

Cyber bullying: A legal framework for South African educators

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1 Introduction

In South Africa, the conduct of learners is regulated by certain provisions in the South African Schools Act,¹ specifically section 8 which authorises the school governing body to 'adopt a code of conduct for learners after consultation with learners, educators and parents'.² The rationale of a code of conduct is to establish a 'disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process'.³ Bullying⁴ or peer victimisation⁵ (as it is sometimes referred to in South Africa) opposes this rationale and is fast becoming an ever increasing problem for schools and educators all over the world, including South Africa.

Current South African school legislation however protects learners from bullying generally. But what happens in situations where a learner or learners use information technology (like computers and cellular phones) to bully other learners; so-called cyber bullying? How do educators (who are expected to have expert knowledge as well as the necessary skills to manage incidents that arise which have potential legal consequences) deal with this new phenomenon? The fact that technology is developing at an alarming rate and that technological

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¹84 of 1996. The South African Schools Act is an over-arching piece of legislation regulating both private and public schools in South Africa.

²Section 8(1).

³Section 8(2).

⁴Generally, bullying may be defined as: 'a direct form of aggression against others, which can assume several forms of behaviour, including teasing, taunting, threatening, hitting and stealing. It also constitutes indirect attacks such as social ostracism, where a student is made to feel marginalised, socially isolated or inferior, which often has more long-term consequences for the victim' (Rasool 'Stop the school bully' (2002) *The Southern Cross* 1-8).

⁵See Neser *et al* 'Predisposition to, reasons for and measures against peer victimisation in schools' (2004) *Acta Criminologica* 83-98 and Smit 'Potential victims of peer victimisation in schools' (2003) *Child Abuse Research in South Africa* 36-41.

devices are so easily accessible to learners (even in the school context), means that cyber bullying will possibly present numerous problems for South African schools and educators in the coming future.

'Cyber bullying or what some people call "Internet aggression", "Internet bullying", or "digital harassment", involves using computers or other information technology (IT) devices, such as personal digital assistants or cell phones, to embarrass, harass, intimidate, threaten, or otherwise cause harm to individuals targeted for such abuse'.⁶ According to McQuade *et al*, cyber bullying is a technological extension of physical bullying and also involves the aggression of one or multiple persons over weaker and more vulnerable individuals.⁷

Some popular forms of cyber bullying used by learners include:

- Sending cruel, vicious, and sometimes threatening messages.
- Creating websites that have stories, cartoons, pictures and jokes ridiculing others.
- Breaking into an email account and sending vicious and embarrassing material to others.
- Engaging someone in instant messaging, tricking that person into revealing sensitive personal information, and forwarding that information to others.
- Posting pictures of classmates online and asking students to rate them on such derogatory features as boring, repulsive, bad smelling, and disgusting.
- Using a digital phone camera to take a photo of a person undressed in the locker room and sending the picture to others.⁸

As stated previously, South Africa does have legislation to regulate bullying in the school context, to a certain extent. However, cyber bullying is a relatively new phenomenon and, to date, it is not specifically regulated in South African law. As a result thereof, no matter how vile, distasteful or contentious the act of cyber bullying may be, in the grand scheme of things, cyber bullying is currently not a violation of any law. However, in 1994 South Africa adopted a supreme⁹ Constitution with a justiciable Bill of Rights.¹⁰ Unlike other national Constitutions, however, the rights in the Bill of Rights are not arranged in any form of hierarchical order.¹¹ That means that

⁶McQuade, Colt and Meyer *Cyber bullying protecting kids and adults from online bullies* (2009) ix.
⁷*Id* 2.

⁸Murray *Violence in America's schools: Understanding, prevention, and responses* (2006) 139.

⁹Section 2 of the South African Constitution provides that: 'this Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'.

¹⁰Chapter 2.

¹¹Eg, in the United States of America freedom of expression is a supreme or pre-eminent right. The First Amendment of the US Constitution states that:

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

each individual human right must be given due regard and is of equal worth. The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state. The school is an organ of state¹² and is also bound by the provisions of the Bill of Rights. The preamble of the South African Schools Act promotes 'the upholding of the rights of all learners'. The act of cyber bullying violates or has the potential to violate numerous human rights and it is for this reason that we have decided to approach this paper in the following manner.

In part 1, we look at cyber bullying from a South African legal or human rights perspective. We do this by balancing or weighing up the right of the cyber bully to freedom of expression¹³ against the rights of their victims to human dignity¹⁴ and generally the rights of children.¹⁵ In the course of our discussion we will be exploring a number of issues *viz* the scope of the right to freedom of expression¹⁶ and the specific prohibition on hate speech,¹⁷ the ambit of the right to human dignity as both a constitutional value¹⁸ and a fundamentally entrenched right and the application of certain children's rights¹⁹ in South African law. Because fundamental rights are not absolute, we also need to engage in a limitations analysis of the various rights at issue. Finally, we put forward a few recommendations on how South Africa could possibly construct its own framework (not necessarily a legislative one) for the successful management of cyber bullying in schools.

2 Freedom of expression and cyber bullying

As human beings, we all have a need to express ourselves in various ways. For example, we may express ourselves by writing, by way of art, or by the way in which we dress. Learners also have a desire to express themselves. But do learners have an unfettered right to freedom of expression? For example, may a learner use a school computer to publish or post nasty comments about another learner on a social networking site like Facebook or Twitter? Or may a learner pin a derogatory image (which was created on a school computer) of another learner on the school's notice board? Or may a learner send hurtful messages via sms or bbm (during official

¹²Section 239 of the South African Constitution defines an 'organ of state' as:

- (a) any department of state or administration in the national, provincial or local sphere of government; or
- (b) any other functionary or institution –
 - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer;...

¹³Section 16 generally.

¹⁴Section 10.

¹⁵Section 28.

¹⁶Section 16(1).

¹⁷Section 16(2)(c).

¹⁸Section 1.

¹⁹Section 28(2).

school hours) to other learners with the intent of insulting, hurting, or harming the reputation of other learners in the school community? All of the above are illustrations of cyber bullying and may be classified as freedom of expression. In this section, however, we consider whether such expression is lawful or not under South African law.

The right to freedom of expression is internationally recognised²⁰ and is 'integral for a democratic society'.²¹ In South Africa this is particularly relevant considering our dark history which was characterised by not only the 'suppression of freedom of expression'²² through apartheid legislation but numerous violations of other fundamental human rights as well. It is for these very reasons that freedom of expression was included in our current Constitution. In fact O'Regan J stated in *South African National Defence Union v Minister of Defence*²³ that:

freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matter.

It was also emphasised in the case of *S v Mamabolo (E TV Intervening)*,²⁴ that:

Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression – the free and open exchange of ideas – is no less important than it is in the United States of America.

The right to freedom of expression is set out in section 16 of the South African Constitution:

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

²⁰Article 19 of the Universal Declaration of Human Rights provides that: 'everyone has the right to freedom of opinion and expression; this right includes the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any means regardless of frontiers'. See also art 19 of the International Covenant on Civil and Political Rights which is similar to art 19 of the Universal Declaration of Human Rights and art 10 of the European Convention for the Protection of Human Rights; Fundamental Freedoms which is also similar to the Universal Declaration of Human Rights but which contains a proviso that States are not prevented from broadcasting, television or cinema enterprises.

²¹*Khumalo v Holomisa* [2002] ZACC 12 para 21.

²²*The Citizen 1978 (Pty) Ltd v McBride* [2011] ZACC 11 para 142.

²³[1999] ZACC 7 para 7.

²⁴[2001] ZACC 17 para 41.

Section 16(1) states that 'everyone' has the right to freedom of expression. The phrase *everyone* 'should be interpreted widely to include *inter alia* individuals, students (*or learners*), juristic persons,²⁵ aliens, journalists, editors, broadcasters, artists, and researchers'.²⁶

The United Nations Convention on the Rights of the Child²⁷ also provides that:

the child²⁸ shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

Expression may be defined as '... every act by which a person attempts to express some emotion, belief or grievance, and they believe it should qualify as constitutionally-protected expression'.²⁹ The phrase *expression* 'while including the act of speaking, encompasses a broader range of activities than speech',³⁰ and 'includes activities such as painting, sculpting, displaying posters, dancing and the publication of photographs'.³¹ Symbolic acts such as flag burning, the wearing of certain pieces of clothing and physical gestures may all constitute forms of expression.³² It is for these reasons that the Constitutional Court held that 'expression' is an extensive concept which should not be interpreted narrowly.³³ Freedom of expression may therefore include any form of human expression;³⁴ in fact, the courts have accepted the wearing of dreadlocks by a learner, who had embraced the Rastafarian religion as an acceptable exercise of the right to freedom of expression.³⁵ The courts have also accepted the wearing of a nose-stud by a learner in pursuance of her Hindu faith as an acceptable form of expression.³⁶ The extensive nature of the term 'expression' as it appears in the Constitution and as it has been interpreted by the Constitutional Court means that we can conclude that the communication or expression of ideas or opinions about

²⁵Section 8(2) of the Constitution provides that the Bill of Rights applies to both natural and juristic persons.

²⁶Burns 'Freedom of expression under the new constitution' (1997) *CILSA* 269. The Constitutional Court has also adopted a purposive interpretation of the word 'everyone' (see *Ex Parte Chairperson of Constitutional Assembly: In re Certification of Constitution of the RSA 1996* 1996 4 SA 744 (CC) para 57).

²⁷Adopted 1989-11-20.

²⁸In South Africa a child means a person under the age of 18 years (s 28(3) of the Constitution).

²⁹De Waal and Currie *The Bill of Rights handbook* (2005) 311.

³⁰Milo, Penfold and Stein 'Freedom of expression; in Woolman (ed) *Constitutional law of South Africa* (2011) (2nd ed) 42-31-42-32.

³¹Van Vollenhoven, Beckmann and Blignaut 'Freedom of expression and the survival of democracy: Has the death knell sounded for democracy in South African schools?' (2006) *Journal of Education* 121.

³²*Ibid.*

³³*De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 1 SA 406 (CC) para 48.

³⁴Burns (n 26) 269.

³⁵*Antonie v Governing Body, Settlers High School* 2002 4 SA 738.

³⁶*MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC).

other learners over the Internet or via other forms of technology we can conclude that material published on or communicated over the Internet, that is, acts of cyber bullying, would obviously fall within the protected scope of section 16(1) of South Africa's Constitution.

[Freedom of expression is] applicable not only to 'information' and 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb ... Such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society.³⁷

The right to freedom of expression in South Africa is however qualified or contains an internal limitation which restricts the scope of the right in section 16(1) and this limitation can be found in section 16(2) which is often referred to as the 'hate speech provision'. The purpose of section 16(2) is to declare that 'certain forms of expression do not deserve constitutional protection because they, among other things, have "the potential to impinge adversely on the dignity" of others and cause harm'.³⁸ Three types of expression are specifically prohibited in section 16(2): (a) propaganda for war; (b) incitement of imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.³⁹

The United Nations Convention on the Rights of the Child (1989) also places limits on the child's right to freedom of expression. Article 13(2) provides that any restrictions (to the right to freedom of expression) should be provided by law and should be necessary for respect of the rights or reputations of others, or for the protection of national security or public order, or of public health or morals. Article 17(e) also recommends the adoption of guidelines by state parties for the protection of children from information and material injurious to their well being.

From section 16(2)(c) above, we can deduce that in the school context, the distribution of online and cellular communications in which the views or opinions of a learner are based on race, ethnicity, gender or religion and which constitutes incitement to cause harm (which most acts of cyber bullying intend to do), would therefore fall outside the scope of protected freedom of expression in terms of South Africa's Constitution. Sending messages over cyberspace which threaten other learners with violence would also constitute unprotected expression, as it would fall into the prohibited category of 'incitement of imminent violence'.

³⁷*Handyside v United Kingdom* (1976) EHRR 737 at 754.

³⁸Pillay 'The cartoon wars: Free speech or hate speech' (2010) *South African LJ* 477.

³⁹See *Human Rights Commission of South Africa v SABC* 2003 1 BCLR 92 (BCCSA). In this case, the Broadcasting Complaints Commission had to decide whether the airing of a Zulu song about the Indian population by singer and composer Mbongeni Ngema contravened the Broadcasting Code. The BCCSA found that the words of the song amounted to hate speech and therefore it had contravened the Broadcasting Code. The song was found to promote hatred on the grounds of race and therefore constituted an incitement to cause harm.

But what about online or cellular communications or material published or distributed where learners express their views or opinions of other learners and such views are based on sexual orientation or social origin or disability? Or what about sending messages over cyberspace which do not threaten learners with violence; but which threatens them into for example, relinquishing their allowances or pocket money to the cyber bully? Or what about online or cellular or material published or distributed that is merely meant to embarrass, harass or ostracise other learners, for example posting a blog that someone is fat or ugly or stupid? Such forms of expression would clearly fall outside the scope of the hate speech provision as the section is silent on such patterns of expression. Section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act⁴⁰ could however offer some assistance here in that it is more generous in its formulation and provides that:

No person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to (a) be hurtful; (b) be harmful or to incite harm; or (c) promote or propagate hatred.⁴¹

In this section 'no person' would include a learner. The prohibited grounds listed in the Constitution and in the Promotion of Equality and Prevention of Unfair Discrimination Act are race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.⁴² The extensive nature of this section means that if the cyber bullying is based on one or more of the prohibited grounds listed immediately above it would obviously constitute unprotected expression. However neither the Constitution nor the Promotion of Equality and Prevention of Unfair Discrimination Act prohibits instances of cyber bullying that are meant to merely embarrass, ostracise, criticise or threaten other learners (as violence can also be emotional or mental). These forms of cyber bullying will have to be evaluated in terms of the limitations clause of the Constitution as no rights are absolute in the Bill of Rights. This will be done at a later stage in the paper.

Thus far we have established that the cyber bully does have a right to freedom of expression under section 16 of the Constitution; albeit a limited right. However, do cyber victims have any rights? In the next part of this paper, we examine two rights protecting the victims of cyber bullying *viz* human dignity and children's rights.

⁴⁰Act 4 of 2000. The Act was promulgated to give effect to s 9 of the Constitution of the Republic of South Africa, 1996, so as to prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech; and to provide for matters connected therewith.

⁴¹Section 10(1).

⁴²Section 9(3) and s 1 respectively.

3 Human dignity

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment.⁴³

The right to human dignity is 'at the heart of individual rights in a free and democratic society'⁴⁴ and is protected in South Africa's Constitution. In this regard section 10 provides that:

Everyone has inherent dignity and the right to have their dignity respected and protected.

The importance of human dignity is also highlighted in international law, for example, the Universal Declaration of Human Rights (1948) states that all human beings are 'born free and equal in dignity and rights', whilst the African Charter of Rights (1982) refers to the 'dignity inherent in a human being'. In South Africa, 'human dignity' is unique in that it is not only a constitutional right, but is also a foundational value. In this regard section 1(a) of the Constitution provides that:

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms; ...⁴⁵

The value of human dignity is also evident in the African concept of *ubuntu*, which may generally be defined as 'the recognition of human worth and respect for the dignity of every person'.⁴⁶ In *S v Makwanyane*,⁴⁷ Mokgoro J referred to *ubuntu* and held that:

⁴³*Law v Canada (Minister of Employment and Immigration)* [1999] 170 DLR 4th 1 (SCC) para 53.

⁴⁴*President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 31.

⁴⁵In *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 35 O' Regan J expounded on the dual nature of human dignity in the Constitution:

Human ... dignity informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights ... Human dignity is also a constitutional value that is of central significance in the limitations analysis.

Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected. In *S v Makwanyane* 1995 6 BCLR 665 (CC) para 144, Chaskalson P stated:

The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter Three (interim Constitution). By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.

In the same case, para 328, O' Regan J stated:

Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in ... (the Bill of Rights).

⁴⁶*Hoffman v South African Airways* 2001 1 SA 1 (CC) para 38.

⁴⁷1995 6 BCLR 665 (CC) para 308. See also Cornell 'Is there a difference that makes a difference between uBuntu and dignity' (2010) 25 SAPL 382-399. Mokgoro and Woolman 'Where dignity ends and uBuntu begins: An amplification of, as well as an identification of a tension in, Drucilla Cornell's thoughts' (2010) 25 SAPL 400-407.

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

Considering South Africa's chequered past, it is not surprising that the concept of dignity is given such due regard in our Constitution.⁴⁸ In the school context, the human dignity of every learner must be respected and protected.⁴⁹ With reference to the definition of dignity in *Law v Canada*⁵⁰ and using the examples of Murray Thomas as a point of reference,⁵¹ it is obvious that cyber bullying has an impact on the human dignity of the cyber victim because it negatively affects (or has the potential to affect) the physical, psychological and emotional integrity of the affected learner.⁵² Cyber victims have actually reported experiencing 'feelings of depression, low self-esteem, social anxiety, alienation and suicidal ideation' after an incident of cyber bullying.⁵³

Besides the right to human dignity the cyber victim also has certain children's rights which will be the focus of the next section of this paper.

4 Children's rights

Section 28 is the children's clause in South Africa's Constitution. In South Africa a child means a person under the age of 18 years.⁵⁴ The drafters of the Constitution realised the need to draw a distinction between adults and children:

not out of sentimental considerations, but for practical reasons relating to children's greater physical and psychological vulnerability. Children's bodies are

⁴⁸See *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* [2011] ZACC 4 para 202.

⁴⁹This was confirmed in *Dowling v Diocesan College* 1999 3 SA 847 (CPD) where it was found that schools have a duty to protect the human dignity of all learners. In this case, a learner was beaten and humiliated by two prefects. The parents of the bullied learner sued the school board and won their case. According to the court, the assault was conducted by prefects who had been appointed by the school; and that the prefects were acting within the scope of their duties as duly appointed prefects.

⁵⁰(*Minister of Employment and Immigration*) [1999] 170 DLR 4th 1 (SCC).

⁵¹Sending cruel, vicious, and sometimes threatening messages to other learners; creating websites that have stories, cartoons, pictures and jokes ridiculing others; breaking into an email account and sending vicious and embarrassing material to others; engaging someone in instant messaging, tricking that person into revealing sensitive personal information, and forwarding that information to others; posting pictures of classmates online and asking students to rate them on such derogatory features as boring, repulsive, bad smelling, and disgusting; using a digital phone camera to take a photo of a person undressed in the locker room and sending the picture to others. See (n 8).

⁵²See generally De Wet 'The voices of victims and witnesses of school bullying' (2005) *Koers: Bulletin for Christian Scholarship* 709; McQuade *et al*(n 6) 24-26 and Rossouw and Stewart 'Student/learner discipline and bullying: A comparative analysis of legal risk management in schools in Australia and South Africa' (2008) *Acta Academica* 262-263.

⁵³Kowalski, Limber and Agatston *Cyber bullying* (2008) 85.

⁵⁴Section 28(3).

generally frailer, and their ability to make choices generally more constricted, than those of adults. They are less able to protect themselves, more needful of protection, and less resourceful in self-maintenance than adults.⁵⁵

Section 28 is a rather lengthy clause dealing with a number of children's rights.⁵⁶ For the purposes of this paper, however, we will only focus on two specific sections of this provision. According to the children's clause, every child has the right to be protected from maltreatment, neglect, abuse or degradation⁵⁷ and a child's best interests are of paramount importance in every matter concerning the child.⁵⁸

These sections have also found expression in the Children's Act⁵⁹ which was enacted to give effect to the rights of children as contained in the Constitution.⁶⁰ The word 'paramount' in section 28(2) of the Constitution requires a more stringent obligation than that required at international law⁶¹ which merely obliges

⁵⁵*Centre for Child Law v Minister of Justice and Constitutional Development* [2009] ZACC 18 para 26. See also Bray *Human rights in education* (2005) 63-67.

⁵⁶(1) Every child has the right –

- (a) to a name and a nationality from birth;
- (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
- (c) to basic nutrition, shelter, basic health care services and social services;
- (d) to be protected from maltreatment, neglect, abuse or degradation;
- (e) to be protected from exploitative labour practices;
- (f) not to be required or permitted to perform work or provide services that –
 - (i) are inappropriate for a person of that child's age; or
 - (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
- (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be –
 - (i) kept separately from detained persons over the age of 18 years; and
 - (ii) treated in a manner, and kept in conditions, that take account of the child's age;
- (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
- (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section 'child' means a person under the age of 18 years.

⁵⁷Section 28(1)(d).

⁵⁸Section 28(2).

⁵⁹Act 38 of 2005. In this regard, 7(1)(i)(ii) provides that:

Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely- the need to protect the child from any physical or psychological harm that may be caused by subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour.

Section 9 provides that:

In all matters concerning the care, protection and well-being of a child the standard that the child's best interests is of paramount importance, must be applied.

⁶⁰Long title of the Act.

⁶¹Heaton 'An individualized, contextualised and child-centred determination of the child's best interests, and the implications of such an approach in the South African context' (2009) *Journal for Juridical Science* 4.

the child's best interests to be 'a primary consideration'⁶² or 'the primary consideration'.⁶³ However, the fact that a child's best interests are of paramount importance in every matter concerning the child does not mean that the child's best interests must prevail perpetually; nor does it mean that one may disregard all the other constitutional rights; or that the child's best interests may not be limited.⁶⁴ When making a determination according to section 28(2) the correct approach is to apply the 'paramountcy principle in a meaningful way without unduly obliterating other valuable and constitutionally protected interests'.⁶⁵

The Children's Act defines 'abuse' as:

... any form of harm or ill-treatment deliberately inflicted on a child, and includes-

- (a) assaulting a child or inflicting any other form of deliberate injury to a child;
- (b) sexually abusing a child or allowing a child to be sexually abused;
- (c) bullying by another child;
- (d) a labour practice that exploits a child; or
- (e) exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally.⁶⁶

It is indeed interesting that bullying is specifically mentioned in this section. On the basis of the constitutional provisions and the provisions of the Children's Act we can conclude that acts of cyber bullying would constitute ill-treatment deliberately inflicted on a child and would infringe upon a learner's section 28(1)(d) rights.

Thus far we have established that the cyber bully has a right to freedom of expression and that the cyber victim has rights to human dignity and various children's rights. In the following section, we engage in a limitations analysis of the various rights at issue.

5 Limitations analysis

As stated previously, none of the rights in the Bill of Rights are absolute. In fact rights may be limited 'under specific circumstances and in a particular way for the protection of some public interest or the rights of others'.⁶⁷ All rights in the Bill of Rights may therefore be limited in terms of the general limitations provision in section 36 of the Constitution. Section 36 provides that:

- (1) The rights in the Bill of Rights may be limited only in terms of law of general

⁶²Article 3(1) of the United Nations Convention on the Rights of the Child.

⁶³Article 4(1) of the African Charter on the Rights and Welfare of the Child.

⁶⁴Heaton(n 61) 4. See also *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) para 20; *Sonderup v Tondelli* 2001 1 SA 1171 (CC) para 29; and *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* [2009] ZACC 8 para 72-78.

⁶⁵*S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC) para 25.

⁶⁶Section 1.

⁶⁷Rautenbach and Malherbe *Constitutional law* (2009) 342.

application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, freedom, taking into account all relevant factors including –

- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

When a court of law is called upon to make a determination concerning a right (or rights) in the Bill of Rights, it engages in a two stage approach. 'The first is to ask whether the right (or rights) in the Bill of Rights have been infringed by the law or conduct or the respondent'.⁶⁸ In our cyber bullying scenario, the cyber victim's rights to human dignity and the right to be protected from maltreatment, neglect, abuse or degradation have been violated. However, the right of the cyber bully to freedom of expression has also been limited as certain forms of his or her expression are not protected under section 16 of the Constitution.

At the second stage of the enquiry (which is dependent on whether question one was answered positively), the court will enquire as to whether 'the infringement can be justified as a permissible limitation of the right'.⁶⁹ Here the limitations clause requires a 'weighing up of competing values and the balancing of different interests'.⁷⁰ 'Constitutional rights are mutually interrelated and interdependent and form a single constitutional value system'.⁷¹ One such right is the right to freedom of expression. 'Although fundamental to our democracy, the right to freedom of expression is not a paramount value, but must be construed in the context of other values enshrined in our Constitution, in particular, the values of human dignity, freedom and equality'.⁷²

The right to freedom of expression is further limited in the school context in that it is not only regulated by the provisions of the Constitution, but is also regulated by the *Guidelines for a Code of Conduct for Learners*⁷³ which was issued by the Ministry of Education during April 1998. The focus of the guidelines

⁶⁸De Waal and Currie (29)166.

⁶⁹*Ibid.*

⁷⁰*Makwanyane* (n 45) para 104.

⁷¹*De Reuck* (n 33) para 55.

⁷²*S v Khumalo* 2002 5 SA 401 (CC) para 25. In fact the right to human dignity underlies many, if not all, other rights. Malherbe 'Constitutional perspective on the rights and duties of learners and educators' in Beckmann (ed) *Engaging the law and education in a transforming society: A critical chronicle of the South African Education Law and Policy Association, 1996-2005* (2006) and Wolhuthur 'Maintaining discipline in schools: Balancing the rights of educators and of learners' in Beckmann (ed) *Engaging the law and education in a transforming society: A critical chronicle of the South African Education Law and Policy Association, 1996-2005* (2006).

⁷³Notice 776 of 1998.

is on positive discipline⁷⁴ and the need to achieve a culture of tolerance and peace in all schools.⁷⁵

According to section 4.5.1 of the *Guidelines*:

Freedom of expression is more than freedom of speech. The freedom of expression includes the right to seek, hear, read and wear. The freedom of expression is extended to forms of outward expression as seen in clothing selection and hairstyles. However, learner's rights to enjoy freedom of expression are not absolute. Vulgar words, insubordination, and insults are not protected speech. When the expression leads to a material and substantial disruption in school operations, activities or the rights of others, this right can be limited, as the disruption of schools is unacceptable.

Therefore, instances of cyber bullying that are meant to merely embarrass, ostracise, criticise or threaten other learners (as violence can also be emotional or mental) could therefore be classified as vulgar words, insubordination, and insults and would not constitute protected speech under South African law. The limitations placed on the right of the cyber bully to freedom of expression in the school context, is therefore justifiable not only in the interest of protecting human dignity, but also in the interests of maintaining order and discipline in the school environment.

In addition to being a constitutional value and a constitutional right, dignity (according to Woolman⁷⁶):

acts as a cornerstone of both democracy and the Bill of Rights,⁷⁷ informs both our interpretation of the ambit of the specific substantive provisions of the Bill of Rights,⁷⁸ and our limitations analysis of the justification of the limitation of a right or freedom.⁷⁹

Section 4.3 of the *Guidelines for a Code of Conduct for Learners* also restates that 'each learner has the right to have his or her human dignity respected, which includes mutual respect for one another's convictions and cultural traditions'.⁸⁰

Dignity is an important human right and children's dignity rights are specifically of importance ... Children merit special protection by the state ... Society has recognised that childhood is a special stage in life which should be protected.⁸¹

⁷⁴See ss 1.4 and 1.6.

⁷⁵Section 5.2.3. See also *Antonie v Governing Body, Settlers High School* 2002 4 SA 738 para 14.

⁷⁶Woolman 'Dignity' in Chaskalson *Constitutional law of South Africa* (2011) 36-19.

⁷⁷Section 7(1) of the Constitution provides that:

This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

⁷⁸Section 39(1) of the Constitution provides that:

When interpreting the Bill of Rights, a court, tribunal or forum –

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

⁷⁹Section 36 of the Constitution.

⁸⁰Roos 'The physical appearance of learners in public schools' (2003) *TSAR* 793.

⁸¹Lotter 'Protecting children against violence on television: Do the bullets hit home?' (2005) *Child Abuse Research in South Africa* 74.

Also considering the best interests of the child principle at this point in the inquiry (and the negative effect that cyber bullying has on the physical, psychological and emotional integrity of the victim) it would not be reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality to limit the right to dignity of the victim of the cyber bully.

The Children's Act was also enacted with the primary rationale of protecting the most vulnerable members of our society *viz* children in mind. The *Guidelines for a Code of Conduct for Learners* also states that learners should be protected from abuse by adults or other learners.⁸² The placing of limitations on children's rights to be free from abuse and not to be neglected or maltreated would obviate the purpose of the Act and would not be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

Thus, we have established that cyber bullying violates or has the potential to violate certain rights in the Constitution. In this regard we have established a violation of the rights to human dignity and children's rights. But how does the school deal with situations where the rights of some learners have been violated by other learner's through the act of cyber bullying? What laws are available to school principals and educators to discipline such behaviour and to prevent their recurrence? In the next section we look at the current education legislation and policy that could possibly assist educators to deal with acts of cyber bullying generally.

6 Current education legislation

As stated above, the school is an organ of state⁸³ and is also a juristic person with the legal capacity to perform its functions in terms of the South African Schools Act.⁸⁴ However, because a juristic person is an abstract entity and cannot perform all the functions of a natural person, the school has to act through a suitably appointed agent.⁸⁵ In this regard, section 16(1) of the Schools Act provides that the governance of a public school is vested in its governing body. The governing body has numerous functions or responsibilities some of the most important being:

- (a) to promote the best interests of the school and strive to ensure its development through the provision of quality education for all learners at the school;
- (b) to adopt a constitution;
- (c) to develop the mission statement of the school;
- (d) to adopt a code of conduct for learners at the school;

⁸²Section 7.2.

⁸³See (n 12).

⁸⁴See s 15 of the South African Schools Act 84 of 1996.

⁸⁵Bray 'The legal status of schools in the new South African education system' in Beckmann (ed) *Engaging the law and education in a transforming society: A critical chronicle of the South African Education Law and Policy Association, 1996-2005* (2006) 96-98.

- (e) to support the principal, educators and other staff of the school in the performance of their professional functions.

Governing bodies also play a vital role in the discipline of learners. 'Any corrective measures or disciplinary action must however be commensurate with the learner's offence or infraction'.⁸⁶ For example, a trivial offence may demand a warning, or submission of the learner to detention or the withdrawal of certain privileges from the learner whilst a more serious offence would demand corrective measures which may become more severe and may then lead to suspension and expulsion.⁸⁷ 'A governing body may, on reasonable grounds, and as a precautionary measure, suspend a learner who is suspected of serious misconduct from attending school'.⁸⁸ Serious misconduct is not defined in the Schools Act but is defined in the *Guidelines for a Code of Conduct for Learners* and includes amongst others:⁸⁹

- (a) conduct which endangers the safety and violates the rights of others; ...
- (g) harmful graffiti, hate speech, sexism, racism; ...
- (j) disrespect, objectionable behaviour and verbal abuse directed at educators or other school employees or learners;
- (k) repeated violations of school rules or the Code of Conduct; ...
- (m) victimisation, bullying and intimidation of other learners;
- (n) infringement of examination rules; and
- (o) knowingly and wilfully supplying false information or falsifying documentation to gain an unfair advantage at school.⁹⁰

Because victimisation, bullying (we could possibly infer that cyber bullying could also be included here) and the intimidation of other learners is specifically mentioned as serious misconduct in the *Guidelines*, it would warrant more serious corrective measures like suspension or expulsion. The right of the school to suspend a learner is however not absolute, but contains an internal modifier. 'The school may only enforce a suspension after the learner has been granted a reasonable opportunity to make representations to it in relation to such suspension'.⁹¹ This section is in accordance with section 33 of the Constitution and the Promotion of Administrative Justice Act⁹² which essentially provides that:

⁸⁶Section 7.6 of the Guidelines for a Code of Conduct for Learners.

⁸⁷See s 9 of the Schools Act in this regard.

⁸⁸Section 9(1).

⁸⁹ (b) possession, threat or use of a dangerous weapon;
 (c) possession, use, transmission or visible evidence of narcotic or unauthorised drugs, alcohol or intoxicants of any kind;
 (d) fighting, assault or battery;
 (e) immoral behaviour or profanity;
 (f) falsely identifying oneself;
 (i) unlawful action, vandalism, or destroying or defacing school property;
 (k) repeated violations of school rules or the Code of Conduct;

⁹⁰Section 11.

⁹¹Section 9(1).

⁹²Act 3 of 2000 which gives effect to s 33 of the Constitution.

Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.⁹³

Therefore, when a student is suspended, governing bodies must ensure that they comply with following basic elements of procedural fairness which are:

- (i) hearing and notice;
A learner must be given written notice of the time, date and place of the hearing. The learner must also be afforded the opportunity to state or present his/her side of the case, 'if the hearing is to lead to the exercise of a discretion, which could affect the learner's rights, privileges and freedoms'.⁹⁴
- (ii) impartial tribunal;
The decision in a dispute or an administrative proceeding must be made by an impartial tribunal. In education law, the principal and the school governing body are recognised as impartial bodies, 'provided they do not have any personal stake in a hearing or its outcome, and do not act with malice or prejudice'.⁹⁵
- (iii) right to information;
Section 32 of the Constitution makes provision for the right to access to information held by the state; and any information that is held by another person and that is required for the exercise or protection of any rights.
- (iv) right to representation;
'A party to a hearing is usually entitled to legal representation where such assistance is necessary to ensure a fair hearing. Thus, although legal representation is not necessary, or permitted, for all administrative proceedings, it is accepted that a person who is party to a complex case or situation, which has serious consequences, does not have a chance to put his or her case unless he or she has assistance'.⁹⁶
- (v) reasons for the decision; and
Section 33(2) of the Constitution provides that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

⁹³Section 33(1). The rest of the section provides that:

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

⁹⁴Squelch 'The right to administrative justice: The implications for school governing bodies' (2006) *A critical chronicle of the South African Education Law and Policy Association (SAELPA) 1996-2005* 367.

⁹⁵*Ibid.*

⁹⁶Squelch (n 94) 368.

(vi) right to appeal

The law allows learners who have been affected by the decision of an administrative body to appeal against such decision. For example, section 9(4) of the Schools Act makes provision for a learner or the parent of a learner who has been expelled from public school to appeal against the decision of the Head of Department to the Member of the Executive Council.

A governing body may not expel a learner but may only make a recommendation to the Head of the Department to expel a learner from a public school.⁹⁷ The rules regarding procedural fairness must also be adhered to when a learner is expelled from school.

7 Conclusion

Current South African education legislation can deal with cyber bullying to a certain extent. However, there are various lacunae in the law which need to be remedied, and numerous practical solutions which can be identified to curb instances of cyber bullying. In the next part of this paper we identify some of these remedies and solutions.

School authorities are not always knowledgeable on aspects of the law. As a result thereof, it is imperative that training is provided to principals, teachers and other school staff educating them about the various forms, and methods of cyber bullying and the laws which could regulate the practice. Training should also be provided to learners on cyber bullying in general. In this regard, learners should be made aware of their legal rights and the consequences of their actions should they become cyber victims or cyber bullies. Learners should also be encouraged to report instances of cyber bullying and should be educated on eradicating the stereotypes associated with reporting abuse; for example, being labelled a 'snitch'. Such training could be incorporated into the school curriculum.

The school as an organ of state⁹⁸ is under an obligation to protect children by enacting laws or policies that will prohibit the infringement of children's rights. School governing bodies should therefore develop clear anti-cyber bullying policies.⁹⁹ Policies are important because: (a) it allows 'school officials to discharge their responsibilities for the safety of all learners; (b) they are meant to protect the welfare of each individual learner; and (c) they are necessary in order

⁹⁷Section 1(1C)(b).

⁹⁸(N 12).

⁹⁹Neser *et al* (n 5) 139. In South Africa, the Constitutional Court has outlawed practices like corporal punishment in schools because:

It is in breach of rights such as human dignity, equality, freedom and security of the person and children's rights ... and involves a degrading assault upon the physical, emotional and psychological integrity of the person to whom it is administered (*Christian Education South Africa v Minister of Education* 2000 10 BCLR 1051 (CC) para 47.

to clarify and protect the position of school personnel by providing strict and clear guidelines'.¹⁰⁰ 'Policies can be updated to include cyber bullying in an existing school policy'.¹⁰¹ For example, section 4.5.1 of the *Guidelines for a Code of Conduct for Learners* may be extended to prevent expression when a learner uses 'computers or other information technology (IT) devices, such as personal digital assistants or cell phones, to embarrass, harass, intimidate, threaten, or otherwise cause harm to individuals targeted for such abuse'.¹⁰² The definition of serious misconduct under section 11(m) of the *Guidelines for a Code of Conduct for Learners* could be extended to include cyber bullying specifically. School governing bodies could also possibly include a section such as 'acceptable use of technology' in their codes of conduct,¹⁰³ which must be signed by each and every parent of the learner, explained to each individual learner so that he or she is aware of 'what the rules are and what the consequences are for violating them' and displayed at the school.¹⁰⁴ In order to maximise efforts to prevent cyber bullying, schools could also 'supervise and monitor technology use by learners in computer labs and any classrooms that use computers'.¹⁰⁵

School authorities must however be careful that programmes and policies that are based on the core values enshrined in the Constitution should be encouraged rather than basing those policies and programmes on a system of rewards and punishments. The concepts of positive discipline¹⁰⁶ and restorative justice¹⁰⁷ are particularly relevant here. In *Le Roux v Dey (Freedom of Expression*

¹⁰⁰Russo, Varnham and Squelch 'Safety and learner searches in schools in the US, New Zealand and Australia' (2007) *Education LJ* as quoted by Mestry 'School searches and drug testing: Are they an infringement of learner's rights and constitutional values?' (2008) *SAJH* 150.

¹⁰¹McQuade *et al* (n 6) 157.

¹⁰²McQuade *et al* (n 6) ix. See also Wood 'Freedom of expression of learners at South African public schools' (2001) *South African Journal of Education* 144.

¹⁰³*Ibid.*

¹⁰⁴McQuade *et al* 164. Section 3.4 of the *Guidelines for a Code of Conduct for Learners* provides that: 'the Code of Conduct of a school must be displayed at the school and as far as possible be given to each learner in the official language of teaching of the learner when he/she enrolls at a school.'

¹⁰⁵*Ibid.*

¹⁰⁶Section 1.6 of the *Guidelines for a Code of Conduct for Learners* provides that: the purpose of a code of conduct is to promote positive discipline, self-discipline and exemplary conduct, as learners learn by observation and experience.

¹⁰⁷The Child Justice Act 75 of 2008 also makes reference to restorative justice by providing that:

The objectives of this Act are to...

Promote the spirit of *ubuntu* in the child justice system through –

- (i) fostering children's sense of dignity and worth;
- (ii) reinforcing children's respect for human rights and the fundamental freedoms of others by holding children accountable for their actions and safe-guarding the interests of victims and the community;
- (iii) supporting reconciliation by means of a restorative justice response; and
- (iv) involving parents, families, victims and where appropriate, other members of the community affected by the crime in procedures in terms of this Act.

Institute and Restorative Justice Centre as Amici Curiae)¹⁰⁸ the Constitutional Court ordered three learners to tender an unconditional apology to the vice principal of the school for the injury they caused him by transposing the heads and faces of the himself and school principal onto a picture of gay body builders (which one of them had acquired over the Internet) who were sitting naked next to each other in a sexually suggestive position, and thereby advocating a restorative justice approach to Mr Dey's claims.¹⁰⁹ In this regard, section 73 of the Children's Act also provides that:

in any matter concerning a child an approach which is conducive to conciliation and problem solving should be followed and a confrontational approach should be avoided.

Schools have a duty to promote a disciplined and purposeful school environment.¹¹⁰ Materials distributed online or materials created online and then printed for the sole purpose of embarrassing, harassing, intimidating, threatening, or otherwise causing harm to other learners and which are then disseminated at schools 'interferes with the proper order and discipline in the school and infringes upon the fundamental rights of any learner'.¹¹¹ It has therefore been suggested that 'the principal should approve all materials disseminated on school property'.¹¹²

Children should be subject to the authority of the school and its staff members. Their views on what is in their best interests should be encouraged and heard, but the school should be able to overrule those views when they are inconsistent with reasonable educational objectives.¹¹³

The principal may consider the following factors when approving such an application: 'the age of the learners, the specific audience (or readers) of the publications; the nature of the publication and the possible impact that it might have on the school or any other learner'.¹¹⁴ Prior approval of the school principal is however limited. For example, no learner is going to send their tweets, facebook messages, sms messages or bbms to the principal for prior approval.

¹⁰⁸[2011] ZACC 4 para 14. The picture was passed on to two of the learner's friends and was also circulated amongst many of the schoolchildren and eventually ended up on the school notice board. The learner and his two friends were disciplined by the school authorities for their conduct, however, the vice principal, Mr Dey decided to charge the learners criminally. He instituted a claim for sentimental damages and infringement of his dignity and reputation. In the courts of first instance, and of appeal, Mr Dey's claims were upheld and he was awarded an amount of R 45 000. After five years of litigation, the matter eventually ended up in the Constitutional Court. Mr Dey's claims were once again upheld but he was only awarded an amount of R 25 000.

¹⁰⁹Paragraph 197.

¹¹⁰Section 8(2).

¹¹¹Van Vollenhoven and Glenn 'Learner's right to freedom of written expression' (2004) *South African Journal of Education* 152.

¹¹²*Ibid.*

¹¹³Malherbe 'The constitutional dimensions of the best interests of the child as applied in education' (2008) *TSAR* 270.

¹¹⁴*Ibid.*

However, parents can play a pivotal role here. The first thing they need to do is to educate themselves about 'digital youth culture, social computing, ways in which social computing is harmful, and cyber bullying as one important form of online abuse and possible crime'.¹¹⁵ Next, parents need to establish and enforce acceptable rules of Internet and cell phone usage in consultation with their children. Next they need to supervise and monitor the cell phone and Internet usage of their children. For example, filtering or tracking software can be used to block access to undesirable websites or to trace sites that have been visited or programmes restricting access may be implemented preventing the child from browsing the Internet or playing games during certain times.

Although laws may assist school authorities in dealing with cyber bullying, it is ultimately the collective responsibility of parents, educators, learners, the police and the community at large that will have the greatest impact on the eradication of cyber bullying in the future. These stakeholders must work together to educate learners about the impact of and consequences of cyber bullying. More importantly though, we must all ensure that the value system of the school (that is, its policies, code of conduct ... etc) and the home correspond to the values entrenched in the Constitution:

Values inform people's beliefs, attitudes and behaviour, and a commitment to eradicating and preventing violations of human rights, respect for human dignity, promotion of tolerance and respect for belief systems, and the protection of all life.¹¹⁶

If we teach learners or children to value and respect the rights of others cyber bullying will probably no longer pose any problem for democratic societies.

¹¹⁵McQuade *et al* (n 6) 140.

¹¹⁶Mestry (n 100) 151.