

# PROVIDING A LEGAL DEFINITION FOR CYBERBULLYING IN SOUTH AFRICA

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## SUMMARY

Traditional bullying is not a new phenomenon, and this behaviour has plagued many countries. It has received a wide interpretation by many academics seeking to define this concept. Bullying itself may take various forms and it has developed and adapted to changing times throughout history. One such adaptation arose owing to the expansion of the Internet – in the form of online bullying or cyberbullying. Although bullying has been given various definitions, cyberbullying in South Africa has not been given a legal definition, and perpetrators are therefore not disciplined in the appropriate manner. Introducing a legal definition would assist law enforcement to regulate cyberbullying and protect victims from harm. Advances in technology have created many opportunities for people to communicate across the world. At the same time, they have also created unintended consequences, such as allowing online users to harm each other. Although bullying has existed for a long time, the threat of cyberbullying online is arguably worse than its traditional counterpart. Scholars have attempted to provide definitions of cyberbullying. However, there is confusion and there are contradictory views regarding the characteristics of this conduct. Recommendations are made on what the requirements should be for a legal definition of cyberbullying. A comparative analysis of the United States and Canada is relied upon to establish clarity on this conduct.

## 1 INTRODUCTION

Bullying has existed for a long time and has been prevalent mainly in schools and has therefore resulted in schools enacting codes of conduct in attempts to address and curb bullying. Advances in technology have also had the unintended consequence of allowing bullying to manifest online and this became known as “cyberbullying”. South African law cannot effectively address and regulate cyberbullying conduct if there is no adequate legal definition. A failure to define this conduct may therefore prove to be an impediment to its regulation. Authors have acknowledged that cyberbullying is a social problem that requires a legal response.<sup>1</sup> One purpose of the law should be to protect the Internet user against acts of cyberbullying, which one author has described as the “cancer” of social networks.<sup>2</sup> The seriousness of cyberbullying cannot be understated. Constant cyberbullying

<sup>1</sup> Murray *Information Technology Law: The Law and Society* (2016) 164.

<sup>2</sup> Morgese “Cultivating the ‘Anti-Bullying Bill of Rights’ throughout the Nation: What Others Can Learn from the Garden State” 2013 *Nova Law Review* 351 354.

may result in “cyberbullicide”, which refers to unrelenting cyberbullying (usually on social media) resulting in the suicide of the victim.<sup>3</sup>

Cyberbullying is arguably more damaging to victims than traditional bullying because extensive information can be quickly uploaded and spread widely through the Internet for others to see, thus making the effects of cyberbullying greater.<sup>4</sup> “Widely” means that messages and images can be sent multiple times to different users, thereby increasing the degradation of the victim.<sup>5</sup> The omission of specific cyberbullying legislation creates difficulty for victims wishing to obtain adequate redress, as there is no clear approach to regulating this conduct.<sup>6</sup> Cyberbullying involves multiple forms, and scholars have submitted that this creates difficulty in defining it. As there is no universal definition of cyberbullying, it is problematic to determine accurately the prevalence of this conduct.<sup>7</sup>

## 2 BULLYING

A “bully” may be defined as someone who demeans or harasses others, particularly those who are seen as inferior to the bully.<sup>8</sup> Traditional bullying may be defined as:

“Repeated and harmful behaviour that is deliberate and harassing, with the intention to cause, or should be known to cause, fear, intimidation, humiliation, distress and/or harm to another person’s body, feelings, self-esteem or reputation.”<sup>9</sup>

Olweus defines bullying of a student as being exposed, repeatedly and over time, to negative, intentional and aggressive actions with the intent to inflict injury or discomfort to the victim by other students.<sup>10</sup> Scholars have also accepted that bullying involves “intentional, aggressive behavior, carried out repeatedly against victims who were unable to defend themselves”.<sup>11</sup> Bullying is therefore unwanted, deliberate and repetitive behaviour that

<sup>3</sup> Chisholm “Review of the Status of Cyberbullying and Cyberbullying Prevention” 2014 *Journal of Information Systems Education* 77 78.

<sup>4</sup> Dooley, Pyzalski and Cross “Cyberbullying Versus Face-to-Face Bullying: A Theoretical and Conceptual Review” 2009 *Journal of Psychology* 182 187.

<sup>5</sup> Ahlfors “Many Sources, One Theme: Analysis of Cyberbullying Prevention and Intervention Websites” 2010 *Journal of Social Sciences* 515 516.

<sup>6</sup> Cassim “Formulating Adequate Legislation to Address Cyber-Bullying: Has the Law Kept Pace With Advancing Technology?” 2013 *South African Journal of Criminal Justice* 1 6.

<sup>7</sup> Langos “Cyberbullying: The Shades of Harm” 2014 *Psychiatry, Psychology and Law* 1 2.

<sup>8</sup> Willard “Educator’s Guide to Cyberbullying, Cyberthreats and Sexting” (2005) <https://cdn.ymaws.com/www.safestates.org/resource/resmgr/imported/educatorsguide.pdf> (accessed 2018-06-17) 1 5.

<sup>9</sup> Mackay “Respectful and Responsible Relationships: There’s No App for That” *Report of the Nova Scotia Task Force on Bullying and Cyberbullying* (29 February 2012) <https://antibullying.novascotia.ca/sites/default/files/Respectful%20and%20Responsible%20Relationships%2C%20There%27s%20no%20App%20for%20That%20-%20Report%20of%20the%20NS%20Task%20Force%20on%20Bullying%20and%20Cyberbullying.pdf> (accessed 2020-10-01) 1 39.

<sup>10</sup> Olweus “Annotation: Bullying at School: Basic Facts and Effects of a School Based Intervention Program” 1994 *Journal of Child Psychology and Psychiatry* 1171 1173.

<sup>11</sup> Cartwright “Cyberbullying and the Law of the Horse: A Canadian Viewpoint” 2017 *Journal of Internet Law* 14 15.

creates a power imbalance between perpetrator and victim.<sup>12</sup> It is characterised by repeated and intentional physical or emotional aggression, including humiliation, teasing, mockery, harassment, violence or a threat of violence, social exclusion and the spreading of rumours.<sup>13</sup> Repeated acts of traditional bullying not only instil fear in the victim, but also cause psychological harm owing to its ongoing nature.<sup>14</sup> The intention of the bully is to inflict harm on the victim using their power or even knowledge to overwhelm the victim.<sup>15</sup> Farrington opines that it is common in bullying that the victim and bully know each other, and it occurs where a more powerful child repeatedly oppresses a less powerful child over a prolonged period.<sup>16</sup> American scholars submit that bullying may be defined as repeated and intentional physical and/or emotional aggression against another in which there is a power differential between the aggressor and the victim.<sup>17</sup>

De Wet therefore proposes the following characteristics of bullying:

- a) intentional behaviour;
- b) frequency and duration of the behaviour;
- c) reaction of the victim;
- d) a power imbalance between bully and victim;
- e) misuse of the power owing to the imbalance between the parties; and
- f) the inability of the victim to defend him- or herself.<sup>18</sup>

Bullying may include a wide range of conduct, including but not limited to insulting, demeaning or intimidating behaviour that has the effect of lowering the self-esteem or self-confidence of the victim.<sup>19</sup> Although bullying usually comprises direct contact, it may also include other forms such as physical, verbal, psychological and indirect acts.<sup>20</sup>

Farrington submits that because bullying involves children, it causes immediate harm or distress to the victim and may cause long-term negative consequences.<sup>21</sup> This is because bullying is aimed at destroying social relationships, personal self-esteem and social status.<sup>22</sup> Patchin and Hinduja summarise the possible impacts bullies may have on victims:

- a) suicidal tendencies;

<sup>12</sup> Shariff and Hoff "Cyber Bullying: Clarifying Legal Boundaries for School Supervision in Cyberspace" 2007 *International Journal of Cyber Criminology* 76 80.

<sup>13</sup> Neiman, Robers and Robers "Bullying: A State of Affairs" 2012 *Journal of Law & Education* 603 607–608.

<sup>14</sup> Dooley *et al* 2009 *Journal of Psychology* 182 183.

<sup>15</sup> Kowalski, Morgan and Limber "Traditional Bullying as a Warning Sign of Cyberbullying" 2012 *School Psychology International* 505–506.

<sup>16</sup> Farrington "Understanding and Preventing Bullying" 1993 *Crime and Justice* 381 383–384.

<sup>17</sup> Neiman *et al* 2012 *Journal of Law & Education* 603 607–608.

<sup>18</sup> De Wet "School Principals' Bullying Behaviour" 2010 *Acta Criminologica* 96 113–114.

<sup>19</sup> Rycroft "Workplace Bullying: "Unfair Discrimination, Dignity Violation or Unfair Labour Practice?" 2009 *Industrial Law Journal* 1431 1434.

<sup>20</sup> Van der Bijl "Corporate "Assault": Bullying and the Aegis of Criminal Law (Part 1)" 2014 *Tydskrif vir die Suid-Afrikanse Reg* 482 483. An example of an indirect act is social exclusion, in which people indirectly exclude another from their social group or activities and the victim is therefore isolated or victimised.

<sup>21</sup> Farrington 1993 *Crime and Justice* 381 382.

<sup>22</sup> Dooley *et al* 2009 *Journal of Psychology* 182 185.

- b) eating disorders;
- c) depression;
- d) other chronic illnesses;
- e) social exclusion;
- f) running away from home; and
- g) responding with acts of violence or engaging in criminal activities.<sup>23</sup>

Owing to the effects of bullying, it is submitted that a clear definition is required for proper regulation and prevention of bullying, in addition to cyberbullying. To make matters worse, bullies no longer require physical contact to bully another as technology has allowed bullies to contact their victims through mobile devices and home computers.<sup>24</sup>

### 3 CYBERBULLYING

Historically, bullying consisted of youth violence that affected children and teenagers within the school environment. However, technology has developed to facilitate online aggression and has been termed “cyberbullying”.<sup>25</sup> Since the Internet was introduced, the traditional definition of bullying has undergone certain changes: electronic communications introduced cyberbullying, which is not defined by the face-to-face interaction associated with traditional bullying.<sup>26</sup> Bullies no longer require physical contact to bully another as technology has allowed bullies to contact their victims through mobile devices and home computers.<sup>27</sup> A major issue concerning cyberbullying is that attempts to curb this offence may not keep up with the rapid development of technology.<sup>28</sup> It is therefore crucial to ensure that a definition of cyberbullying can apply to current and future forms of cyberbullying.

Cassim defines cyberbullying as the use of digital technology or technological devices by a person to threaten, embarrass, harass, hurt or humiliate another person.<sup>29</sup> A “cyberbully” is therefore defined as someone who repeatedly uses electronic media to cause harm or humiliation to another person online; the victim may be a targeted individual or an unknown random victim.<sup>30</sup> Although scholars have attempted to define cyberbullying, there is no consistency in the definition of this concept.<sup>31</sup> It may be defined as any intentional, repetitive and harmful conduct towards

<sup>23</sup> Patchin and Hinduja “Bullies Move Beyond the Schoolyard: A Preliminary Look at Cyberbullying” 2006 *Youth Violence and Juvenile Justice* 148 151.

<sup>24</sup> Beran and Li “The Relationship Between Cyberbullying and School Bullying” 2007 *Journal of Student Wellbeing* 16.

<sup>25</sup> Patchin and Hinduja 2006 *Youth Violence and Juvenile Justice* 148.

<sup>26</sup> Cartwright 2017 *Journal of Internet Law* 14 15.

<sup>27</sup> Beran *et al* 2007 *Journal of Student Wellbeing* 16.

<sup>28</sup> Smit “Cyberbullying in South African and American Schools: A Legal Comparative Study” 2015 *South African Journal of Education* 1 4.

<sup>29</sup> Cassim 2013 *South African Journal of Criminal Justice* 1 2.

<sup>30</sup> Ahlfors 2010 *Journal of Social Sciences* 515 516.

<sup>31</sup> Burton and Mutongwizo “Inescapable Violence: Cyber Bullying and Electronic Violence Against Young People in South Africa” 2009 *Centre for Justice and Crime Prevention* issue paper no 8 1 3.

another person through electronic means.<sup>32</sup> Anderson and Sturm suggest that cyberbullying is the new form of bullying that affects children because electronic devices facilitate communication and socialisation, which is often deliberate, hostile and repetitive in this group.<sup>33</sup>

To make regulating cyberbullying easier, identifying its characteristics may prove useful in establishing its conduct. Below is a suggested list of the characteristics of cyberbullying.

### 3 1 Characteristics of cyberbullying

#### 3 1 1 Children

##### (i) South Africa

Smit argues that although the terms “cyberbullying” and “cyber harassment” are sometimes used interchangeably, cyberbullying usually applies to the electronic harassment of minors.<sup>34</sup> Other South African scholars agree with this sentiment and propose that cyberbullying involves children predominantly.<sup>35</sup> Burton and Mutongwizo submit that cyberbullying is a danger most commonly related to young people and children, owing to their vulnerability when making use of online platforms and applications.<sup>36</sup> Cassim opines that cyberbullying involves adolescents, which encompasses teenagers, minors and children.<sup>37</sup> It is submitted that it is important to determine to which age group cyberbullying applies because the remedies may differ according to the age of the perpetrator.

##### (ii) United States (US)

Schwartz submits that cyber harassment, cyberstalking and cyberbullying are often used interchangeably when referring to harmful online conduct. However, cyberbullying pertains to minors, whereas similar conduct relating to adults constitutes cyber harassment or cyberstalking and this indicates that age plays an important defining feature in establishing the particular

<sup>32</sup> Du Preez and Prinsloo “An Exploration of Bullying in School Context with Specific Focus on Cyberbullying as a Form of Cybercrime in Tshwane, Gauteng” 2017 *Acta Criminologica* 103 104–105.

<sup>33</sup> Anderson and Sturm “Cyberbullying From Playground to Computer” 2007 *Young Adult Library Services* 24–25. The authors submit that children are often cyberbullied by their friends, peers or anonymous students online. The authors further suggest that older children are more likely to commit and experience cyberbullying than younger children because older children have more access to and a better understanding of electronic devices and of the Internet.

<sup>34</sup> Smit 2015 *South African Journal of Education* 1 3.

<sup>35</sup> Laubscher and Van Vollenhoven “Cyberbullying: Should Schools Choose Between Safety and Privacy?” 2015 *Potchefstroom Electronic Law Journal* 2218 2249.

<sup>36</sup> Burton and Mutongwizo 2009 *Centre for Justice and Crime Prevention, Issue Paper No 8* 11–6. The authors argue that young people are the group most at risk because they are vulnerable targets online, especially in terms of instant messaging.

<sup>37</sup> Cassim 2013 *South African Journal of Criminal Justice* 1 2. In his fn 3, Cassim describes cyberbullying as conduct committed by a group of people, usually adolescents. Children are therefore a key element in the definition of cyberbullying.

type of conduct.<sup>38</sup> Smith concurs and states that “cyber harassment” and “cyberbullying” are often used interchangeably by scholars; other scholars acknowledge that cyberbullying involves harassment between minors, usually within the school context.<sup>39</sup>

Fukuchi is also of the view that the major difference between cyber harassment and cyberbullying is that cyberbullying involves the victimisation of minors by other minors, whereas cyber harassment involves online harassment between adults.<sup>40</sup> Cyberbullying, therefore, does not occur if an adult harasses or bullies a minor, and only includes acts by a minor perpetrated toward another minor.<sup>41</sup>

### (iii) Canada

Scholars have concluded that cyberbullying is most common and harmful against adolescents.<sup>42</sup> A major issue in addressing cyberbullying in Canada is that there is no accepted definition of the phenomenon and this is partly owing to the various forms it may take, using different technologies.<sup>43</sup> The department of justice acknowledges that the definitions of cyberbullying and cyber harassment often overlap: some incidents that are classified as cyberbullying may also be criminal harassment under section 264 of the Criminal Code. However, the main difference between the two types of conduct is that cyberbullying is used to describe harmful use of technology among students.<sup>44</sup>

<sup>38</sup> Schwartz “Criminal Liability for Internet Culprits: The Need for Updated State Laws Covering the Full Spectrum of Cyber Victimization” 2009 *Washington University Law Review* 407 409–410. The author argues that students and juveniles are usually involved in cyberbullying.

<sup>39</sup> Smith “Protection of Children Online: Federal and State Laws Addressing Cyberstalking, Cyberharassment, and Cyberbullying” (19 October 2009) Homeland Security Digital Library <https://www.hsdl.org/?abstract&did=735549> (accessed 25 May 2020-05-25) 1 4. See also National Conference of State Legislatures “State Cyberstalking, Cyberharassment and Cyberbullying Laws” (20 December 2010) <https://www.csg.org/sslfiles/dockets/2012cycle/32B/32Bdocmins/Cyberstalking,%20Cyberharassment%20and%20Cyberbullying%20Laws.pdf> (accessed 2020-07-30).

<sup>40</sup> Fukuchi “A Balance of Convenience: The Use of Burden-Shifting Devices in Criminal Cyber Harassment Law” 2011 *Boston College Law Review* 289 292.

<sup>41</sup> Stringer “Cyberbullying: Louisiana’s Solution to Confronting the Latest Strain of Juvenile Aggression” 2012 *Louisiana Law Review* 1129 1134.

<sup>42</sup> Cappadocia, Craig and Pepler “Cyberbullying: Prevalence, Stability, and Risk Factors During Adolescence” 2013 *Canadian Journal of School Psychology* 171 172–173. According to these authors, cyberbullying was at its peak during a student’s middle-school years. See also Talwar, Gomez-Garibello and Shariff “Adolescents’ Moral Evaluations and Ratings of Cyberbullying: The Effect of Veracity and Intentionality Behind the Event” 2014 *Computers in Human Behavior* 122 123.

<sup>43</sup> Broll, Dunlop and Crooks “Cyberbullying and Internalizing Difficulties Among Indigenous Adolescents in Canada: Beyond the Effect of Traditional Bullying” 2018 *Journal of Child Adolescent Trauma* 71–72. See also Deschamps and Mcnutt “Cyberbullying: What’s the Problem?” 2016 *Canadian Public Administration* 45 46. The authors allude to the fact that there are still problems and debates surrounding the definition of cyberbullying in Canada.

<sup>44</sup> Department of Justice “A Handbook for Police and Crown Prosecutors on Criminal Harassment” (9 January 2017) <https://www.justice.gc.ca/eng/p-pr/cj-jp/fv-vf/har/EN-CHH2.pdf> (accessed 2020-10-01) 1 17.

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It is clear from the submissions of other scholars that certain harmful online conduct directed at children, and particularly students, will constitute cyberbullying.

### 3 1 2 *Intention*

#### (i) South Africa

As a result of cyberbullying involving children, one must be careful in defining its conduct to avoid punishing non-actionable conduct. The *Le Roux* case also set out important considerations regarding children:

- a) They are vulnerable and immature and are still developing emotionally and intellectually.
- b) They have easy access to electronic devices and often experiment with them, which may lead to the creation of inappropriate messages or images.
- c) They sometimes react unreasonably and spontaneously and without thinking.
- d) They often like to make jokes about others that can be bland or tasteless.
- e) Expression is vitally important to the development of children, and the Constitution affords appropriate protection for freedom of speech that is in their best interests.<sup>45</sup>

Burton and Mutongwizo argue that the elements of cyberbullying are similar to bullying in that the key element is the repeated nature of the act of intentional aggression towards another.<sup>46</sup> The main assessment should be whether the perpetrator intended to harm a victim because this is inherent in what makes cyberbullying morally wrong.<sup>47</sup> These arguments illustrate that the elements of cyberbullying are interrelated and do not exist in isolation. A perpetrator must intend on causing harm to the victim, or a victim must have suffered harm as a result of the perpetrator's willful act.

It is submitted that, because there is little South African legal authority on cyberbullying, it is still unclear as to how the intention element should be assessed. This is also important considering that cyberbullying involves children, and some children may not possess the mental capacity to appreciate the nature of their wrongdoing, as stated in the *Le Roux* case. At the same time, a child who is cyberbullied by another child should be allowed to obtain redress for harmful conduct. Intention should therefore be analysed together with repetitive harmful conduct, because a repetitive wrongful act may indicate an intention to cause harm to another.

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<sup>45</sup> *Le Roux v Dey* 2011 (3) SA 274 CC par 57.

<sup>46</sup> Burton and Mutongwizo 2009 *Centre for Justice and Crime Prevention Issue Paper No 8 1*.

<sup>47</sup> Langos 2014 *Psychiatry, Psychology and Law* 1 5.

## (ii) US

In the US, the intention requirement focuses on whether the conduct was committed wilfully. The Megan Meier Cyberbullying Prevention Bill<sup>48</sup> was never passed but it contained useful information regarding cyberbullying. For example, the Bill defined cyberbullying as:

“any communication, with the intent to coerce, intimidate, harass, or cause substantial emotional distress to a person, using electronic means to support severe, repeated, and hostile behavior.”<sup>49</sup>

As there is no explicit federal legislative definition of cyberbullying, one must rely on definitions provided by scholars. Hinduja and Patchin argue that cyberbullying involves wilful and repeated harm inflicted through the medium of electronic text.<sup>50</sup> Stringer submits that the online behaviour must be intentional or deliberate and not merely accidental.<sup>51</sup> This element considers whether the act in question is purposeful or committed deliberately to cause another harm.<sup>52</sup> The intention element may be assessed in two ways: first, as to whether the intention in sending the electronic communication was to harm the victim; and secondly, a foreseeability assessment, as to whether the cyberbully intended their electronic communication to be spread to a large audience, where it might also be forwarded by others online.<sup>53</sup>

Rodkin and Fischer argue that, since cyberbullying involves children as both victims and perpetrators, the law may revisit the requirement of intention because cyberbullying may include conduct that is reckless or negligent in the use of electronic media.<sup>54</sup> This is important in instances where children play harmful jokes or attempt to tease others online; there may not be an intention to bully another online, but the conduct may negligently cause harm to another child.

## (iii) Canada

Canadian Bill Belsey is regarded as one of the first people to coin the term “cyberbullying”. He defined it as

“[t]he use of information and communication technologies to support deliberate, repeated, and hostile behaviour by an individual or group, that is intended to harm others.”<sup>55</sup>

<sup>48</sup> H.R.1966 – 111th Congress (2009–2010).

<sup>49</sup> S 3(a) of the Megan Meier Cyberbullying Prevention Bill.

<sup>50</sup> Patchin and Hinduja 2006 *Youth Violence and Juvenile Justice* 148 152–153.

<sup>51</sup> Stringer 2012 *Louisiana Law Review* 1129 1134.

<sup>52</sup> Patchin and Hinduja “Measuring Cyberbullying: Implications for Research” 2015 *Aggression and Violent Behavior* 69 70.

<sup>53</sup> Rodkin and Fischer “Cyberbullying From Psychological and Legal Perspectives” 2012 *Missouri Law Review* 619 623.

<sup>54</sup> Rodkin and Fischer 2012 *Missouri Law Review* 619 624.

<sup>55</sup> See Belsey “Cyberbullying: An Emerging Threat to the ‘Always On’ Generation” (24 March 2019) <http://www.billbelsey.com/?cat=13> (accessed 2020-07-19); see also Kift, Campbell and Butler “Cyberbullying in Social Networks and Blogs: Legal Issues for Young People and Schools” 2010 *Journal of Law, Information and Science* 60 62.

Cases have also attempted to define cyberbullying. One court gave the following definition:

“The use of electronic technology, including social media, text messaging, websites and email, in a manner that is intended to cause, or should reasonably be known to cause, fear, intimidation, humiliation, distress or other forms of harm to another person’s body, feelings, self-esteem, reputation or property.”<sup>56</sup>

Some Canadian scholars have argued that cyberbullying can also include unintentional conduct because children often do not understand and do not appreciate the difference between jokes and intentional harm.<sup>57</sup> In other words, a perpetrator may not intend causing harm, but nevertheless sends a communication that is likely to cause the victim harm. The intention requirement may also be difficult to prove because one cannot easily determine the emotional responses of parties involved, or the tone of online communications.<sup>58</sup> Yet, on the basis of such communications, one is assessing whether there is an intention to bully through online means or whether the cyber bully was reckless in their communications. This contrasts to Belsey’s definition of cyberbullying provided earlier, where electronic communication is intended to cause harm to another. Again, these elements cannot be viewed in isolation because the use of technology to harass, ridicule or insult another indicates an intention to cause harm to that person.<sup>59</sup>

The definitions above stipulate that the communication can be sent either maliciously with the intention of harming another or recklessly, involving a risk of harm to another person. This indicates that both an objective and subjective standard may be used to determine whether the perpetrator caused harm to the victim. There are, however, no definitions of “malicious” or “reckless” in the legislation. In *Crouch v Snell*,<sup>60</sup> the court defined “malice” as “acting with culpable intent”.<sup>61</sup>

A crucial issue raised by scholars is the importance of identifying *whose* perspective is adopted for purposes of a definition of cyberbullying; if one adopts the perpetrator’s perspective, then the focus is on the intent of the bully and the bully may say they did not think their conduct would be hurtful;<sup>62</sup> whereas if one adopts the victim’s perspective, then one relies on the impact of the victim who may be sensitive rather than objective, indicating the need to adopt a compromise perspective that relies on the reasonable victim in the circumstances and how they might regard the cyberbullying.<sup>63</sup> Mackay proposes that the reasonable victim approach is

<sup>56</sup> *Yenovkian v Gulian* 2019 ONSC 7279 par 60.

<sup>57</sup> Talwar *et al* 2014 *Computers in Human Behavior* 122.

<sup>58</sup> Vaillancourt, Faris and Mishna “Cyberbullying in Children and Youth: Implications for Health and Clinical Practice” 2017 *The Canadian Journal of Psychiatry* 368 369.

<sup>59</sup> Kift *et al* 2010 *Journal of Law, Information and Science* 60 63.

<sup>60</sup> 2016 346 CRR (2d) 273.

<sup>61</sup> *Crouch v Snell supra* par 80.

<sup>62</sup> Mackay <https://antibullying.novascotia.ca/sites/default/files/Respectful%20and%20Responsible%20Relationships%2C%20There%27s%20no%20App%20for%20That%20-%20Report%20of%20the%20NS%20Task%20Force%20on%20Bullying%20and%20Cyberbullying.pdf> 1 41.

<sup>63</sup> *Ibid.*

correct – where the perspective focuses on the victim and responds to the problem, while also trying to correct the negative impact on victims.<sup>64</sup>

### 3 1 3 *Aggression and harm*

#### (i) South Africa

Online aggression is a key characteristic of cyberbullying. However, some types of cyberbullying may be more harmful than others; in some instances, the harm may be trivial.<sup>65</sup> There are different forms of cyberbullying; the harm also depends on how widely the communication is spread online, which may exacerbate the effect on a victim. Popovac and Leoschut argue that the use of different types of technology in committing cyberbullying may result in differing levels of harm.<sup>66</sup> Some communications posted online may merely be intended as cyber jokes and not to cause harm to the victim. However, although intended as a joke, it may not be perceived as one.<sup>67</sup> This is where the intention element becomes important.

In South Africa, there is no clear test to determine whether victims have suffered harm in relation to cyberbullying. The question is whether South Africa should opt for a subjective and or an objective test. One must then also rely on comparative analysis to determine how other jurisdictions have defined such harmful conduct. A final determining factor of harm will depend on what type of cyberbullying has been committed.<sup>68</sup>

#### (ii) US

Scholars characterise cyberbullying as an act of aggression that is intended to cause harm through repetitive conduct occurring between individuals whose relationship involves a power imbalance.<sup>69</sup> Goodno opines that cyberbullying may cause significant harms to victims.<sup>70</sup> It has been proposed

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<sup>64</sup> *Ibid.*

<sup>65</sup> Langos 2014 *Psychiatry, Psychology and Law* 1 16.

<sup>66</sup> Popovac and Leoschut “Cyber Bullying in South Africa: Impact and Responses” 2012 *Centre for Justice and Crime Prevention Paper No 13* 1 4–5. The authors submit that people will suffer differing degrees of harm depending on the type of cyberbullying committed. They corroborate their view by way of illustration in which a person receiving an aggressive text message may experience a different effect compared to someone who is defamed on a public platform.

<sup>67</sup> Vandebosch and Van Cleemput “Defining Cyberbullying: A Qualitative Research Into the Perceptions of Youngsters” 2008 *Journal of CyberPsychology & Behavior* 499 501.

<sup>68</sup> The types or forms of cyberbullying are discussed later on in this research. As will be seen, more severe forms of cyberbullying may cause the victim more distress than other forms. Every case will therefore have to be determined on its own merits.

<sup>69</sup> Whittaker and Kowalski “Cyberbullying via Social Media” 2015 *Journal of School Violence* 11 11–12.

<sup>70</sup> Goodno “How Public Schools Can Constitutionally Halt Cyberbullying: A Model Cyberbullying Policy That Considers First Amendment, Due Process and Fourth Amendment Challenges” 2011 *Wake Forest Law Review* 641 644.

that cyberbullying may cause severe psychological, emotional and social harm to victims.<sup>71</sup>

Patchin and Hinduja aver that online harm may be difficult to establish because harm focuses on the effect on the victim and is often subjective. However, they propose that harm may refer to physical, emotional, psychological or behavioural harm. Barnett submits that harm generally refers to a reasonable fear of harm and not physical harm, and the author further suggests that most US statutes rely on educational harm – harm that has the effect of disrupting or substantially interfering with a student's school performance.<sup>72</sup> Fenn highlights two tests that may be used to determine harm: first one analyses the defendant's conduct and whether the harm would not have occurred but for the defendant's conduct; secondly, one asks whether the defendant's conduct is material and a substantial factor in causing harm to another.<sup>73</sup> These proposals are useful for South Africa in establishing its own assessment of whether harm has occurred as a result of cyberbullying.

### (iii) Canada

Cyberbullying may also be known as cyber aggression, electronic bullying, or Internet harassment and may simply be defined as aggression that occurs via technology or through the Internet.<sup>74</sup> Li submits that cyberbullying may have several negative effects and the ability to inflict serious psychological, emotional, or social harm.<sup>75</sup> Other scholars have argued that the harmful effects of cyberbullying include physical and emotional harm, isolation, loss of reputation, low self-esteem and in extreme cases, suicide.<sup>76</sup>

In *R v PSD*,<sup>77</sup> the court stated that the transmission of intimate images causes significant harm, especially where consent has not been granted and may result in severe emotional trauma to victims where others can access such images.<sup>78</sup> The court held further that this trauma exists particularly when victims are young persons and females. When the conduct constitutes cyberbullying, young women tend to take their own lives owing to the effect of online torment.<sup>79</sup> The aggressive conduct therefore causes some form of reasonable harm to the victim.

<sup>71</sup> Patchin and Hinduja 2006 *Youth Violence and Juvenile Justice* 148 155. This may stem from public embarrassment as a victim's online life may have an effect in the real world. The authors argue there is sometimes no separation between online and offline as rumors and mistreatment that originated online could also continue offline.

<sup>72</sup> Barnett "Cyberbullying: A New Frontier and a New Standard: A Survey of and Proposed Changes to State Cyberbullying Statutes" 2009 *Quinnipiac Law Review* 579 598.

<sup>73</sup> Fenn "A Web of Liability: Does New Cyberbullying Legislation Put Public Schools in a Sticky Situation?" 2013 *Fordham Law Review* 2729 2745–2746.

<sup>74</sup> Shapka, Onditi and Collie "Cyberbullying and Cybervictimization Within a Cross-Cultural Context: A Study of Canadian and Tanzanian Adolescents" 2018 *Child Development* 89.

<sup>75</sup> Li "Cyberbullying in Schools: An Examination of Preservice Teachers' Perception" 2008 *Canadian Journal of Learning and Technology* 75 76.

<sup>76</sup> Talwar *et al* 2014 *Computers in Human Behavior* 122.

<sup>77</sup> 2016 BCPC 400.

<sup>78</sup> *R v PSD supra* par 9.

<sup>79</sup> *Ibid.*

### 3 1 4 Repetition

#### (i) South Africa

Although cyberbullying may include similar traits to traditional bullying, the element of repetitiveness may become an issue in acts of cyberbullying. A problem with requiring repetition is that it may have the consequence of dismissing a single incident, although such an incident may still have a severe effect on the victim. A single aggressive act online may result in continued and widespread harm to the victim because the act is available online where it can be relived repeatedly or distributed widely.<sup>80</sup> Historically, bullying has always been regarded as repetitive conduct and therefore cyberbullying may follow this trait. The comparative analysis in other jurisdictions addresses this issue.

#### (ii) US

According to US scholars, online acts of bullying are often repeated towards another user, and it is not usually a once-off incident, as is argued below. Patchin and Hinduja propose that the element of repetition is one of the most important, and easily identifiable facets of bullying.<sup>81</sup> Schwartz argues that a once-off act would not constitute cyber victimisation because it may overly or unfairly penalise a perpetrator who has committed such conduct out of anger, as opposed to someone who has engaged in repetitive acts.<sup>82</sup>

Patchin and Hinduja aver that one online publication may not constitute cyberbullying. However, some communications may “go viral” and a single post that is visible and shareable by others may meet the criterion of repetition in cyberbullying if there is evidence of distribution.<sup>83</sup> It has been argued, therefore that the repetition requirement in cyberbullying may feature in various ways, such as where the conduct occurs more than once, or where a single incident is repeatedly transmitted to an unknown and ever-growing audience.<sup>84</sup>

#### (iii) Canada

As mentioned for other jurisdictions, a problem with requiring repetition is that the act may have been committed only once, but the Internet allows that communication to be shared or viewed multiple times.<sup>85</sup> Since electronic

<sup>80</sup> Dooley *et al* 2009 *Journal of Psychology* 182 183.

<sup>81</sup> Patchin and Hinduja 2015 *Aggression and Violent Behavior* 69 70.

<sup>82</sup> Schwartz 2009 *Washington University Law Review* 407 430.

<sup>83</sup> Patchin and Hinduja 2015 *Aggression and Violent Behavior* 69 70. The authors advance their argument by illustration. They submit that where a student posts a single hurtful communication on a publicly viewable website, this would constitute cyberbullying if the wrongdoer knew or should have known that the post was visible to others. Furthermore, owing to the public nature of the website, other users may share or further distribute the communication online.

<sup>84</sup> Rodkin and Fischer 2012 *Missouri Law Review* 619 625; for e.g., an online video posted once as revenge pornography.

<sup>85</sup> Vaillancourt *et al* 2017 *The Canadian Journal of Psychiatry* 368 369.

devices can share and distribute communications widely, scholars argue that the repetition requirement may have to change; a single act may lead to repeated victimisation as soon as harmful material is posted or shared online.<sup>86</sup>

Although bullying is usually characterised as repetitive conduct, it may be that some single acts should constitute cyberbullying.<sup>87</sup> Requiring repetition as an essential characteristic may also exclude extreme single incidents.<sup>88</sup> Thus it appears that repetition is not an essential characteristic in Canada, a great departure from other jurisdictions.

### 3.1.5 Power imbalance

#### (i) South Africa

As mentioned, a power imbalance is a key element in traditional bullying, where victims are unable to defend themselves.<sup>89</sup> Since cyberbullying is not defined in South African legislation, there is little authority on its elements and there seems to be no indication that a power imbalance is an essential element.

#### (ii) US

Cyberbullying may be characterised by a power imbalance – where victims are cyberbullied repeatedly and cannot defend themselves.<sup>90</sup> Whereas a power imbalance in traditional bullying refers to physical attributes and social status, in cyberbullying this may relate to proficiency; some Internet users are able to manipulate technology better than others and use this to commit their harmful online acts.<sup>91</sup> Although a perpetrator may have little power in the real world, they may possess superior technological skills, allowing them to overpower or overwhelm a victim.<sup>92</sup>

Unequal and coercive power over another is a distinguishing feature in bullying; in cyberbullying, this requirement may be met through anonymity,

<sup>86</sup> Peter and Petermann “Cyberbullying: A Concept Analysis of Defining Attributes and Additional Influencing Factors” 2018 *Computers in Human Behavior* 350 355. The authors submit that even where the communication is deleted, it may have been shared or downloaded before deletion, thus resulting in the communication being spread and repeated despite the original perpetrator only acting once.

<sup>87</sup> Mackay <https://antibullying.novascotia.ca/sites/default/files/Respectful%20and%20Responsible%20Relationships%2C%20There%27s%20no%20App%20for%20That%20-%20Report%20of%20the%20NS%20Task%20Force%20on%20Bullying%20and%20Cyberbullying.pdf> 1 43.

<sup>88</sup> Mackay <https://antibullying.novascotia.ca/sites/default/files/Respectful%20and%20Responsible%20Relationships%2C%20There%27s%20no%20App%20for%20That%20-%20Report%20of%20the%20NS%20Task%20Force%20on%20Bullying%20and%20Cyberbullying.pdf> 1 39.

<sup>89</sup> Laas and Boezaart “The Legislative Framework Regarding Bullying in South African Schools” 2014 *Potchefstroom Electronic Law Journal* 2667 2669. See also De Wet 2010 *Acta Criminologica* 96 113–114.

<sup>90</sup> Dooley *et al* 2009 *Journal of Psychology* 182 183.

<sup>91</sup> Patchin and Hinduja 2006 *Youth Violence and Juvenile Justice* 148 152.

<sup>92</sup> Bauman “Cyberbullying: What Does Research Tell Us?” 2013 *Theory into Practice* 249.

as an unknown user is enough to constitute a threat and a power imbalance.<sup>93</sup>

### (iii) Canada

Some scholars argue that a power imbalance is a key characteristic of cyberbullying and this may relate to the technology used to carry out the cyberbullying.<sup>94</sup> Canadian scholars submit that a power imbalance may arise through online anonymity, as the victim cannot identify his or her aggressor.<sup>95</sup> Other power imbalances relate to online supporters of the perpetrator encouraging or joining the acts of cyberbullying, or the victim being part of a marginalised group that is less powerful than the perpetrator in terms of status.<sup>96</sup> Although scholars make these submissions, there is nothing indicated in any laws regarding a power imbalance. The power imbalance requirement, according to scholars, has apparently changed from physical power to psychological power.

## 3 1 6 *Electronically through electronic devices*

### (i) South Africa

Electronic communications sent through electronic devices are a feature that distinguishes cyberbullying from traditional bullying. An electronic communication may be defined as “a communication by means of data messages”.<sup>97</sup> Furthermore, a “data message” can be defined as “data generated, sent, received or stored by electronic means, where any output of the data is in an intelligible form”.<sup>98</sup>

However, Mienie makes an important argument: a definition of cyberbullying and the characteristics of electronic devices should not specify the type of act or device because the definition should be open to accommodate future technological evolution that may be used to commit cyberbullying.<sup>99</sup> Laubscher and Vollenhoven argue that the rapid increase in the popularity of social media has allowed cyberbullying to proliferate.<sup>100</sup> Acts of cyberbullying are unlikely to decrease in the future owing to the sophistication and evolution of technology that allows for easy perpetration of this type of behaviour.<sup>101</sup>

<sup>93</sup> Rodkin and Fischer 2012 *Missouri Law Review* 619 625–626.

<sup>94</sup> Vaillancourt *et al* 2017 *The Canadian Journal of Psychiatry* 368 369.

<sup>95</sup> Cappadocia *et al* 2013 *Canadian Journal of School Psychology* 171 172. The authors submit that the aggressor could be any youth regardless of their popularity or physical attributes.

<sup>96</sup> Vaillancourt *et al* 2017 *The Canadian Journal of Psychiatry* 368 369.

<sup>97</sup> S 1 of the Electronic Communications and Transactions Act 25 of 2002.

<sup>98</sup> S 1 of the Cyber Crimes Act 19 of 2020.

<sup>99</sup> Mienie “Managing Cyber-Bullying in Schools: Lessons Learnt From American and Australian Law” 2013 *Southern African Public Law* 146 149

<sup>100</sup> Laubscher and Van Vollenhoven 2015 *Potchefstroom Electronic Law Journal* 2218 2220.

<sup>101</sup> Burton and Mutongwizo 2009 *Centre for Justice and Crime Prevention Issue Paper No 8* 1 3.

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(ii) US

US scholars submit that there are two major electronic devices that cyberbullies use to harass their victims from afar. The first devices used to send harassing, obscene, insulting or defamatory e-mails or instant messages are personal computers, and the second are cellular phones.<sup>102</sup> The Megan Meier Cyberbullying Prevention Bill defined “electronic means” as “any equipment dependent on electrical power to access an information service, including email, instant messaging, blogs, websites, telephones, and text message”.<sup>103</sup> A “communication” was defined as “the electronic transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received”.<sup>104</sup>

(iii) Canada

A definition of electronic communication is provided in the Intimate Images and Cyber-Protection Act as:

“Any form of electronic communication, including any text message, writing, photograph, picture recording or other matter that is communicated electronically.”<sup>105</sup>

This definition is crucial because it explains the electronic requirement of cyberbullying, which is an important feature in all jurisdictions. The online component of cyberbullying is what classifies it as cyberbullying and it involves using the Internet or technology to send or post text or images that cause threats, hurt or embarrassment to another person.<sup>106</sup> A majority of Canadian youth have access to technological devices, and rely heavily on these electronics, which increases their risk of being cyberbullied.<sup>107</sup>

Although the above analysis has attempted to provide the characteristics of cyberbullying, the many forms that it may take can further complicate its regulation. Each form may also have its own definition and therefore exhibit its own characteristics. Below are examples of forms of cyberbullying.

### 3.2 Forms of cyberbullying

Cases around the world have illustrated the many forms that cyberbullying may take. Various jurisdictions have contained the same or similar forms of cyberbullying. Scholars have made attempts to list the several forms of cyberbullying and certain websites also contain information as to what may constitute cyberbullying. According to the Centre for Justice and Crime Prevention in South Africa, cyberbullying may take various forms. However,

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<sup>102</sup> Patchin and Hinduja 2006 *Youth Violence and Juvenile Justice* 148 153–154.

<sup>103</sup> S 3(b)(2) of the Megan Meier Cyberbullying Prevention Act.

<sup>104</sup> S 3(b)(1) of the Megan Meier Cyberbullying Prevention Act.

<sup>105</sup> S 3(e) of the Intimate Images and Cyber-Protection Act, Ch 7 of the Acts of 2017.

<sup>106</sup> Talwar *et al* 2014 *Computers in Human Behavior* 122 123.

<sup>107</sup> Coburn, Connolly and Roesch “Cyberbullying: Is Federal Criminal Legislation the Solution?” 2015 *Canadian Journal of Criminology and Criminal Justice* 566 567.

these forms mirror those listed by American scholar Nancy Willard, and South Africa may have borrowed these from the US. They include the following:<sup>108</sup>

- a) *Flaming or trolling* takes place on public platforms and include online messages that are often heated, vulgar, angry or threatening in nature. “Flaming” occurs where there is abusive language used in online groups or bulletin boards on the Internet.<sup>109</sup> Trolling may include flaming because it involves messages designed to attract undue responses or “flames” that often provoke futile arguments.<sup>110</sup>
- b) *Harassment* is repeatedly sending cruel, threatening or offensive online communications to a specific individual. It is submitted that harassment against children falls under the definition of cyberbullying.
- c) *Denigration* involves the sending or uploading of online publications of cruel gossip or rumours about another person with the intention of damaging that person’s reputation or friendship. This may also involve uploading digitally altered pictures of the victim that portray the victim in a harmful or sexualised way. Denigration is therefore not limited to written communication but may also comprise pictures or videos that spread rumours or make fun of the victim.<sup>111</sup>
- d) *Online impersonation* occurs where the perpetrator gains access to the account of the victim and uses the victim’s account to send online communication to others that has a damaging effect on the victim’s reputation. The perpetrator usually sends negative or inappropriate communications impersonating the victim with the intention of damaging the victim’s friendships or attempting to get the victim in trouble. Other scholars have submitted that online impersonation may involve creating a fake account on the Internet of another person, without that person’s consent and with the intent to harm or threaten that person.<sup>112</sup>
- e) *Outing or trickery* occurs where the perpetrator shares the victim’s secrets, embarrassing pictures or information online with other people without the consent of the victim. The perpetrator may take embarrassing pictures of the victim and upload them on social media, and only the original poster can remove these publications.<sup>113</sup>
- f) *Exclusion* usually involves excluding a person from an online group, which may cause emotional stress to the victim. This is seen as a type

<sup>108</sup> Pillay and Sacks “Cyberbullying – A Shrouded Crime: Experiences of South African Undergraduate Students” 2020 *The Oriental Anthropologist* 370 373–374; see also Willard [https://cdn.ymaws.com/www.safestates.org/resource/resmgr/imported/educators\\_guide.pdf](https://cdn.ymaws.com/www.safestates.org/resource/resmgr/imported/educators_guide.pdf) 1. For the similar Canadian forms, see Kift *et al* 2010 *Journal of Law, Information and Science* 60 64–65.

<sup>109</sup> Van der Merwe, Roos, Eiselen, Nel, Erlank and Mabeka *Information and Communications Technology Law* (2021) 540.

<sup>110</sup> Nekmat and Lee “Prosocial vs Trolling Community on Facebook: A Comparative Study of Individual Group Communicative Behaviors” 2018 *International Journal of Communication* 1 3.

<sup>111</sup> Weber and Pelfrey *Cyberbullying: Causes, Consequences and Coping Strategies* (2014) 104.

<sup>112</sup> Cox “Protecting Victims of Cyberstalking, Cyberharassment, and Online Impersonation Through Prosecutions and Effective Laws” 2014 *Jurimetrics* 277 280.

<sup>113</sup> Weber and Pelfrey *Cyberbullying: Causes, Consequences and Coping Strategies* 103.

of social bullying because an individual is intentionally excluded from online groups or online discussions.<sup>114</sup>

- g) *Cyberstalking* comprises online threats of harm or repeated online intimidation, involving threatening or harassing messages.
- h) *Happy slapping* is a new form of cyberbullying in which the perpetrator walks up to someone and slaps the victim (or uses some other physical violence), while someone records it and uploads the video clip.<sup>115</sup>

The submission being made is that cyberbullying can encompass an array of online misconduct, which adds to the difficulty of defining the conduct. The inclusion of online harassment and online stalking also makes it confusing to differentiate these three forms of conduct.

#### 4 CONCLUSION

From the above analysis, it is clear that cyberbullying has certain essential characteristics. The US and Canada provide insight as to what requirements South Africa may rely on to develop a legal definition for cyberbullying. It is clear that an electronic communication is what characterises bullying as cyberbullying. Whilst traditional bullying has always been characterised by intentional conduct, some authors believe that the intention element in sending an electronic communication may be done recklessly or negligently in causing harm to another. As it stands, the South African position should opt for intention on the part of the cyberbully because a reckless or negligent threshold may be too low for children to attract liability.

The repetition requirement is debatable in both South Africa and Canada. However, traditional bullying has always been characterised as repetitive conduct, and cyberbullying may well follow this approach. Cyberbullying, however, may be spread multiple times online, although there may only be a single original electronic communication. One would also have to determine the intention of the cyberbully and whether the intention was to harm the victim or cause the electronic communication to be spread and shared widely.

It is therefore proposed that the main characteristics of cyberbullying are: an electronic communication, causing harm, and featuring intention, repetitiveness and children. Power imbalance can be another factor that is indicative of a cyberbully's intention and aggression. Repeated online acts of harm show an intention to inflict harm on the victim; hiding behind an anonymous name may also reveal an intention to hide from liability.

The following definition is proposed for cyberbullying in South Africa: "an electronic communication having the intention to cause repeated harm to a child". As discussed earlier, an electronic communication includes more than just text messages or words and also encompasses pictures and videos. "Repeated" looks at whether the cyberbully intended the harm to spread

<sup>114</sup> Bullying UK "What is Cyberbullying?" (undated) <https://www.bullying.co.uk/cyberbullying/what-is-cyberbullying/> (accessed 2022-07-30).

<sup>115</sup> Mann "Social Networking Websites – A Concatenation of Impersonation, Denigration, Sexual Aggressive Solicitation, Cyber-Bullying or Happy Slapping Videos" 2009 *International Journal of Law and Information Technology* 252 263.

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despite only sending one communication. The discussion of “harm” included mainly psychological and emotional harm. It is here that an objective and subjective assessment is required. One would have to assess the cyberbullying objectively to determine whether the electronic communication causes reasonable harm, and thereafter one has to look at the subjective intention of the cyberbully and the effect of the harm on the victim. This would ensure that over-sensitive cases are not penalised but also that perpetrators do not escape liability where they commit cyberbullying.

The last element is children. Cyberbullying has been shown to have harmful effects on children, which in extreme cases may lead to self-harm or suicide. A proper legislative response may assist in curbing this online conduct. However, owing to the online nature of cyberbullying, it may be difficult to regulate. Addressing cyberbullying is a tremendous task requiring assistance from schools, policy makers and law enforcement officials. Finding a suitable definition for cyberbullying will take us one step closer to addressing this harmful conduct.