and security, the right to equality, and the right to privacy. While current South African legislation provides protection and remedies for bullying, it does not specifically address cyberbullying.

Cyberbullying may be considered more dangerous than traditional bullying due to the various characteristics of cyberbullying that have been identified in this research. These characteristics include, but are not necessarily limited to⁴⁰³:

1. The speed at which harmful content can be distributed due to accessibility of the internet and the various social media platforms which can be used to humiliate the victim.
2. The anonymous nature of the internet enables bullies to hide their identity, which can make it difficult to hold them accountable for their actions. This anonymity can also

⁴⁰³ Unpublished: CA Hills 'Developing a law and policy framework to regulate cyber bullying in South African schools' unpublished PhD thesis, University of South Africa, 2017 229.

embolden bullies, as they may feel less likely to face consequences for their behaviour.

3. Prosecuting a cyberbully can be challenging due to the difficulty in identifying and locating the offender. In traditional bullying situations, the victim is often able to identify the bully and the school governing body may hold a disciplinary hearing in accordance with their code of conduct to discipline the offender. However, in the case of cyberbullying, schools may not have the necessary technology or resources to identify the cyberbully and determine which student is responsible for the behaviour. This can make it difficult to hold the offender accountable and provide justice for the victim.

5.2 Discussion:

It is necessary to adopt a proactive approach to addressing cyberbullying by raising awareness and educating children about the gravity and seriousness of the issue through workshops and other educational programs. This preventative strategy is preferable to reacting to the consequences of cyberbullying after the fact. Schools have a responsibility to educate their students on the harmful effects of cyberbullying and encourage them to be mindful of their actions online.

In chapter one, the background and significance of the issue of cyberbullying was explored. It was noted that children are increasingly at risk due to the dangers associated with internet use. While it is impressive that a large number of South African children have access to the internet, it is unfortunately not only used for educational purposes, but it has become a tool used to attack and humiliate other learners.

It is clear that children, due to their naivety, may be unaware of the dangers and legal consequences of their actions on various social media platforms. In order to address this issue, schools should lead awareness campaigns to educate students about the risks and potential consequences of cyberbullying. It is important for children to be informed about how to use social media safely and responsibly.

It is widely recognized that cyberbullying differs significantly from traditional bullying, in which the victim is often aware of their bully. However, the anonymity of cyberbullying

creates various challenges for prosecution authorities, as the victim may not be able to identify their bully. This anonymity can make it difficult to hold the offender accountable and provide justice for the victim.

In chapter two the holistic effect of cyberbullying was discussed where the consequences of cyberbullying were investigated. From the discussion it was evident that cyberbullying had a detrimental effect on the mental health of victims where children who were cyberbullied often suffered with depression or anxiety disorders.⁴⁰⁴ A discussion regarding the physical health of victims revealed the emotional trauma experienced by victims of cyberbullying also manifested into physical health complications.

In addition, an analysis of the impact of cyberbullying on a child's academic progress revealed that victims of cyberbullying often had higher absentee rates and lower scores on standardized academic assessments. This may be an indication that cyberbullying can negatively impact a child's education and learning abilities and may lead to a dislike of school in some cases.

Chapter three focused on the current domestic legal framework in South Africa relevant to cyberbullying. This chapter highlighted the various legal instruments which address cyberbullying, paying special attention to the new Cybercrimes Act which recently came into effect in South Africa and is a significant step in the right direction for South Africa. While the Cybercrimes Act is welcomed, challenges related to the enforceability and implementation of the various provisions in the Act were discussed.

Chapter four of this study examined the various international frameworks that exist to address the issue of cyberbullying, in order to assess whether South Africa is in line with global efforts to enforce cybersecurity legislation and policies. The vulnerable nature of children was emphasised and the greater need to ensure adequate protection of children, in fulfilling the best interest of the child principle which affirms the best interests of the child are of paramount importance in all matters affecting the child.

⁴⁰⁴ Unpublished: JE Vines 'An embedded case study of the proposed Megan Meier Cyberbullying Prevention statute & the proposed Tyler Clementi Higher Education Anti-Harassment statute' unpublished PhD thesis, Clemson University, 2015 1.

A recurring theme in all international frameworks is the need to protect children from child pornography and the importance of criminalizing the offense of sharing and distributing Child Sexual Abuse Material, in addition to the creation of such material.

The importance of developing a standardized approach to addressing cyberbullying was emphasized. It is crucial for states to align their domestic laws with international law and policies in order to establish a standardized approach to combating cybercrimes and prosecuting offenders across borders. This is especially important given the nature of cybercrime, which can be committed remotely without the perpetrator needing to physically be present in a particular country. It is therefore necessary for states to cooperate with one another in order to ensure effective prosecution processes.

5.3 Recommendations:

South Africa is making significant progress in addressing issues related to cybercrime and cybersecurity and the newly enacted Cybercrimes Act is evidence of this advancement. We shall discuss the recommendations below specific to the various entities, bodies and groups of persons:

5.3.1 The International Community:

The discussion in Chapter 4 underscores the importance of international mechanisms within the framework of international law to address online interactions, particularly concerning cyberbullying. General Comment No. 25 on children's rights in the digital environment exemplifies efforts to fill gaps in directly addressing cyberbullying under the UNCRC. Governments are urged to align their domestic legislation with this General Comment, ensuring comprehensive policies safeguarding children's rights online. However, acknowledging the current absence of a single instrument explicitly defining cyberbullying, it is recommended that the Committee on the Rights of the Child takes steps to develop a specific instrument dedicated to cyberbullying. This instrument should define cyberbullying and outline sanctions to address such behavior, serving as a guideline for all state parties to effectively combat cyberbullying and protect children's rights in the digital sphere.

5.3.2. The African Union:

- It is recommended that specific cyberbullying instruments are developed under the African Union to better address the complexities of the digital environment and cyberbullying, thereby ensuring robust safeguards for children's online privacy rights. This update should involve a thorough review and incorporation of provisions that specifically address the challenges posed by digital technologies and online interactions, aligning with contemporary realities and advancements in the digital landscape.
- Encourage member states to ratify the Malabo Convention to foster cooperation among African Union member states in safeguarding personal data, thereby enhancing protection measures against cyberbullying.⁴⁰⁵
- Facilitate engagement with state parties during reporting procedures to assess the implementation of measures aimed at protecting children's privacy and personal data online.⁴⁰⁶ This will enable the identification of gaps in online privacy protection and enable informed guidance to member states.⁴⁰⁷
- Develop comprehensive guidance notes for member states outlining children's rights to privacy online within the framework of the Children's Charter and the Malabo Convention. These guidelines should cover various aspects of online privacy, including data collection, interception of communications, surveillance, and unauthorized sharing of children's personal information on online platforms.⁴⁰⁸
- Foster collaboration and dialogue among African Union organs, the private sector, National Human Rights Institutions, intergovernmental organizations, and civil society organizations to raise awareness among children, parents, and teachers on digital literacy, online safety, and responsible use of digital technology. Additionally, tools and resources should be developed to assist teachers, parents, and children in ensuring online privacy.⁴⁰⁹

⁴⁰⁵ OM Sibanda (n 358 above) 176.

⁴⁰⁶ OM Sibanda (n 358 above) 176.

⁴⁰⁷ As above.

⁴⁰⁸ As above.

⁴⁰⁹ As above.

5.3.3. Schools:

- Schools should incorporate cyberbullying awareness and prevention programs into their curriculum, educating students, parents, and teachers about the harmful impacts and legal repercussions of cyberbullying. This education should emphasize that cyberbullying is a serious offense punishable by law, thereby highlighting the severity of the issue and discouraging perpetrators.
- Schools should establish cyberbullying as a form of misconduct in the Code of Conduct for learners, ensuring that clear guidelines are outlined regarding the consequences of engaging in such behaviour. This will provide a framework for addressing cyberbullying incidents within the school environment and reinforcing the message that such behaviour is unacceptable.
- Schools should prioritise preventative measures by promoting a culture of respect and empathy among students, encouraging positive online behaviour, and fostering a supportive school community where students feel comfortable seeking assistance if they are experiencing cyberbullying. Schools should offer support services to students in need, providing guidance and resources to help them navigate and overcome the challenges associated with cyberbullying.
- It is imperative that schools develop clear policies and procedures specifically addressing cyberbullying, including mechanisms for reporting incidents, conducting investigations, and implementing appropriate interventions and disciplinary measures. School governing bodies should establish comprehensive guidelines defining cyberbullying and outlining the steps to be taken in response to instances of cyberbullying, ensuring consistency and accountability in addressing this issue within the school environment.

5.3.4 Government and the Department of Basic Education:

- Utilize the existing Guidelines on e-Safety in schools as a comprehensive resource for overseeing internet access and combating cyberbullying incidents. Ensure that educators, parents, and relevant stakeholders are familiar with these guidelines and actively implement them in school environments.

- Leverage the Guidelines on e-Safety to educate children about the adverse implications of cyberbullying and promote responsible online behaviour. Encourage the adoption of the Acceptable Use Policy introduced by these guidelines, which emphasizes prudent and responsible online practices while holding children accountable for their actions online. The development and implementation of these policies demonstrate significant advancements in South African schools, aligning them with the fast-paced technological developments in the digital era.
- Continuously update and refine the Guidelines on e-Safety to align with the rapidly evolving technological landscape. Incorporate best practices and emerging trends in cyberbullying prevention to ensure that South African schools remain at the forefront of addressing this issue in the digital era.
- Provide ongoing training and support for educators and school staff on implementing the Guidelines on e-Safety effectively. Equip them with the necessary knowledge and skills to recognize and respond to cyberbullying incidents promptly and appropriately.
- Collaborate with relevant stakeholders, including parents, community organizations, and government agencies, to create a coordinated approach to cyberbullying prevention and response. Foster partnerships that leverage resources and expertise to create a safer online environment for South African students.

5.3.5 Parliament:

It is important to note the Cybercrimes Act fails to define cybercrime or cyberbullying and it can be questioned where this Act will bring about the change and reform required to address the issue of cyberbullying, as prosecution authorities shall be required to rely on interpretations and inferences taken from the Act. Therefore the following recommendations are made:

- Future amendments of the Cybercrimes Act should explicitly define cyberbullying and incorporate precise sanctions for individuals convicted of such acts. This will provide clarity and legal certainty for prosecution authorities, facilitating effective investigation and prosecution of cyberbullying offenses.
- Ensure that authorities responsible for enforcing cybercrime legislation are adequately trained and equipped with the necessary skills to investigate and prosecute cyber-related offenses, including cyberbullying. This may involve providing

specialized training programs and resources to law enforcement agencies and legal professionals.

- Foster collaboration between Parliament and relevant stakeholders, including law enforcement agencies, legal experts, and civil society organizations, to develop comprehensive strategies for addressing cyberbullying. This may involve conducting consultations and hearings to gather input from experts and affected communities, ensuring that legislative measures are informed by a diverse range of perspectives.

In conclusion, the study and examination of cyberbullying legislation in South Africa highlight significant strides towards aligning the country's legal framework with international norms and standards. The introduction of the Cybercrimes Act marks a positive advancement in addressing cyberbullying and other forms of cybercrime.

However, it is crucial to recognize the fast-paced nature of the internet, necessitating South Africa's legal framework to remain agile and adaptable to the evolving online landscape. Grassroots interventions at the school level are vital to ensure that teachers, parents, learners, and all relevant stakeholders are well-informed about the definition of cyberbullying and its consequences.

Education and awareness campaigns should prioritize defining cyberbullying, highlighting its harms, and emphasising the legal ramifications of harassing a child online. It is imperative for schools to incorporate cyberbullying prevention measures into their Codes of Conduct, facilitating early intervention and proactive addressing of the issue. By prioritizing education and awareness campaigns, South Africa can create a safer online environment for its children and effectively combat cyberbullying.

Furthermore, the principle of the best interests of the child should guide interventions, ensuring that the rights outlined in the Constitution, including human dignity, privacy, and freedom of expression, are upheld for both victims and perpetrators. As the internet continues to evolve, it remains crucial for legislation to remain adaptable, keeping pace with technological advancements to effectively address cyberbullying and protect children's rights.

6 Bibliography

Books:

Juvonen, J & Graham S Peer Harassment in School, The Plight of the Vulnerable and Victimized

(The Guildford Press 2001).

Kilkelly, U & Liefaard, T International Human Rights of Children (Springer:Singapore 2019)

Reio, TG & Ortega, CL 'Chapter 8 - Cyberbullying and Its Emotional Consequences: What We Know and What We Can Do' in Tettegah, SL & Dorothy, LE (eds) Emotions, Technology, and Behaviors (Academic Press: London 2016).

Skelton, A 'Complaints and Remedies' in Kilkelly, U & Liefaard, T (eds) International Human Rights of Children (Springer:Singapore 2019).

Snyman, CR Criminal Law 6th Edition (LexisNexis:South Africa 2014).

Journal articles

Albin, KA 'Bullies in a Wired World: The Impact of Cyberspace Victimization on Adolescent Mental Health and the Need for Cyberbullying Legislation in Ohio' (2012) 25 *Journal of Law and Health* 167.

Adewoye SE 'Adolescent cyberstanders' experience of cyberbullying in the era of Covid-19 in South Africa' (2022) 14 *International Journal of Emotional Education* 37.

Alipan, A; Skues, J; Theiler, S & Wise, L 'Defining cyberbullying: A multiple perspectives approach' (2015) *Annual Review of Cybertherapy and Telemedicine* 9.

Andrews, NCZ; Cillessen, AHN ; Craig, W; Dane, AV; & Volk AA 'Bullying and the Abuse of Power (2023) *International Journal Of Bullying Prevention* 1.

Arseneault, L 'Annual Research Review: The persistent and pervasive impact of being bullied in childhood and adolescence: Implications for policy and practice' (2018) 59 *Journal of Child Psychology and Psychiatry* 405.

Asam, AE & Samara, M 'Cyberbullying and the Law: A Review of Psychological and Legal Challenges' (2016) 65 *Computers in Human Behavior* 127.

Badenhorst, C 'Legal responses to cyberbullying and sexting in South Africa' (2011) 10 *Centre for Justice and Crime Prevention* , 8.

Ball, KM 'African union convention on cyber security and personal data protection' (2017) 56(1) *International Legal Materials* 164-192.

Bauman, S 'Cyberbullying: a Virtual Menace' (2007) National Coalition Against Bullying National Conference.

Belsey, B 'Bullying. org: A learning journey.' (2006) 49.4 *Bulletin–Newfoundland and Labrador Teachers Association* 20.

Blumenfeld, T; Malatji H & Pillay R 'The knowledge base of South African educators regarding Cyberbullying in schools' (2023) Preprints 3.

Brewer R; Cale C; Goldsmith A & Holt TJ 'Young People, the Internet, and Emerging Pathways into Criminality: A Study of Australian Adolescents' (2018) 12 *International Journal of Cyber Criminology* 115.

Bullo, A & Schulz PJ 'Parent-child Communication, Social Norms, and the Development of Cyber Aggression in Early Adolescence' (2022) 51, *Journal of youth and adolescence* 1777.

Burgess, J & McLoughlin, C 'Investigating cyberbullying: Emerging research and e-safety strategies within families and communities' (2011) 6 *Communities, Children and Families Australia*.

Camerini, AL; Marciano, L Carrara, A & Schulz, PJ 'Cyberbullying perpetration and victimization among children and adolescents: A systematic Review of longitudinal studies' *Telematics and Informatics* (2020) 49.

Cassim , F 'Formulating adequate legislation to address cyber-bullying: Has the law kept pace with advancing technology?' (2013) 26 *South African Computer Journal* 1-20.

Chipangura, B 'Securing the cybersafety of South African online high school learners beyond COVID-19' (2022) 18(1) *The Journal for Transdisciplinary Research in Southern Africa* 1.

Cililiers, L 'Perceptions and experiences of cyberbullying amongst university students in the Eastern Cape province, South Africa' (2021) 17 *The Journal for Transdisciplinary Research in Southern Africa* 1.

Cohen-Almagor, R 'Cyberbullying, moral responsibility, and social networking: Lessons from the Megan Meier tragedy' (2020) 16(1) *European Journal of Analytic Philosophy* 75-98.

Copeland, WE ; Wolke, D ; Angold, A & Costello EJ 'Adult Psychiatric Outcomes of Bullying and Being Bullied by Peers in Childhood and Adolescence' (2013) 70(4) *Jama Psychiatry* 9.

Cowie, H 'Cyberbullying and its impact on young people's emotional health and well-being' (2013) 37(5) *The psychiatrist* 167-170.

Clough, J 'A world of difference: the Budapest convention on cybercrime and the challenges of harmonisation' (2014) 40(3) *Monash University Law Review* 698-736.

Craig, WM 'The relationship among bullying, victimization, depression, anxiety, and aggression in elementary school children' (1998) 24(1) *Personality and individual differences* 123-130.

De Wet, A 'Cyberbullying, schools and the Protection from Harassment Act: Shaping school policy and practice towards the protection of learner' (2015) 20 *South African Education Law Association* 2.

Donthu, N & Gustafsson, A 'Effects of COVID-19 on business and research' (2020) *Journal of Business Research* 285.

Du Toit, T 'Cyberbullying in South African and American schools: A legal comparative study' (2015) 35 *South African Journal of Education* 1.

Du Toit, T 'Cyberbullying Dilemma: A case for Ubuntu' (2019) 2.

Dodge, A & Spencer, D 'Online sexual violence, child pornography or something else entirely? Police responses to non-consensual intimate image sharing among youth' (2018) 27(5) *Social & Legal Studies* 636-657.

F, Parvaneh; Maluleke, C & Mutshaeni, NH 'Emotional and academic effects of cyberbullying on students in a rural high school in the Limpopo province, South Africa' (2019) 21(1) *South African Journal of Information Management* 7.

Ferrara, P; Ianniello, F Villani, A & Corsello, G 'Cyberbullying a modern form of bullying: let's talk about this health and social problem' (2018) *Italian journal of pediatrics* 44(1) 1-3.

Foody, M; Samara, M & Carlbring, P 'A review of cyberbullying and suggestions for online psychological therapy' (2015) 2(3) *Internet Interventions* 235-242.

Grigg, D 'Cyberaggression: Definition and Concept of Cyberbullying' (2010) 20 *Australian Journal of Guidance and Counselling* 143.

Isik, B & Ozdemir, N 'How does cyberbullying affect the values of university youth?: Its' analysis in terms of education and mental health' (2019) 6(1) *New Trends and Issues Proceedings on Humanities and Social Sciences* 1.

Jabulani N & L Edward. M. 'The whole-school approach to manage cyberbullying: lessons from South African schools (2021) 20(1) *Journal of Educational Studies*.

Kaime, T 'The Convention on the Rights of the Child and the cultural legitimacy of children's rights in Africa: Some reflections' (2005) 5(2) *African Human Rights Law Journal* 221-238.

Korenis, P & Billick, SB 'Forensic implications: Adolescent sexting and cyberbullying' (2014) 85(1) *Psychiatric quarterly* 97-101.

Khan, D 'The impact of Covid-19 on cyberbullying: A delictual claim for emotional harm?' (2021) *De Jure Law Journal* 565.

Kowalski, RM & Limber, SP 'Psychological, physical, and academic correlates of cyberbullying and traditional bullying' (2013) 53(1) *Journal of adolescent health* 13-20.

Langos, C 'Cyberbullying: The Challenge to Define' (2012) 15 *Cyberpsychology, Behavior, And Social Networking* 285.

Li, C; Wang P; Martin-Moratinos M & Bella-Fernandez M ' Traditional bullying and cyberbullying in the digital age and its associated mental health problems in children and adolescents: a meta-analysis' (2022) *European Child & Adolescent Psychiatry* 1.

Maurya, C ; Muhammad, T; Dhillon, P & Maurya, P 'The effects of cyberbullying victimization on depression and suicidal ideation among adolescents and young adults: a three year cohort study from India' (2022) *BMC Psychiatry* **22**, 1.

Mbise, AT 'The diffusion of the United Nations Convention on the Rights of the Child (UNCRC) more than the African Charter on the Rights and Welfare of the Child (ACRWC) in Africa: The influence of coercion and emulation' (2017) 60(5) *International Social Work* 1233-1243.

Meredith, JP 'Combating Cyberbullying: Emphasizing Education over Criminalization' (2010) 63 *Federal Communications Law Journal* 339.

Moodley, I 'Cyber bullying: A legal framework for South African educators' (2012) 27(2) *Southern African Public Law* 539-558.

Mui Hung Kee, D; Lutf Al-Anesi, MA & Luft Al-Anesi SA 'Cyberbullying on social media under the influence of COVID-19' (2022) 41 *Global Business and Organizational Excellence* 18
Olweus, D 'School bullying: Development and some important challenges' (2013) 9(1) *Annual review of clinical psychology* 751-780.

Ngwoke, RA; Mbanjo, IP & Helynn, O 2023 'A critical appraisal of doctrinal and Non-doctrinal legal research methodologies in contemporary times' (2023) 3(1) *International Journal of Civil Law and Legal Research* 9.

Paunović, N 'Cyberbullying of children: Challenges of victim support' (2018) 21(2) *Temida* 249-268.

Peter, IK & Petermann, F 'Cyberbullying: A concept analysis of defining attributes and additional influencing factors' (2018) 86 *Computers in human behavior* 350-366.

Quarshie, HO & Martin-Odoom, A 'Fighting cybercrime in Africa' (2012) 2(6) *Computer Science and Engineering* 98-100.

Reyneke, MJ & Jacobs, L 'Can legal remedy be used to address bullying and cyberbullying in South African schools?' (2018) 71(1) *Polish journal of educational studies* 66-80.

Rosa, S & Dutschke 'Child rights at the core: A commentary on the use of international law in South African court cases on children's socio-economic rights' (2006) A Project 28 Working Paper (2006) *Cape Town: Children's Institute, University of Cape Town* 1.

Selwyn, N 'The digital native – myth and reality' (2009) 61 *Aslib Proceedings* 368.

Sibanda, OM 'Towards a more effective and coordinated response by the African union on Children's privacy online in Africa' (2022) 6 *African Human Rights Yearbook* 161.

Smit, DM 'Cyberbullying in South African and American schools. A legal comparative study' (2015) 35(2) *South African Journal of Education* 1-11.

Smith, PK; Mahdavi, J Carvalho, M Fisher, S Russell, S & Tippett, N 'Cyberbullying: Its nature and impact in secondary school pupils' (2008) 49(4) *Journal of child psychology and psychiatry* 376-385.

Taekema, S , 'Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice' (2018) *Law and Method* 1.

Thomas, HJ ; Connor, JP & Scott JG 'Integrating Traditional Bullying and Cyberbullying: Challenges of Definition and Measurement in Adolescents – a Review' (2015) 27 *Educational Psychology Review* 135-152.

Tokunaga, RS 'Following you home from school: A critical review and synthesis of research on cyberbullying victimization' (2010) 26(3) *Computers in human behavior* 277-287.

Vaillancourt, T; Faris, R & Mishna, F 'Cyberbullying in Children and Youth: Implications for Health and Clinical Practice' (2017) 62(6) *The Canadian Journal of Psychiatry* 370.

Watts, LK; Wagner, J; Velasquez, B & Behrens, PI 'Cyberbullying in higher education: A literature review' (2017) 69 *Computers in Human Behavior* 268-274.

Wunmi Grigg, D 'Cyber-Aggression: Definition and Concept of Cyberbullying'(2010) 20 *Australian Journal of Guidance & Counselling* 143.

Zhu, C; Huang, S; Evans, R & Zhang, W "Cyberbullying Among Adolescents and Children: A Comprehensive Review of the Global Situation, Risk Factors, and Preventive Measures' (2021) 9 *Frontiers in Public Health* 9.

Statutes

Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act No. 32 of 2007

Cybercrimes Act 19 of 2022

The Child Justice Act 75 of 2008

The Children's Act 38 of 2005

The Constitution of South Africa 1996

Electronic Communications and Transactions Act 25 of 2002

The Films and Publications Act 65 of 1996

Films and Publication Amendment Act 11 of 2019

The Protection from Harassment Act 17 of 2011

The South African Schools Act 84 of 1996.

Conventions and treaties

The African Union Convention of Cyber Security and Personal Data Protection 2014.

The Council of Europe's Treaty on Cybercrime (Budapest 2001).

The United Nations Convention of the Rights of the Child 1989.

The African Declaration on Internet Rights and Freedoms 2013.

United Nations Convention on the Right of the Child General Comment No. 25.

Theses and dissertations

Unpublished: A Liebenberg 'The Prevalence of Cyber bullying in Gauteng private schools among grade 7 to 9 learners' unpublished MSc thesis, University of the Witwatersrand 2003.

Unpublished: CA Hills 'Developing a law and policy framework to regulate cyber bullying in South African schools' unpublished PhD thesis, University of South Africa, 2017.

Unpublished: JE Vines 'An embedded case study of the proposed Megan Meier Cyberbullying Prevention statute & the proposed Tyler Clementi Higher Education Anti-Harassment statute' unpublished PhD thesis, Clemson University, 2015 1.

Unpublished: NI Hlazo 'The legal remedies to protect minors against cyberbullying in South Africa' unpublished Master's thesis, Nelson Mandela University, 2018 25.

Policies

The National Child Care and Protection Policy 2019 in South African schools.

The Department of Basic Education: Guidelines on e-Safety in Schools: Educating towards responsible, accountable and ethical use of ICT in education.

UN Special Representative of the Secretary-General on Violence Against Children: 2016 Background Paper On Protecting Children From Bullying And Cyberbullying.

Newspaper articles

Cyberbullying: SA has 4th highest global death rate among teens Roodepoort record 15 April 2021 1.

Case Law

United States vs Drew 259 F.R.D. 449 (C.D. Cal. 2009).

Online resources

Foxcroft, M Wingu Academy <https://wingu-academy.com/the-devastating-effects-of-cyberbullying-in-south-africa/> (Accessed 23 March 2023)

IGI Global Publishing 'What is Cyber-Aggression' <https://www.igi-global.com/dictionary/cyber-aggression/6573> (accessed 22 March 2023).

Megan Meier Foundation <https://www.meganmeierfoundation.org/megans-story> (Accessed 20 September 2022)

'More than half of SA's children have been cyberbullied, survey finds' Times Live (2021) <https://www.timeslive.co.za/news/south-africa/2021-03-10-more-than-half-of-sas-children-have-been-cyberbullied-survey-finds/> (Accessed 10 March 2023)

'Pupil who beat Lufuno Mavhunga filled with regret, says her mom' Times Live 3 May 2021 <https://www.timeslive.co.za/news/south-africa/2021-05-03-pupil-who-beat-lufuno-mavhunga-filled-with-regret-says-her-mom/> (accessed 10 March 2023)

L Lois 'Bullying in schools' Family Digest 39 May 2021, South African Catholic Bishops Conference, Parliamentary Liaison Office 1 <http://www.cplo.org.za/wp-content/uploads/2021/05/Family-Digest-39-Bullying-in-Schools-by-Lois-Law.pdf>

(Accessed 13 March 2023)

A Moyo“ Top-notch Cyber Crimes Act ultimately fails to deliver” ITWEB Security Summit <https://www.itweb.co.za/content/PmxVEMKEyOovQY85> (Accessed 15 October 2022)

Internet usage in Africa – statistics & facts <https://www.statista.com/topics/9813/internet-usage-in-africa/> (Accessed 30 October 2022)

UNICEF, 8 February 2022 'One third of children in South Africa at risk of online violence, exploitation and abuse' 8 February 2022 <https://www.unicef.org/southafrica/press-releases/one-third-children-south-africa-risk-online-violence-exploitation-and-abuse>

(Accessed 2 December 2022)

List of countries which have signed, ratified/ acceded to the African Union Convention on Cybersecurity and personal data protection, 25 March 2022 https://au.int/sites/default/files/treaties/29560-sl-AFRICAN_UNION_CONVENTION_ON_CYBER_SECURITY_AND_PERSONAL_DATA_PROTECTION_0.pdf (Accessed 28 March 2023).