

**DM Smit**

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## Virtual bullying in employment

### Abstract

The world of work has certainly benefitted much from the revolution in information communications technology and the wave of digitisation of the 21<sup>st</sup> century – e-mail, websites and virtual marketing platforms have truly removed many boundaries. However, these boundaries have also been removed for those in the workplace with less noble intentions: bullies. Virtual bullying, or cyberbullying, in the workplace has become a major concern worldwide. Some even regard virtual bullying as being more sinister than its face-to-face equivalent, as personal attacks launched on virtual platforms are often more intense, frequent, unexpected and difficult to stop, and can have far-reaching consequences not only for the employee on the receiving end, but also for the often unsuspecting employer, who may be held vicariously liable. Cyberbullying in the workplace may take various forms, including identifiable or pseudonymous e-mails and SMSs; communications that feature offensive content; negative characterisation on workplace or personal blogs, and the like. This article provides an overview of the differences between face-to-face bullying and virtual bullying; discusses the essential elements and prevalence of virtual bullying in the workplace, and then proceeds to compare the legal position with regard to this phenomenon in the United States of America, South Africa, the United Kingdom and Australia. It concludes with a few possible solutions to this pervasive problem in employment.

### Virtuele bullebakkerij in die werkplek

Die arbeidswêreld het ongetwyfeld groot baat gevind by die revolusie in inligtings-kommunikasietegnologie en die golf van digitalisering van die 21<sup>ste</sup> eeu – e-pos, webtuistes en virtuele bemarkingsplatforms het waarlik heelwat grense opgehef. Tog is hierdie grense terselfdertyd opgehef vir diegene in die werkplek met minder edel bedoelings: bullebakke. Virtuele bullebakkerij, of kuberbullebakkerij, in die werkplek wek deesdae wêreldwyd groot kommer. Sommige beskou virtuele bullebakkerij as selfs meer sinister as sy fisiese ekwivalent, want persoonlike aanvalle op virtuele platforms is dikwels meer intens, meer gereeld, meer onverwags en moeiliker om stop te sit. Boonop kan dit verreikende gevolge hê, nie net vir die werknemer aan die ontvangkant nie, maar ook vir die soms niksvermoedende werkgewer, wat middellik aanspreeklik gehou kan word. Kuberbullebakkerij in die werkplek kan 'n magdom vorme aanneem, waaronder e-pos en SMS'e onder 'n bekende of skuilnaam; kommunikasie met aanstootlike inhoud; negatiewe karakterisering op werk- of persoonlike blogs, en dies meer. Hierdie artikel bied 'n oorsig van die verskil tussen bullebakkerij van aangesig tot aangesig teenoor bullebakkerij in die virtuele wêreld; bespreek die noodsaaklike elemente en voorkoms van virtuele bullebakkerij in die werkplek, en gaan dan oor tot 'n vergelyking van die regstandpunt met betrekking tot hierdie verskynsel in die Verenigde State van Amerika, Suid-Afrika, die Verenigde Koninkryk en Australië. 'n Paar moontlike oplossings vir hierdie diepgaande probleem in die arbeidswêreld word laastens aan die hand gedoen.

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## 1. Introduction

The internet communications technology (ICT) revolution has the potential to change the face of traditional bullying, and has certainly added to employers' duty of care to ensure a safe and healthy work environment.<sup>1</sup> In a sense, virtual bullying may be viewed as being even more sinister than face-to-face bullying, as personal attacks launched on virtual platforms are often more intense, frequent, unexpected and seemingly difficult to stop.<sup>2</sup> This then gives rise to the question about the differences between normal bullying and bullying in the virtual world, and whether existing mechanisms for dealing with face-to-face bullying may simply be transferred to address virtual bullying in the world of work as well. The matter is further complicated by the lack of a universally accepted definition for bullying and virtual bullying.<sup>3</sup> In addition, the failure thus far to provide a legal characterisation of what bullying entails<sup>4</sup> makes this topic a worthwhile and relevant field of study.

After a discussion of the essential elements and prevalence of virtual bullying in the workplace, the focus of this paper shifts to a comparison of the legal position with regard to virtual bullying – or cyberbullying, as it is also referred to – in the workplace in South Africa, the United States of America, the United Kingdom and Australia. In conclusion, possible solutions are offered to this pervasive problem in employment.

## 2. From bullying face-to-face, to bullying online, to online bullying in the workplace

In this modern, digital era, the lines between the virtual world and the real world are often blurred,<sup>5</sup> and failure to acknowledge this essentially means denying that our future might be a foreign, technologically enabled and increasingly digital landscape that may require things to be done differently. 'Doing things differently' will not only entail learning how to make use of the new technologies on offer, but also learning how to deal with their adverse effects.

Some victims would merely ignore the offending message, report it to a friend or block the sender, but people experience cyberbullying differently and could suffer from depression, anxiety or draw into themselves.<sup>6</sup>

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1 Privitera & Campbell 2009:399.

2 Sabella *et al* 2013:2704.

3 Pettalia *et al* 2013:2758.

4 According to Sabella *et al* 2013: 2704, it is a myth that everyone knows what cyberbullying is. The various definitions developed by different researchers also lead to inconsistencies in measuring cyberbullying, providing an incomplete picture of the severity of the problem.

5 Ogilvie 2000:5.

6 Cassim 2013:2, 3.

As mobile phones afford users increasing spontaneity through mobile communication and the internet enhances communication across the globe, more and more of our future human interactions are likely to occur via some form of electronic communication.<sup>7</sup> The misuse of these electronic means can prove more devastating than the enjoyment thereof, according to Grigg.<sup>8</sup>

Not unlike humans, crimes such as stalking have also evolved and present themselves differently in the digital era. In Los Angeles, a woman who had rejected the advances of a security guard went through an ordeal when the man started to impersonate her in online chat rooms, advertised for men to fulfil her 'rape fantasies' and posted her name and address online. She was physically stalked and woken up at night by strange men banging on her door, screaming that they were there to rape her.<sup>9</sup> Normal anti-stalking laws are no longer appropriate to deal with situations like this. In this regard, Ogilvie rightfully remarked: "[T]he internet needs to be recognized as a new medium of communication rather than the 'latest version' of the old mediums."<sup>10</sup>

This very principle may be extrapolated and applied to the working environment, for example the forwarding of digitised data files<sup>11</sup> that could threaten notions of copyright and intellectual capital, threaten or breach the normal, implied duties of employers and employees, or expose employers to civil liability cases. How does one control or manage interactions where the sender could assume a false identity, pretend to be someone else or steal another's identity, let alone the jurisdictional issues that may present themselves in cyberspace?

In its simplest form, the internet (and, by inference, smartphones also) can be described as a means of convenience,<sup>12</sup> a means of control<sup>13</sup> or a medium of range enhancement<sup>14</sup> in transferring digitised data. It is a fact that more and more people are using social networking sites on a daily basis, and derogatory remarks about their employers, fellow workers and superiors are often noted. In 2005, there were more than three billion internet and cellphone users worldwide,<sup>15</sup> and the rapid growth in technology leaves

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7 University of South Australia n.d.:1.

8 2010:143.

9 Ogilvie 2000:5.

10 2000:6.

11 Wherein digitised data files are transferred instead of sending it via post in a brown bag as per Ogilvie 2000:3.

12 Ogilvie 2000:2, describing an instance where data are transferred from a sender to a nominated and willing recipient.

13 Ogilvie 2000:2, describing an instance where data may be exchanged in an interaction involving an unwilling and/or unknown party being manipulated by a usually unknown and effectively invisible external party.

14 Ogilvie 2000:2, describing an instance where data are organised in such a way that any number of 'data seekers' may locate and obtain the information, such as 'internet surfers'.

15 Privitera & Campbell 2009:395.

many employers utterly exposed to all sorts of cybercrime or cyberbullying.<sup>16</sup> Due to the rapid growth in the number of people interacting by means of modern technologies, these technologies also increasingly serve as a new or alternative way for bullies to target their victims,<sup>17</sup> and the workplace is no exception.<sup>18</sup> As this phenomenon has grown into a global concern, it deserves attention.<sup>19</sup>

### 3. What is virtual bullying in the workplace?

#### 3.1 A broad understanding of virtual bullying in the workplace

Bullying involves an abuse of power and authority, and may take the form of a threat, humiliation and control rather than physical assault. The emergence of digital technologies such as e-mail, SMS, phone calls, chat rooms, social networks and the internet has provided bullies or mobs with the tools to exercise dominance and inflict pain over their targets or victims from a safe, remote spot.<sup>20</sup>

It has been said that “digital bullying in the workplace does not differ enormously from nastiness in the playground”;<sup>21</sup> it is merely presented differently. Cyberbullying in the workplace includes identifiable or pseudonymous e-mails and SMSs; communications to an individual’s work phone or e-mail address; communications that feature offensive content, such as erotic images or jokes about ethnicity, religious affiliation or sexual preference; messages that are aimed at reprimanding an individual, but are sent to an entire group of people, thereby humiliating the initial recipient; negative characterisation on workplace or personal blogs; use of e-mail to flood an employee with frivolous tasks, often after hours, with the aim of eroding the employee’s personal time, and the sharing of images that have been manipulated to offend or humiliate.<sup>22</sup>

#### 3.2 Overlap and differences between traditional and cyberbullying in the workplace, and some prevalence figures

Interestingly, there seems to be a direct link between regular face-to-face bullying in the workplace and cyberbullying in employment. An Australian study conducted in the manufacturing industry showed that 34 percent of the sample had been exposed to normal bullying actions over a six-month period, while a third of those had been exposed to cyberbullying at the

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16 Privitera & Campbell 2009:395.

17 Privitera & Campbell 2009:395.

18 Privitera & Campbell 2009:395.

19 Privitera & Campbell 2009:396.

20 Caslon Analytics n.d.(a).

21 Caslon Analytics n.d.(a).

22 Caslon Analytics n.d.(a).

same time (using Leymann's model and definition of bullying),<sup>23</sup> which equates to 11 percent. In government, 20 percent of State Victoria public servants reported having been bullied.

Other studies report different figures. Jäger and colleagues<sup>24</sup> refer to a prevalence figure of 29 percent of young working people who considered themselves to have been the victims of cyberbullying. Those who experienced cyberbullying reported face-to-face bullying as well, which seems to be in contrast to another study finding on the experience of schoolchildren, who reported cyberbullying even though there was no face-to-face bullying.<sup>25</sup> In 2010, altogether 52 percent of the European population were online, and thus, internet communication technologies had a major impact on everyday lives<sup>26</sup> and lives at work. For example, one in ten workers in the United Kingdom reported having experienced cyberbullying in the workplace,<sup>27</sup> while some studies even indicate this figure to be as high as eight out of ten British employees.<sup>28</sup> The question has been asked whether the internet is in fact a curse or a blessing,<sup>29</sup> and rightfully so. According to Henry, the proliferation of the internet and the extent of its reach now mean that bigoted messages can be sent with great ease to a much larger audience than ever before.<sup>30</sup>

However, despite the overlap with traditional bullying, certain aspects are unique to virtual or cyberbullying, such as the fact that the perpetrator can conceal his or her identity and that data can transcend the boundaries of time and space.<sup>31</sup> Whereas, traditionally, workplace harassment (also known as bullying) has occurred face-to-face, it now increasingly occurs via electronic media, which is a growing concern, since most of these messages can be retrieved outside the workplace as well. Hence, it has been suggested that the negative consequences of virtual workplace bullying are more widespread than those of more traditional forms of bullying.<sup>32</sup> This is exacerbated by the fact that the victim cannot control who sees or reads the offending postings nor knows the real identity of the offender, as it has become extremely easy to assume another's identity in the virtual world. Virtual bullying actions in employment could bring the name of the employer into disrepute and be construed as bullying, irrespective of whether the remarks or actions occurred during working hours or in the workplace. According to Subramanien and Whietear-Nel,<sup>33</sup> the possibility of employers being held vicariously liable for inappropriate internet use is not limited to liability for defamation or harassment, and employers would be

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23 Privitera & Campbell 2009:398.

24 2010:170.

25 Privitera & Campbell 2009:398.

26 Jäger *et al* 2010:169.

27 Pitcher 2007.

28 Faragher 2012.

29 *Sedick & Another/Krisnay (Pty) (Ltd)* 2011 8 BALR 879 (CCMA):57, 60.

30 2009:235.

31 Jäger *et al* 2010:170.

32 Ford 2013:409.

33 2013:10.

well advised to also protect themselves against misuse that could take the form of virtual bullying.

## 4. The essential elements of cyberbullying in the workplace

### 4.1 Problems in defining cyberbullying

In their research, Privitera and Campbell offered the following description of the constituent elements of cyberbullying: “Cyberbullying techniques use modern communication technology to send derogatory or otherwise threatening messages directly to the victim or indirectly to others, to forward personal and confidential communication or images of the victim for others to see and to publicly post denigrating messages.”<sup>34</sup> This probably represents the most accurate description of what cyberbullying entails. However, opinions on the matter are greatly varied, as the following will show.

In the United Kingdom, cyberbullying is defined as “an aggressive intentional act carried out by a group or individual, using electronic forms of contact repeatedly and over time against a victim who cannot easily defend himself”,<sup>35</sup> Badenhorst notes that, in South Africa, there are several definitions for virtual bullying,<sup>36</sup> most of which include acts involving bullying and harassment through the use of electronic devices or technology. According to Grigg,<sup>37</sup> cyberbullying shares certain criteria with traditional bullying, including intentional harm caused to the victim, an imbalance of power and the repetition of victimisation. The main difference between the two is attributed to the means through which the bullying is committed, namely electronic devices. However, Grigg continues, this view is not universal and authors such as Menesini and Nocentini call for a completely separate definition for cyberbullying.<sup>38</sup>

Nocentini and colleagues have stated that defining virtual bullying poses a problem, especially across borders where culture plays a vital role (as in traditional bullying) and where bullying may actually be called different names and presented with different labels.<sup>39</sup> In turn, Pettalia and colleagues have noted that irrespective of the way in which cyberbullying is defined, it is a pressing issue and is worthy of investigation and prohibition.<sup>40</sup> Noting that half of all employees have e-mail accounts and 96% enjoy internet access, curbing cyberbullying will be no easy task.<sup>41</sup>

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34 2009:396.

35 Grigg 2010:143 with reference to Smith *et al* 2008:376.

36 2011:2.

37 2010:143.

38 Grigg 2010:143.

39 2010:130.

40 Pettalia *et al* 2013:2758.

41 Giumetti & Hatfield 2013:298.

Research by Grigg<sup>42</sup> yielded a comprehensive list of “cyberbullying deeds” in which participants described this type of bullying with words such as “anonymous, fraudulent, aggressive, unwanted messages, spreading rumours, hacking into someone’s e-mail account, threats, harassment, attacks, unwanted phone calls, and malicious, abusive messages”. No age or gender differences were noted in the way in which the participants had perceived these acts.<sup>43</sup> Cyberbullying has also been extended to include virus uploads, changing passwords to pose as the original owners, the sending of unwanted messages as well as the targeting of businesses.<sup>44</sup>

In an attempt to capture the categories of cyberbullying, Nocentini and fellow researchers<sup>45</sup> have described four broad types, being written-verbal behaviour (phone calls, text messages, e-mails, instant messaging and the like), visual behaviour (postings, sending or sharing compromising pictures), exclusion (being the purposeful exclusion of someone from an online group) and impersonation (inclusive of stealing and revealing personal information). Badenhorst<sup>46</sup> referred to Burton and Mutongwizo,<sup>47</sup> who had identified seven types of cyberbullying, namely harassment,<sup>48</sup> denigration,<sup>49</sup> impersonation or identity theft,<sup>50</sup> outing,<sup>51</sup> cyber-stalking,<sup>52</sup> happy slapping<sup>53</sup> and sexting.<sup>54</sup>

## 4.2 The elements: An imbalance of power, repetition/proliferation, intent/effect, an anonymous bully and a public audience

It is accepted that an imbalance of power is needed to constitute both traditional and cyberbullying, even though this imbalance may be more subtle in the latter case. According to VandeBosch and Van Cleemput,<sup>55</sup> the

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42 2010:148.

43 Grigg 2010:148.

44 Grigg 2010:151.

45 2010:130.

46 2011:2.

47 2009:2.

48 Which involves frequently sending a cruel or threatening message to a person’s e-mail account or mobile phone.

49 Sending or posting malicious gossip or rumours about a person to damage his or her reputation or friendships.

50 When someone breaks into another’s e-mail or social networking account and poses as that person.

51 Sharing someone’s secrets, embarrassing information or images online.

52 Similar to traditional stalking, involving threats or harm or intimidation through repeated online harassment or threats.

53 Where a person walks up to another and slaps him, whilst another captures the violence using a mobile phone camera for online broadcasting purposes.

54 Involving sending a nude or semi-nude photo or video and/or sexually suggestive messages via mobile phone or texting or instant messaging, or could involve children combining texting and sex, which could in South Africa be classified as child pornography, which is criminalised.

55 2008:499.

imbalance of power in cyberbullying very often refers back to a real-life experience of power, which supports Grigg's argument,<sup>56</sup> citing Campbell,<sup>57</sup> that cyberbullying simply entails old bullying behaviour occurring in new forms. Nocentini and colleagues<sup>58</sup> view the power imbalance in cyberbullying to be the victim's inability to force internet service providers to delete harmful content, as well as a potentially higher level of digital literacy and a higher social status within a virtual community on the part of the perpetrator. In face-to-face bullying, the bully has a rather 'physical' power advantage over the victim, leaving the victim feeling powerless, but in cyberspace, technological advantages or anonymity are what makes the bully feel superior.<sup>59</sup>

The element of repetition that characterises traditional bullying is somewhat problematic in cyberbullying, as some online actions occur only once and may technically fall short of this requirement.<sup>60</sup> However, it is argued that although the offensive material is sent only once, the repetitive element presents itself each time the material is viewed by the audience.<sup>61</sup> This proliferating effect of cyberbullying exposes the victim to equally negative consequences than those suffered by face-to-face bullying victims. To Nocentini and colleagues,<sup>62</sup> the element of repetition in cyberspace is located in the mere possibility of postings to be reviewed and forwarded repeatedly. In this way, a single act of cyberbullying could lead to countless incidents of victimisation or bullying:<sup>63</sup> For example, one posting of an offensive picture may be viewed by trillions of viewers before it is eventually taken down, repeatedly inflicting harm on the victim.<sup>64</sup>

In respect of the element of intent, Nocentini and fellow researchers<sup>65</sup> used their study to prove that, in making out a case of cyberbullying, intent is of lesser importance than the actual negative actions experienced by the victim. The participants in their study relied heavily on the effect on victims rather than the requirement of intent. In turn, Giumetti and Hatfield<sup>66</sup> believe that electronic media attract lesser adherence to social norms, and may produce communication that is either intended or perceived to be rude. Such incivility through electronic media, they say, is more likely to lead to serious negative consequences.<sup>67</sup>

Two final elements that are unique to cyberbullying are the cyber-specific criteria of an anonymous bully and a public audience. The fact

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56 2010:145.

57 2005.

58 2010:131.

59 Pettalia *et al* 2013:2758.

60 Grigg 2010:145.

61 Grigg 2010:143.

62 2010:131.

63 Grigg 2010:131.

64 Pettalia *et al* 2013:2756.

65 2010:139.

66 2013:297.

67 2013:297.

that the victim is oblivious as to the identity of the bully may in fact reduce the need for a power imbalance as a criterion, according to Nocentini and colleagues,<sup>68</sup> but Pettalia and fellow authors view this anonymity as part and parcel of the power differential.<sup>69</sup> In addition, it has been said that the impact of cyberbullying is often more traumatising than physical bullying due to the extreme public nature thereof.<sup>70</sup> Privitera and Campbell<sup>71</sup> mentioned that the two electronic devices mainly used for virtual bullying in the workplace are online computers (with access to e-mail and websites) and smartphones, which imply large and public audiences. Although these two elements are not regarded as prerequisites to be able to label negative electronic behaviour as cyberbullying, they are important, as they connote the severity and nature of a cyber-attack.<sup>72</sup>

## 5. A comparative study: The position with regard to virtual bullying in the workplace in the United States, South Africa, the United Kingdom and Australia

In the United States, the First Amendment guarantees freedom of speech. This has left the American government largely restricted in its ability to regulate online speech through both civil and criminal law and, thus, subsequent attempts to pass laws to regulate online speech have been declared unconstitutional,<sup>73</sup> leaving the employer and victims without protection and remedy from a federal source. Popular media have referred to the increase in cyberbullying as employees resort to texts and e-mails to attack their colleagues.<sup>74</sup> The United States law distinguishes between cyber-stalking, which is regulated by state civil and penal codes<sup>75</sup> and involves threatening behaviour in line with the criminal definition of stalking, and cyber-harassment, which differs from cyber-stalking in that it does not necessarily involve threats. In some American states, reference to harassment committed via electronic means is included in their general harassment statutes, while other states have their own stand-alone cyber-harassment statutes.<sup>76</sup> Although the terms 'cyber-harassment' and 'cyberbullying' are often used interchangeably, cyberbullying in America seems to be generally used to refer to bullying via electronic means among schoolchildren only.<sup>77</sup>

Two novel approaches have come to the fore in the United States. Firstly, non-governmental organisations started to campaign and drum up support for greater protection against hate speech, which led to the

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68 2010:131.

69 Pettalia *et al* 2013:2765.

70 Badenhorst 2011:3.

71 2009:396

72 Nocentini *et al* 2010:139.

73 Henry 2009:236.

74 Ward 2012:1.

75 See for example California Civil Code § 1708 7 and Penal Code §646.9.

76 See for example California Penal Code §§ 422,635.2.

77 See for example California Education Code §§ 32661, 32270, 48900.

establishment of the Southern Poverty Law Centre and the Anti-Defamation League. These two organisations use the internet as a weapon against hate speech and hate groups, and have been utilising internet service providers as watchdogs to identify hate speech and play a role in getting it removed.<sup>78</sup> Secondly, after several failed attempts to regulate sexual offences on the internet, even pertaining to child pornography, the United States government eventually managed to get the Prosecutorial Remedies and other Tools to End the Exploitation of Children Today Act (hereinafter called ‘the PROTECT Act’) passed in 2003.<sup>79</sup> The PROTECT Act survived First Amendment challenges, and criminalises “offers to provide or requests to obtain contraband, child obscenity and child pornography involving actual children”.<sup>80</sup> The American government may prosecute online hate speech only if it poses a real threat of imminent harm to an identifiable victim, and the prosecution of website operators for hate speech is a very rare occurrence.<sup>81</sup> Anti-Defamation League website filters could be used in the battle against online bullying, bringing about the removal of offensive material as an *ex post facto* remedy,<sup>82</sup> but this is not proactive in nature and might prove to be insufficient in the workplace.

Online bullying extends beyond hate speech, and thus, employers in the United States are left to deal with online bullying on a state-by-state basis or, in the absence of state legislation, are left to their own devices. Many have consequently resorted to adopting policies, procedures and practices to deal with virtual bullying in the workplace. Keep in mind that the prevalence of school bullying in America has caused several states to adopt legislation to deal with this problem; bullies in the American workplace, however, are still relatively free to continue their reign of terror.

Turning to South Africa, the country’s legal system contains no specific legislation that deals with virtual bullying, and victims have to rely on remedies offered by the criminal and/or civil law, either as employees and employers or as learners and educators.<sup>83</sup> Anti-discrimination laws may apply but only where the bullying amounts to harassment and is embedded in either the listed or “other arbitrary” grounds as per the new Employment Equity Amendment Act,<sup>84</sup> but does not cater for instances where virtual bullying is not embedded in either a listed or arbitrary ground<sup>85</sup> or does not amount to harassment. Many bullying deeds are not regarded as harassment and can thus not be brought under South African harassment laws.

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78 Henry 2009:236.

79 Pub.L. 108-21, 117 Stat. 650, S. 151.

80 Henry 2009:237.

81 Henry 2009:238, 239 with reference to the Maine Civil Hate Crime Act and *HUD v Wilson*, 2000, in which damages to the amount of \$1 million were ordered.

82 Henry 2009:246.

83 Badenhorst 2011:7.

84 84 Employment Equity Amendment Act, 47 of 2013.

85 85 See section 6(1) of the Amended Employment Equity Act

The Protection from Harassment Act,<sup>86</sup> which came into effect on 27 April 2013, defines “harassment”, affords protection against harassment, specifically via electronic media, and extends protection by means of a restraining order, even to those in the workplace<sup>87</sup> and is probably the best way to currently deal with virtual bullying.

However, the problem still is that it is not clear whether South Africa sees bullying as a form of harassment or as a violation of dignity, and only time will therefore tell whether virtual harassment is sufficiently covered by the abovementioned act; and whether it could find application where social media is misused in employment since the act only refers to “harassment”.

According to Badenhorst, the current position is that, depending on the nature of the negative cyber-acts, a perpetrator may be charged with *crimen iniuria*, assault, criminal defamation or extortion,<sup>88</sup> whilst civil law responses include orders to keep the peace, interdicts or defamation claims.<sup>89</sup> Where sexting occurs and children are involved, either as perpetrators or being used as ‘models’, it could lead to a transgression of the Films and Publications Amendment Act,<sup>90</sup> which prohibits child pornography in a broad sense, or a conviction of child pornography in terms of the Sexual Offences and Related Matters Amendment Act.<sup>91</sup>

The Electronic Communication and Transaction Act<sup>92</sup> regulates bullying in as far as it overlaps with the distribution of personal information; if not, there is no specific legislation governing such issues. Subramanien and Whitear-Nel<sup>93</sup> caution employers to appropriately manage employees’ access to the workplace internet, for failure could result in significant risk, such as liability for civil claims or even criminal conduct in South Africa. “Phishing”, a term used to describe fraudulent electronic communication, often by means of e-mails, has lately been linked to identity theft, and has now given rise to the phenomenon of “spearphishing”, which refers to the theft of corporate trade-related information.<sup>94</sup> Employers in South Africa may be held vicariously liable for their employees’ actions, and no reason has thus far been tendered as to why bullying actions should be excluded from this, as it had been shown that vicarious liability extends to acts such as

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86 17/2011, published in Government Gazette 34818, 5 December 2011.

87 Item (ii) of the definition for ‘harassment’ in the Protection from Harassment Act 2011 deals with engagement in verbal, electronic or any other communication aimed at the complainant or a related person by any means, whether or not conversation ensues, while item (iii) refers to the sending of letters, electronic mail and other means of communication.

88 Badenhorst 2011:8.

89 Badenhorst 2011:9.

90 3/2009.

91 2007.

92 25/2002.

93 2013:9.

94 Subramanien & Whitear-Nel 2013:11.

defamation, harassment or even as a result of copyrighted material being downloaded from the internet onto a work computer.<sup>95</sup>

When looking at the situation in the United Kingdom, it has been said that virtual bullying in the workplace is becoming more widespread as communication technologies advance, and that between 14 and 20 percent of employees experience virtual bullying on at least a weekly basis – a rate similar to that pertaining to conventional bullying.<sup>96</sup> Molluzzo and colleagues<sup>97</sup> have called this the “abuse of choice” of the “cyberimmersion” generation. According to a survey done by the Dignity at Work Partnership in 2007, one in ten employees in the United Kingdom believes that cyberbullying is a problem at work.<sup>98</sup> Harassment in the United Kingdom is prohibited by the Protection from Harassment Act of 1997<sup>99</sup> and the Equality Act of 2010<sup>100</sup> which include references to the display of pictures or the sending of offensive material. However, should cyberbullying be deemed to fall outside this ambit (with the exception of schools), there appears to be no specific legislation dealing with cyberbullying in employment in the United Kingdom. The Protection from Harassment Act of 1997 does not refer to virtual bullying specifically. This makes it an inappropriate mechanism to prohibit virtual bullying in employment and clearly shows that this form of anti-stalking legislation is not meant to curb cyberbullying in the workplace. In the United Kingdom, cyberbullying may lead to tort action<sup>101</sup> taken against the perpetrator, but this can hardly be seen as a proactive measure to curb the problem.

Finally, the legal frameworks governing bullying in Australia are rather diverse, and those pertaining to virtual bullying even more so. Should the virtual bullying amount to discrimination, the Commonwealth and state/territories have established a range of statutes dealing with discrimination in the workplace. In South Australia, even health and safety laws prohibit bullying. However, should bullying involve SMSs, e-mail or phone calls, it is dealt with as stalking and is governed by state/territory anti-stalking legislation, such as the Crimes Act 1900 (ACT). Governments have also on occasion withdrawn authorisation of organisations to train apprentices, for example under the Vocational Education and Training Act 1990 (Vic), due to virtual bullying.<sup>102</sup> However, Australian courts have not held intermediaries such as Telstra, Australia Post and MySpace responsible for bullying in cases where those entities were unaware that bullying was occurring.<sup>103</sup>

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95 Subramanien & Whitear-Nel 2013:11,12.

96 Ward 2012:2.

97 2012:1.

98 Pitcher 2007.

99 C 40.

100 2010.

101 Gilani *et al* 2012:4.

102 Caslon Analytics n.d.(b).

103 Caslon Analytics n.d.(b).

## 6. Possible solutions

Whilst it can be argued that some forms of virtual bullying are reminiscent of real-life harassment or other forms of uncivil behaviour, some certainly are not. Therefore, it is important to note that the digital era may magnify, distort and ignore some attributes of the real world in ways that we urgently need to address.<sup>104</sup>

Codes of practice need to be updated to keep up with technology, and workplaces need to implement policies and procedures<sup>105</sup> that should include a ban on cyberbullying/virtual bullying as well as provision for *ex post facto* transgressions, affording protection to both the victim and the employer.

Websites could be restricted during the day using a restricted-access protocol in working hours, although it could be argued that employees would find another way of connecting during these periods.<sup>106</sup>

It has been suggested that policies be developed to deal with ownership issues, private use, expectations of privacy as well as prohibited use<sup>107</sup> to help deal with the difficulties of cyberbullying in employment. The adaptation of existing legislation should be explored to keep pace with the evolution of technology, while the preventative role of internet service providers should also be broadened.

Ultimately, however, no technological or statutory intervention to try and curb virtual bullying in the workplace will be adequate if the actual scope and effect of the problem is not grasped and tackled head-on. In the words of well-known American author Studs Terkel in his 1974 book *Working*:<sup>108</sup>

... [W]ork is, by its very nature, about violence to the spirit as well as the body. It is, above all, (or beneath all), about daily humiliations. To survive the day is triumph enough for the walking wounded among the great many of us.

Little did Mr Terkel know about the virtual “violence” and “humiliations” awaiting employees in the 21<sup>st</sup> century.

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104 Ogilvie 2000:6.

105 Privitera & Campbell 2009:399.

106 Cilliers 2012:3.

107 Subramanien & Whitear-Nel 2013:20.

108 Cited in Namie & Namie 2011:1.

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