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COMBATING BULLYING IN SCHOOLS: A SOUTH AFRICAN LEGAL PERSPECTIVE

By

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Dedication

I dedicate this dissertation to my parents – thank you for your unwavering faith in me. I love you.

Acknowledgements

First and foremost, I thank God for giving me the strength and ability to complete this dissertation. I can do all things through Him who gives me strength.

Secondly, I wish to thank my supervisor Professor Trynie Boezaart for her professionalism, encouragement, mentoring and patience throughout my research.

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List of abbreviations

ACRWC: African Charter on the Rights and Welfare of the Child

APD: Antisocial Personality Disorder

CD: Conduct Disorder

CRC: United Nations Convention on the Rights of the Child

ETB: Educator Targeted Bullying

ODD: Oppositional Defiant Disorder

OBPP: Olweus Bullying Prevention Programme

SACE: South African Council of Educators

SASA: South African Schools Act 84 of 1996

WHO: World Health Organisation

Summary

This study holistically examines the *status quo* of learner-on-learner bullying in South African schools. An exposition is given pertaining to *inter alia* constitutional law, common law, statutory provisions and case law. Since bullying is a global problem, a legal comparative study is necessary in order to place the phenomenon of bullying into context. Concepts such as bystander behaviour, bullycide and restorative justice feature prominently in this dissertation. Important findings include the necessity of drafting of anti-bullying legislation as well as the inception of bullycide as a statutory crime. Furthermore, restorative justice processes are critically important to not only rehabilitate and reintegrate the bully, but also to vindicate the victim in a way that protects and promotes the rights of all parties involved. Recommendations are made with regard to the importance of a national anti-bullying policy to be implemented in conjunction with existing codes of conduct.

Keywords: Bullying, bullycide, restorative justice, anti-bullying policy, victim, bully, bystander behaviour, *ubuntu*

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Chapter 1: Introduction and problem statement

1.1 Introduction

It is said that courage can be likened to fire and bullying can be likened to smoke.[1] Bullying is a phenomenon that is elusive, conniving and hard to define properly because times change and so do means by which to inflict harm upon others. It is thus stated that bullying behaviour is a cowardly action, in all probability caused by some or other childhood pain.[2] In order to remedy the problem, one has to find and treat the root. One can not hope to solve a problem by merely scratching the surface. In recent years, school bullying and related violence have escalated to the point where multiple newspaper reports pertaining to bullying-related incidents are published annually.[3]

Ideally, even on school level, a spirit of *ubuntu*[4] ought to be maintained. An important quality, which would ultimately bring an end to bullying, is mutual respect. Respect for oneself, respect for peers, respect for authority figures. This study aims to explore bullying; to examine cause and effect and to propose possible solutions from a legal point of view. It must be borne in mind that bullying behaviour has certain legal consequences, even though the alleged bully may be a minor. A myriad of rights come into play when bullying is considered, from a criminal as well as civil law point of view, not to mention, most importantly – constitutional rights.[5]

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1 Paraphrasing of the original quote: "Courage is fire, and bullying is smoke" of Benjamin Disraeli.

2 A well-balanced child will not bully others, as he/she will not have the need to deflect a lack of self-esteem.

3 See par 1.2.1 footnote 12.

4 Nussbaum "*Ubuntu*: Reflections of a South African on our common humanity" 2003 *Reflections* 21-26 describes *ubuntu* as follows: "Ubuntu is the capacity in African culture to express compassion, reciprocity, dignity, harmony, and humanity in the interests of building and maintaining community. Ubuntu calls on us to believe and feel that: Your pain is My pain, My wealth is Your wealth, Your salvation is My salvation."

5 Constitutional rights infringed upon when a child is bullied are, *inter alia*: equality (section 9), human dignity (section 10), freedom and security of the person (section 12), rights of the child (section 28) and education (section 29).

When considering all the rights infringed upon when a child is bullied, one of the most important rights transgressed, is the right to education. Education plays an integral part in the development of a well-balanced young person and by eliminating this basic right, the balance is disturbed. To illustrate: suppose that a child is beaten up at school by a fellow learner, to such an extent that his physical injuries keep him from school for a number of weeks. His emotional injuries cause him to develop didaskaleinophobia[6] and therefore a total imbalance occurs. This is counterproductive to study, withholding this child from laying the foundation for his future and so a negative snowball effect starts. In effect, one violent lash-out can ruin a child's life by keeping him from obtaining the necessary intellectual tools needed to further himself in life.

1.2 Problem statement

1.2.1 Bullying statistics

In 2012, a study conducted by Unisa established that out of a research sample of 3371 learners, 1158 learners (34.4%) had been victims of bullying.[7] Furthermore, emotional bullying is evidently more prevalent, with 55.3% of learners falling victim to emotional bullying, 38.4% being victimised physically, 16.9% being tormented via social media (social media) and 2.8% being the victims of verbal bullying.[8] This study also shows that 29.3% of bullying incidents transpire at school after class; and 32.2% of bullying incidents occur during class.[9] In 2008, over a million South African learners were subjected to some form of violence[10]

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6 Definition of didaskaleinophobia accessed from http://common-phobias.com/didaskaleino/phobia.htm on 2011-09-24 and states the following: "Didaskaleinophobia is the fear of going to school. The origin of the word Didasko is Greek (meaning teach) and phobia is Greek (meaning fear)."

7 Youth Research Unit "Nature, extent and impact of bullying among secondary school learners in Gauteng" 2012 A research report compiled on behalf of the Bureau of Market Research University of South Africa.

8 *Ibid*.

9 *Ibid*.

10 Anon "Bullying vs Violence" (2009) accessed on 2011-06-23 from http://www.bullyingstatistics.org/content/bullying-vs-violence.html notes that bullying is a form of violence and the two ought to be regarded as parallel, co-dependent fields.

at school.[11] It is unlikely that these statistics have declined over the last four years, as media reports on bullying have been escalating.[12] Studies have also shown that a survey of 207 learners, indicated that 60,9% had been bullied.[13] The first South African national youth risk behavioural survey was conducted by the Department of Health in 2002.[14] According to the results, 49,3% of secondary school pupils in the Free State had been bullied in the month before the survey was undertaken.[15]

A previous[16] National Schools Violence Study undertaken by the Centre for Justice and Crime Prevention, the largest national survey conducted with regards to school violence to date,[17] included 120 primary schools, 139 principals, 277 teachers and 6 787 learners.[18] The findings of this survey were:

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11 Burton "Snapshot results of the CJCP National Schools Violence Study" 2008 http://www.cjcp.org.za/admin/uploads/Research%20Bulletin%202%20final.pdf [2012-07-03]. The Centre for Justice and Crime Prevention (CJCP) undertook the National Schools Violence Study (NSVS) in 2008 and found that 15,3% of all learners (roughly 1 821 054 learners) have experienced some or other form of violence at school.

12 *The Star* 7 February 2007 "Parents sue government over daughter's death-leap, blame bullying letters"; *The Star* 10 February 2007 "Hi-Tech bullying: cell phones used for "abuse""; *Citizen* 12 June 2007 "Mom in court to stop school bully"; *The Times* 12 June 2007 "Mom in court to 'stop bully'"; *Die Rapport* 3 Julie 2011 "Ma begin veldtog om skoolboelies te stuit"; *Die Beeld* 4 September 2011 "Meisie hang haar nadat sy glo by skool geboelie is"; *IOL News* 10 February 2012 "Bullying on the increase"; *The Star* 9 February 2012 "Girl's bullying ordeal"; *News 24* 22 Febuary 2012 "Girl stripped to panties at school"; *Parent 24* 22 February 2012 "Bullying, stripping and suicide"; *News 24* 3 March 2012 "Jhb pupils revolt after murder"; *Health 24* 5 March 2012 "Bullying linked to suicidal thoughts"; *News 24* 3 May 2012 "Headmaster sues parent for libel"; *News 24* 7 May 2012 "Teen sex rife in Eastern Cape schools"; *News 24* 10 May 2012 "Schoolboy 'raped' on rugby tour"; *News 24* 24 May 2012 "Satanic rituals reported at CT school"; *The Star* 23 May 2012 "School guard with a history of rape"; *News 24* 28 May 2012 "Rape investigation failed my son – dad"; *Die Beeld* 30 Mei 2012 "Bfn se 666-nes"; *Die Beeld* 4 Junie 2012 "Kleuter glo by crèche geslaan"; *News 24* 8 June 2012 "Mute girl, 14, raped at school"; *News 24* 5 June 2012 "Principal, teacher, suspended for assault".

13 De Wet "The nature and extent of bullying in Free State Schools" 2005 *South African Journal of Education* 83 notes that a survey was undertaken in 2002 in a Gauteng research project into bullying, which showed that, in the preceding year (2001), 90% of learners had been bullying victims.

14 De Wet "Educators perceptions on bullying prevention strategies" 2007 *South African Journal of Education* 191-208.

15 *Ibid*.

16 See footnote 11.

17 Van der Westhuizen and Maree "Student teachers' perceptions of violence in primary schools" 2010 *Acta Criminologica* 1.

18 *Ibid*.

i) 10,8% of participants had been threatened with violence at some point;
ii) 7,5% of participants had been assaulted at some or other time;
iii) 3,19% of participants had been robbed;
iv) 1,4% of participants had been the victim of some sort of sexual violence; and
v) 12% of participants had been shouted at or made to feel inferior.[19]

1.2.2 *Background and historical overview*

Bullying in schools is a real problem.[20] By sending one's children to school, one lays the foundation for their life. Bullying is a harmful external factor that sets the stage for permanent damage which will ultimately have a lasting, negative effect on the child's life, reaching beyond puberty, to adulthood. Bullying may be physical or psychological, which in turn means that it is much more complex than mere playground pushing and shoving. In South Africa, no successful measures have been taken yet to eradicate bullying, whether legislative, or through policy, awareness or any other means by which to stop the terror that is bullying.

Bullying has always been an omnipresent phenomenon. However, the general attitude of people towards bullying in the past caused bullying to be glanced over as a "right of passage".[21] Only in recent years have professionals such as lawyers and educators realised that bullying is in fact a form of abuse.[22] The fact that bullying has only been labelled a problem in the last 30 to 40 years, makes it difficult to trace the roots.

19 Van der Westhuizen and Maree 2010 *Acta Criminologica* 2.
20 See footnote 12.
21 Carpenter and Ferguson "History of Bullying" accessed on 2011-08-26 from http://www.netplaces.com/dealing-with-bullies/what-is-bullying/history-of-bullying.htm
22 *Ibid*.

However, if one examines literature in the form of novels,[23] it is evident that bullying has always been present.

Olweus[24] started a large-scale study on bullying in 1970, which is now generally regarded as the world's first study of its kind.[25] The findings[26] of this study were published in Scandinavia in 1973 and in the United States of America in 1978.[27] In the 1980s Olweus conducted the first intervention study against bullying which is known today as the *Olweus Bullying Prevention Program* (OBPP).[28] Suffice to say, most, if not all of what is currently understood about bullying can be attributed to the work done by Olweus and the OBPP.

1.3 Research methods

1.3.1 Literature study

A literature review of relevant South African law pertaining to children's rights, schools and school safety, as well as criminal and delictual liability for any form of bullying behaviour will be conducted. The review will include, *inter alia*, legislation, statutes, case law, common law, textbooks, articles and electronic media.

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23 *Oliver Twist* was written by Charles Dickens and published in 1838, it tells the tale of how Oliver had been bullied and mistreated; *Lord of the Flies* was written by William Golding and published in 1954 and describes a group of children's descent into barbarism when left unsupervised by an adult; *The Outsiders* was written by S.E Hinton in 1967 and tells the story of the bullying of a 14-year-old boy; *Blubber* was written by Judy Blume in 1974 and tells the tale of how a fifth-grader had been viciously bullied. Even though these are works of fiction, all of them depict a similar, real-life phenomenon, which is bullying. Therefore, if one looks at the timeline, it only proves the fact that bullying is not a new problem. These examples were accessed from http://www.netplaces.com/dealing-with-bullies/what-is-bullying/history-of-bullying.htm on 2011-08-26.

24 An authority figure regarding bullying prevention who is also the person who started the Olweus Bullying Prevention Program. His research and programmes are used globally. See also footnote 25 below.

25 Information on Olweus accessed on 2011-08-26 from http://www.hazelden.org/OA_HTML/hazAuthor.jsp?author_id=4206&item=9444

26 The title of this book is *Aggression in the Schools: Bullies and Whipping Boys*.

27 Information accessed on 2011-08-26 from http://www.hazelden.org/OA_HTML/hazAuthor.jsp?author_id=4206&item=9444 .

28 *Ibid.*

1.3.2 Legal comparative study

Bullying is far from a mere local problem. Bullying in schools happens globally. It would however, be near impossible to include every country's view on bullying and its measures eradicating bullying in schools. Australia's legal system is similar[29] to the legal system of South Africa and therefore the *status quo* of the South African legal system will be compared to that of Australia.[30] Sources to be used for the study will inter alia include the *Australia Capital Territory Schools Authority Act 1976*, the *Charter of Human Rights and Responsibility Act 2006 (VIC)* and the *Child Wellbeing and Safety Act 2005 (VIC)*.

1.4 Point of departure, assumptions and hypothesis

1.4.1 Point of departure

Every child enjoys constitutional protection, which includes basic socio-economic rights, as well as protection against any unlawful act or omission that leads to maltreatment and abuse. Bullying violates five

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29 Bekker, Rautenbach *et al Inleiding tot Regspluralisme in Suid Afrika* 5 makes the point that South Africa is a multi-cultural society within which many legal systems flourish. Customary law is used as umbrella term to describe the various legal systems of the indigenous populace found in South Africa. Stately law in the South African context means Roman-Dutch law as influenced by the English common law; interpreted and developed through court decisions and legislation, as well as customary law incorporated into case law and legislation. Australia's common law was developed from English law. Key elements of the Australian legal system are *inter alia*, the rule of law, justice and independence of the judiciary. Principles such as procedural fairness, judicial precedent and *trias politica* are of crucial importance in the Australian legal context. The rule of law is entrenched in the South African Constitution in section 1, containing the founding provision. *Trias politica* is governed by section 165 of the South African Constitution. The mere fact that Australia and South Africa share the same common law heritage; together with the abovementioned examples of legal principles is enough to state that there are similarities between the two legal systems. Information on the Australian legal system accessed from http://www.dfat.gov.au/facts/legal_system.html on 2011-10-05.

30 See chapter 8 for an overview of Australian law.

constitutional rights enshrined in the Bill of Rights.[31] The child's best interest is always paramount.[32]

1.4.2 Assumptions

i) Schools inclusive of all teaching and non-teaching staff, as well as all stakeholders, are obliged to protect and respect the rights of children, even protect children from one other.

ii) By protecting the rights of children constitutionally, a possibility is created for the drafting of legislation in keeping with present times to protect children.

iii) Where schools' jurisdiction ends, it is the obligation of the State to create another body to work in conjunction with schools to oversee the upholding, respect and protection of children and their rights.[33]

iv) Violating any rights afforded to a child will leave such a person with a liability; whether criminal, delictual or both.

v) The child's best interest would entail upholding all the constitutional values enshrined in the constitution, human dignity, freedom, equality, *et cetera*.[34]

1.4.3 Hypothesis

It takes a village to raise a child,[35] in other words a team effort is required to address bullying properly. A holistic[36] approach would

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31 These rights are: equality (section 9), human dignity (section 10), freedom and security of the person (section 12), rights of the child (section 28) and education (section 29).

32 Section 28(2) of the Constitution; section 9 of the Children's Act 38 of 2005.

33 Bray "Law, Education and the Learner" in Boezaart (ed) *Child Law in South Africa* (2009) 456-474 makes the point that the state is a basic provider of public education in South Africa (in accordance with sections 12(1) and 34(1) of the South African Schools Act). The state also has important partnership obligations to work together with schools and their local communities to promote school education. It is thus stated that these partnership obligations, include an obligation to ensure that children are safe in and out of school.

34 See par 5.2.

35 This is an African proverb but has been adopted by Hillary Rodham Clinton in her 1996 book "It Takes a Village: And Other Lessons Children Teach Us".

36 The *Oxford English Dictionary* 359 defines holistic as: "treating the whole person rather than just the symptoms of a disease."

therefore properly address the issue of bullying by getting all stakeholders involved. By either drafting anti-bullying legislation or amending current legislation to bring to life a national anti-bullying movement[37] in keeping with the spirit of *Ubuntu*,[38] bullying in South African schools can be abolished.[39]

1.5 Legal questions

Following the above problem statement, the primary question to be answered can be formulated: Is current legislation providing a solution with regard to bullying in South African schools? Following this question, a few subsidiary questions arise, which are -

i) What is bullying?
ii) What is the legal status of minors pertaining to criminal liability?
iii) Can anti-bullying legislation rectify the situation?
iv) What should such legislation contain?
v) Is it possible to make bullying a crime?
vi) Will the criminalisation of bullying address the issue?

1.6 Framework of the dissertation

The introductory chapter will familiarise the reader with the position in South Africa, pertaining to bullying as it currently stands. Statistics on the high prevalence of bullying will prove that a huge problem exists within both the South African legal system and society. However, solutions and findings will only be given in the final chapter. This chapter

37 It must be borne in mind that one cannot right one wrong with another and especially when working with children, special care must be taken not to do more harm than good. It is thus stated that one cannot declare war when the aim is peace. The process to be followed to eradicate bullying ought to be a stern but peaceful and humane system of restorative justice.
38 See par 1.1 footnote 4.
39 A restorative justice approach is preferred above a punitive approach. See section 2(b)(*iii*) of the Child Justice Act 75 of 2008, which states that *ubuntu* needs to be promoted by *inter alia* reconciliation through restorative justice.

will create the foundation for the research to be conducted throughout the study, by giving background information on bullying, familiarising the reader with the research methods to be used, establishing the point of departure, assumptions and hypothesis and following this, the legal questions to be answered.

Chapter 2 further builds upon the understanding the reader has of bullying, as it contains definitions of *inter alia* violence, bullying, bullycide and restorative justice. Literature has made it evident that violence and bullying goes hand in hand, but these two terms are not the only important definitions to keep in mind when researching bullying. Therefore an entire collection of terminology needs to be studied. This chapter also includes the limitations of the study, making mention of the areas of bullying that will not be dealt with, since bullying in itself is such a broad field.

Chapter 3 will delve deeper into the problem of bullying, by discussing material by experts on the field of bullying,[40] to form a clear picture of why bullying behaviour occurs, what causes it and what might solve the problem, for to solve any problem fully, the cause must be understood. Chapter 3 will build further upon the definitions of both violence and bullying, set out in chapter 2. This chapter will also sketch the *status quo* in South African schools, for the purpose of comparing it to Australian schools later on in the study.

Building upon the milieu sketched in chapter 3, chapter 4 will delve deeper into bullying by exploring and unravelling a bullying incident and compartmentalising the key role players. These role players are: bully (bullies), passive bullies or henchmen, bystanders, defenders and victims.[41] In this chapter, the phenomenon known as bystander behaviour will also be discussed as a possible cause and catalyst for

40 Olweus, De Wet, Joubert, etc.
41 Information accessed on 2011-11-27 from http://olweus.org/public/bullying.page.

bullying.[42] It is important to look at a bullying incident from "ground level" in order to grasp the intricate goings-on fully. Possible solutions to bullying might be found inwardly instead of introducing external stimuli.[43]

Chapter 5 will discuss the current legal position in South Africa pertaining to the rights of children with regard to violence, school safety and human rights extensively. Sections of the Constitutions will be explored, *inter alia* sections 9, 10, 12, 14, 28, 33 35(3)(*l*) and 39. Once the constitutional framework has been established, legislation will be added to form a clearer picture. This will form the basis of the legal comparative study. Legislation to be made use of will *inter alia* be the South African Schools Act 84 of 1996,[44] the Education Laws Amendment Act 31 of 2007,[45] National Education Policy Act 27 of 1996,[46] the Employment of Educators Act 76 of 1998,[47] Child Justice Act 75 of 2008[48] and the Children's Act 38 of 2005.[49] Government notices such as Government Notice 776 of 1998[50] are also relevant.

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42 Rigby and Johnson "Expressed readiness of Australian schoolchildren to act as bystanders in support of children who are being bullied" 2006 *Educational Psychology* 425-440 state that bullying has been reduced in schools where bystanders have been encouraged to step in for victims of bullying.

43 It is thus stated that a restorative justice system where learners take the leading role in mediation might be the key to solving the problem, rather than blowing a situation further out of proportion. However, in serious cases where criminal charges can be brought, it is a different matter altogether.

44 The South African Schools Act 84 of 1996 regulates all matters pertaining to basic public education and creates a uniform system for the organisation of matters relating to schooling.

45 The Education Laws Amendment Act 31 of 2007 ought to be read along with the South African Schools Act 84 of 1996, since this Act repeals certain sections or amends certain sections of the Schools Act in order to keep legislation current and up to date.

46 The National Education Policy Act 27 of 1996 lays down basic principles for national education policy as well as amending certain parts of the National Policy for General Education Affairs Act 76 1984.

47 The Employment of Educators Act 76 1998 regulates the employment of educators of public schools, terms and conditions of service, discipline and discharge and any other issue pertaining to employment of educators.

48 The Child Justice Act 75 of 2008 establishes a criminal justice system for child offenders.

49 The Children's Act 38 of 2005 gives effect to the rights of children as stated in the Constitution as well as the United Nations Convention on the Rights of the Child 1989 and the African Charter on the Rights and Welfare of the Child 1999.

50 GG 18900 1998-05-15 lays down guidelines for the drafting of a code of conduct for learners in schools.

The applicable rules of common law are also very important and will be discussed and added to the framework. Areas of common law that are applicable to this study are:

i) the principle of legality;
ii) *audi alteram partem*;
iii) aspects of criminal law;
iv) the law of delict;
v) due process; and
vi) *in loco parentis*.

A review of relevant case law will follow, discussing cases such as *Dowling v Diocesan College and others*,[51] *Danielle Antonie v Governing Body, The Settler High School and Head Western Cape Education Department*,[52] *High School Vryburg and the Governing Body of High School Vryburg v The Department of Education of the North West Province*[53] and *Jacobs v Chairman, Governing Body, Rhodes High School and others*.[54]

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51 *Dowling v Diocesan College and others* 1999 (3) SA 847 (CPD). This case dealt with a school's liability for the actions of its prefects. A young boy was bullied, beaten and humiliated by two prefects. His parents instituted legal proceedings against the school board. The finding was that schools are obliged to protect the inherent dignity of their learners. The prefects assaulted the boy while acting in a duly appointed capacity (as prefects), thus they acted on behalf of the school. Therefore, the school was held liable for the actions of the prefects.

52 *Danielle Antonie v Governing Body, The Settler High School and Head Western Cape Education Department* 2002 (4) SA 738 (C). This case dealt with human dignity. A learner challenged her suspension because she refused to tie her hair back. The court ruled that a too severe punishment can only have a negative effect, on both her development as well as her dignity. The suspension was set aside. This case is especially important when regarding the position of a bully, since one must instil good values by rehabilitation instead of punitive punishment.

53 *High School Vryburg and the Governing Body of High School Vryburg v The Department of Education of the North West Province* (CA 185/99). This case highlighted the crucial importance of following due process. A grade 9 pupil was charged with assault with intent to do grievous bodily harm after he allegedly stabbed another pupil with a pair of scissors. The grade 9 pupil appeared before the governing body. He was also charged criminally and upon his arrival back at school was told to leave, as he had been suspended. He later arrived with members of the African National Congress Youth League and Congress of South African Students, demanding his reinstatement. He was tried before the school board again and suspended again. The matter went to the High Court where it was found that the disciplinary hearing's outcome was to be regarded as null and void. The reason for this was that the

International law will not be discussed in this chapter; however, it is still applicable and will be discussed in a following chapter dealing with international law.

It is of crucial importance to stop bullying, but it cannot be done "by any means necessary". It will be argued that the aim should always be to restore justice, dignity, harmony and mutual respect.[55] This chapter seeks to explore what restorative justice means,[56] how it can be applied to the South African school system and how that might affect the prevalence of bullying. Restorative justice is a corner stone of this study and therefore critically important.

Chapter 7 will deal exclusively with international instruments such as charters and conventions that influence the rights of children. Instruments to be reviewed will be the *United Nations Convention on the Rights of the Child 1989* (CRC),[57] *African Charter on the Rights and*

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disciplinary hearing could not be seen as fair and just and therefore he could not be expelled. His parents had not been notified and the rules of natural justice had not been applied. This case is of crucial importance when working with bullies, since one needs to follow due process to the letter in order for change to take effect.

54 *Jacobs v Chairman, Governing Body, Rhodes High School and others* 2011 (1) SA 160 (WCC). This case dealt with violence directed at an educator. A learner bludgeoned a teacher against the head with a hammer. The learner was charged and convicted of attempted murder. The incident resulted in the educator being hospitalized for three days and suffering thereafter from severe depression and trauma. The question to be asked was, did an obligation rest upon the school to ensure that no harm befell its staff? It was found that indeed a legal duty rested upon the school to protect not only its learners but also its staff from harm. Failure to do so would result in the application of the Acquilian action. This case is important because it highlights the fact that educator-targeted bullying is a reality, but also, that a school has a legal duty to protect learners, teachers and non-teaching staff alike.

55 See par 1.4.3 and footnote 35.

56 See par 2.2.6.

57 The preamble to the UN Convention on the Rights of the Child *inter alia* mentions the following: "Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community, Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding, …".

Welfare of the Child 1999 (ACRWC),[58] the *Universal Declaration on Human Rights 1948*[59] and *the Declaration on the Promotion Among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples 1965*.[60] These international instruments together with the framework established in chapter three, form a cohesive unit through which children ought to be fully protected. However, this is not the case and in this chapter the persisting *lacunae* will also be highlighted and discussed. By doing this, one can solidify the link between South African and international law.[61]

Australia's legal system was developed from England's common law.[62] Needless to say, South Africa has also been influenced greatly by English common law and thus certain commonalities will exist between the legal systems of Australia and South Africa.[63] Australia has quite an impressive list of legislation and policy regarding human rights as well as children's rights. Legislation to be considered more closely will be the *Child Wellbeing and Safety Act 83 of 2005,*[64] *Schools Authority Act 1976,*[65] *Children and Young Persons (Care and Protection) Act 157 of*

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58 An extract from the preamble states the following: "RECOGNIZING that the child occupies a unique and privileged position in the African society and that for the full and harmonious development of his personality. The child should grow up in a family environment in an atmosphere of happiness, love and understanding."

59 The preamble *inter alia* states: "Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations…".

60 This declaration's preamble *inter alia* states the following: "*Taking into consideration* the fact that in the conflagrations which have afflicted mankind it is the young people who have had to suffer most and who have had the greatest number of victims."

61 Section 39 of the Constitution states the following – "(1) When interpreting the Bill of Rights, a court, tribunal or forum a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; b) must consider international law; and c) may consider foreign law." This means that international law is both applicable and important to form an objective and clear picture of bullying and how to address the issue.

62 Leeming "Common Law within three federations" 2007 submitted at the International Association of Constitutional Law Conference June 2007 Athens (unpublished conference paper).

63 See footnote 23 for a discussion on the similarities between the Australian and South African legal systems.

64 This Act aims to establish principles for the wellbeing of children and create certain bodies to oversee the wellbeing of children.

65 This Act aims to establish a framework for the Australian school system and is much like the South African Schools Act 84 of 1996.

1998,[66] *Charter of Human Rights and Responsibilities Act 2006,*[67] *Human Rights and Equal Opportunity Commission Act 1986,*[68] *NSW Anti-Discrimination Act*[69] and the *Sex Discrimination Act 1984.*[70] Policy regarding children, violence and bullying to be looked at will *inter alia* be *Behaviour Management in Schools,*[71] *Anti-discrimination, Harassment and Bullying Policy*[72] and *Student Discipline in Government Schools*: *Anti-bullying Plan for Schools*.[73] This is, however, not an exhaustive list and more legislation will be added throughout the study.[74] The literature will be discussed, examined and compared with the legal framework of South Africa to find a possible solution within legal comparative research.

In chapter 9, a conclusion will be drawn from the aforementioned research. After comparing the legal position of South Africa with that of Australia, an analysis can be made from which new understanding can

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66 This Act aims to provide and care for children and young persons, as well as to provide for services as needed by children and young persons, much like the South African Children's Act 38 of 2005.

67 This Act establishes human rights and is similar to the Bill of Rights found in Chapter 2 of the Constitution of the Republic of South Africa, 1996.

68 This Act puts a commission in place to oversee that human rights are enforced equally.

69 The Anti-discrimination Act builds upon the protection of human rights of the people of Australia by ensuring that no unjust discrimination takes place.

70 This Act deals with discrimination based on sex, marital status, pregnancy, potential pregnancy, family responsibilities or sexual harassment.

71 This policy aims to promote positive social relations, a healthy school environment and procedural fairness regarding any decisions made pertaining to learners.

72 The Anti-discrimination, Harassment and Bullying policy brings to the foreground the responsibilities of teaching and non teaching staff in Catholic institutions, regarding bullying and harassment and thus promotes a harmonious environment where rights are respected.

73 This plan sets out a strategy for bullying behaviour in New South Wales schools, as well as developing and implementing anti-bullying strategies.

74 Examples are: *Children and Young People Act* 2008 (Australian Capital Territory), *Care and Protection of Children Act* 2007 (Northern Territory), *Child Protection Act* 1999 (Queensland), *Children's Protection Act* 1993 (Southern Australia), *Children, Youth and Families Act* 2005 (Victoria), *Children, Young Persons and their Families Act* 1997 (Tasmania), *Children and Community Services Act* 2004 (Western Australia), *Education Act* 2004 (Australian Capital Territory), *Education Act* 8 of 1990 (New South Wales), *Education Act* 2007 (Northern Territory), *Education (General Provisions) Act* 2006 (Queensland), *Education Act* 1972 (Southern Australia), *Education and Training Reform Act* 2006 (Victoria), *Education Act* 1994 (Tasmania), *School Education Act* 1999 (Western Australia). These pieces of legislation and other sources along with their applicable sections will be examined in detail in chapter 8.

be gained of bullying and violence in schools. A structure for the fight against bullying in schools can be built on this. Recommendations will be made on the best way forward, whether the drafting of anti-bullying legislation in conjunction with anti-bullying policy or pure amendments to current legislation.

1.6 Conclusion

It is evident, if one only looks at the statistics and media reports that something needs to be done.[75] The best place to start would be by doing research into the cause of the problem, the effect of bullying behaviour and the legal consequences of bullying. This will yield a clearer picture of what can be done about the matter. Many studies in the fields of psychology, education and sociology have been undertaken regarding bullying; however, legal research into the problem of bullying is scarce.

Legal research into bullying is necessary in order to obtain a solution that is both sustainable and enforceable in the long run. This will help to ensure safe schools and raise responsible, respectable young adults and could ultimately have a positive effect on the crime rate.[76]

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75 See par 1.2.1 and footnote 12.

76 Mollo *A Legal Perspective on the Establishment of Anti-bullying Policies in Public Schools* (MEd dissertation 2009 UP) 25 and Sampson *Bullying in Schools* (2009) 2 both make the point that bullies can ultimately turn into criminals as adults and it is thus stated that by eliminating bullying behaviour, criminal behaviour as an adult could be greatly limited.

Chapter 2: Definitions and conceptual framework

2.1 Introduction

It is evident that bullying is a problematic issue.[1] One of the biggest problems is the fact that a plethora of definitions for bullying exist, without uniform application thereof. Therefore, in order to fully conceptualise, understand and address it properly within this study, a framework of definitions is needed. The conceptual framework thus also delimits the study to set parameters to guide the research.[2] When considering bullying, terms such as bullying, violence, bullycide, restorative justice, learner and educator, are of crucial importance and will be explored and discussed.

2.2 Limitations of the study

Bullying is a topic encompassing various fields[3] of study not limited to law[4] alone. Because of the vastness of bullying as a concept, it is imperative to delimit this study in order to achieve the desired depth. The following areas will not be considered:

2.2.1 Workplace bullying

This form of bullying takes place at a person's place of employment and although some of the elements are the same, it does not have much to do with learner-on-learner bullying in schools. Workplace bullying can be defined as –

> Workplace bullying is repeated, health-harming mistreatment of one or more persons (the targets) by one or more perpetrators that takes one

1 See par 1.2.1 and footnote 12 in chapter 1 above in this regard.
2 See par 2.2.
3 These fields are *inter alia* psychology, sociology, anthropology, criminology and education.
4 Bullying touches on aspects of criminal law, the law of delict, child law, education law, labour law, internet laws etc.

> or more of the following forms: Verbal abuse; Offensive conduct/behaviours (including nonverbal) which are threatening, humiliating, or intimidating; Work interference: sabotage.[5]

Workplace bullying can take place at a school, as educator-targeted bullying[6] is a reality; however, this study focuses purely on the imbalance of power between learners, not educators and learners.

2.2.2 Cyberbullying

Cyberbullying can be defined as - "Cyber-bullying is harassing, humiliating, threatening or embarrassing another person through electronic methods, such as instant messaging, email or text messaging".[7] It is a phenomenon all on its own and an entire study can be devoted to cyberbullying alone. Cyberbullying shares elements with learner-on-learner bullying as learners use social media to inflict emotional damage upon fellow learners, but that constitutes cyber crime and is governed by a set of entirely different legal principles.

2.2.3 Educator-targeted bullying

Educator-targeted bullying (ETB) is bullying directed at the educator, whether verbal or physical abuse.[8] The same basic definition of bullying applies; however, as stated, it is not directed at a learner in this instance, but at an educator. However, this would constitute work place bullying and therefore it is excluded from the study.

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5 Definition for workplace bullying accessed on 2011-03-14 from *targetedindividualscanada.wordpress.com/2011/03/14/definitions/*.

6 See par 2.2.3.

7 Definition for cyberbullying accessed on 2011-03-14 from *education.scholastic.co.uk/content/6030*.

8 De Wet "Victims of educator-targeted bullying: a qualitative study" 2010 *South African Journal of Education* 189-201 defines ETB as: "For the purposes of this study, ETB is defined as aggressive behaviour in which there is an imbalance of power between the aggressor (learner/s) and the educator. The aggressive acts are deliberate and repeated and aim to harm the victim physically, emotionally, socially and/or professionally. Acts of bullying may be verbal, non-verbal, physical, sexual, racial and/or electronic."

2.2.4 Educator-on-learner bullying

Educator-on-learner bullying almost seems to be an urban myth, given the fact that so little research has been done on the matter; however, it occurs in schools daily. The South African Council of Educators (SACE) explicitly prohibits[9] the bullying of learners by educators. It states that educators should refrain from any conduct which humiliates a learner, any form of abuse (whether physical or psychological) and any form of sexual harassment.[10] Very little research has been done on the matter and more empirical evidence is needed to substantiate proper findings and therefore this form of bullying will also be excluded.

2.2.5 Play fighting

Learners engaging in violent activities and/or games, but where consent was given, will be excluded. This will typically be the case where boys engage in sporting type games such as rugby and touch rugby, but it is not exclusive to sport. A fine line must be drawn between consent and intentional harm or humiliation, which would fall within the gist of bullying. When play fighting falls in this category, it will be discussed in this study.

2.3 Focus of study

This study will deal exclusively with learner-on-learner bullying, whether direct (physical) or indirect (verbal).

2.4 Conceptual framework

2.4.1 Violence

Violence lays the foundation for bullying. Therefore one needs to understand what violence is and how it links to bullying in order to grasp

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9 The Code of Professional Ethics par 3 accessed from http://www.sace.org.za/Legal_Affairs_and_Ethics/jit_default_21.The_Code_of_Professional_Ethics.html on 2011-09-15.

10 De Wet "Free State educators' experiences and recognition of bullying at schools" 2006 *South African Journal of Education* 61-73.

the concept of bullying. The *Oxford English Dictionary* defines violence as – "(n) behaviour involving physical force intended to hurt, damage or kill".[11] However, this definition alone is too narrow.

In reality, violence encompasses quite a few elements.[12] Still, this is not all, since violence does not solely comprise a physical element. The World Health Organisation (WHO) created a very broad definition for violence, which includes aspects of physical, emotional and sexual abuse.[13] It must be borne in mind that bullying is very similar to, if not identical, to, assault.[14] A key component of assault is violence, by either

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11 *Oxford English Dictionary* 1613.

12 Definition of violence accessed from the http://www.thefreedictionary.com/violence on 2011-06-21 states the following: "Violence (n) -
1. Physical force exerted for the purpose of violating, damaging, or abusing: crimes of violence.
2. The act or an instance of violent action or behaviour.
3. Intensity or severity, as in natural phenomena; untamed force: the violence of a tornado.
4. Abusive or unjust exercise of power.
5. Abuse or injury to meaning, content, or intent: do violence to a text.
6. Vehemence of feeling or expression; fervor."

13 Definition of violence accessed from the http://www.justice.govt.nz/publications/global-publications/s/safer-communities-action-plan-to-reduce-community-violence-sexual-violence/definition-of-violence on 2011-06-21 states the following: "The intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community, that either results in or has a high likelihood of resulting in injury, death, psychological harm, mal-development or deprivation. The definition should be understood to include physical, sexual and psychological abuse (such as the significant abuse of power arising from a dependent relationship, threats, intimidation and neglect).Violence can result in psychological and social problems as well as physical problems, all of which are of concern to communities and place considerable burdens on the health, social and justice systems. This definition recognizes that the outcomes of violence are broader than physical injury, disability or death and demonstrates that violence is not only an issue of concern to Police and the justice sector, but to the social sector as a whole."

14 Burchell *Principles of Criminal Law* 680 interestingly describes assault as: "unlawfully and intentionally (1) applying force to the person of another, or (2) inspiring a belief in that other person that force is immediately to be applied to him or her." Snyman *Strafreg* 432 defines assault as - "Aanranding bestaan uit enige wederregtelike en opsetlike doen of late (a) wat tot gevolg het dat iemand anders se liggaamlike integriteit direk of indirek aangetas word, of (b) wat iemand anders laat glo dat so 'n aantasting van haar liggaamlike integriteit omniddellik sal plaasvind." Note that the *Oxford English Dictionary* 293 defines force as: "1 physical strength or energy accompanying action or movement. 2 pressure to do something backed by the use or threat of violence [in other words assault]." Burchell does not make mention of violence, but uses the word "force" instead. The application of force, according to Burchell, encompasses

involving violent behaviour towards the victim or by putting the victim under the impression that he or she is under immediate threat of violence.[15] A link can thus be drawn between violence and bullying and it is therefore stated that bullying is in fact a form of violence.[16]

2.4.2 Bullying

The *Oxford English Dictionary* defines bullying as – "Bully (n): a person who deliberately intimidates or persecutes those who are weaker (v) (bullies, bullying, bullied) intimidate or persecute (someone weaker)."[17] This basic definition lays the foundation for research into the phenomenon.

The *Oxford* definition is however not the only definition and to conceptualise the real issue fully, one needs an accurate definition first. Such a definition ought to be detailed enough to give a clear picture, but should also not be too wide, to prevent confusion. Olweus[18] defines bullying as – "a person is bullied when he or she is exposed, repeatedly and over time, to negative actions on the part of one or more other persons, and he or she has difficulty defending himself or herself".[19]

Three key components can be identified in this definition of Olweus: –

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violent force applied to a human person, which leads to wounding, bruising, mutilation etc. Thus, violence and force can be deemed as synonymous terms.

15 Burchell *Principles* 685 note that to inspire fear also constitutes assault. Inspiring the conviction in someone's mind that he or she is under immediate threat of force or violence constitutes assault. See also Snyman *Strafreg* 448.

16 Burchell *Principles* 680 point out that society in general believes in the sanctity of the physical human being, which is an echo of the general belief pertaining to the sanctity of human life. This is in turn reflected by the criminal justice system, as force and violence directed towards a human being are prohibited and punishable.

17 *Oxford English Dictionary* 184.

18 An authority figure regarding bullying prevention and the person who founded the Olweus Bullying Prevention Program (OBPP). His research started in 1970 in Sweden and progressed to the United States. In 1983 three teenage boys committed suicide, most likely in response to severe bullying and this incident triggered the development of the first OBPP. His research and programmes are used globally. Information obtained from http://www.olweus.org/public/bullying_research.page?menuheader=2 and accessed on 2011-10-03.

19 Definition of bullying accessed from the Hazelden Foundation on 2011-05-24 at http://www.olweus.org/public/bullying.page.

i) Bullying in essence is aggressive behaviour where a bully acts negatively.
ii) It forms a pattern over time.
iii) Bullying involves a power imbalance.[20]

For the purposes of a legal definition for bullying, it should be neither too wide, nor too narrow. Therefore, other options should also be explored. According to Bully OnLine (the world's largest online resource regarding workplace bullying and related matters),[21] bullying can be defined as –

> Bullying is persistent unwelcome behaviour, mostly using unwarranted or invalid criticism, nit-picking, fault-finding, also exclusion, isolation, being singled out and treated differently, being shouted at, humiliated, excessive monitoring, having verbal and written warnings imposed, and much more. In the workplace, bullying usually focuses on distorted or fabricated allegations of underperformance.[22]

From this definition of bullying it is evident that there has been some expansion, adding more elements and characteristics. Taking into account all the above-mentioned definitions, a clearer picture surfaces of what bullying is and what the problem entails.

Bullying is a wrongful, intentional act; whether a physical act, gesture, verbal, written or electronic communication, taking place repeatedly and is performed by either a single individual or more than one person. Bullying can be characterised as frightening, intimidating treatment to which a learner is repeatedly subjected by another learner/learners or an educator resulting in:

i) Physical harm to the learner or his or her property;

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20 *Ibid*.
21 Bully OnLine has been a project of the Tim Field Foundation since 1996. Field had a vision of a world free from bullying and published a book, "Bully in Sight", and also started bullyonline.org. These are only two examples of the work Field has done to eradicating bullying and in 2009 the Tim Field Foundation received a makeover carrying the vision of the late Field. Information obtained from http://timfieldfoundation.org/component/content/article/9-overview/1-introduction on 2011-10-03.
22 Definition of bullying accessed from http://www.bullyonline.org. on 2011-05-24.

ii) emotional harassment the learner;

iii) making the learner fear for his or her own safety or the safety of his or her property;

iv) substantial disruption of the orderly functioning of school activity; and

v) the ultimate creation of a hostile environment that is counterproductive to learning.

The above definition will serve as an interim definition of what bullying is for the purposes of this research. Throughout this study, the definition will be developed further in order to be used in school policies and anti-bullying legislation.

2.4.3 The relationship between violence and bullying

Bullying is considered a form of violence; however it has been argued that it has different root causes from some other forms of violence and therefore preventing bullying requires a different approach than other forms of violence.[23] Rather than seeing these two fields as two separate and unrelated entities, they should be seen as parallel and co-dependent fields.[24]

Bullies and victims of bullying will more often than not exert themselves violently; because of low self-esteem and often depression issues.[25] However, these are not the only catalysts to violent behaviour in children who are involved in bullying behaviour.[26] Bullies rather than victims are more likely to engage in violent activity.[27]

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23 Anon "Bullying vs Violence" (2009) accessed on 2011-06-23 from http://www.bullyingstatistics.org/content/bullying-vs-violence.html.

24 *Ibid*.

25 *Ibid*.

26 Psychological problems associated with bullying are not explicitly mentioned in psychological texts as such, since the link has not yet been drawn specifically. However, symptoms from certain behavioural disorders in children can be ascribed to bullying. Theron "Gedragsversteurings by kinders en adolessente" in Louw (ed) *Suid-Afrikaanse Handboek van Abnormale Gedrag* (1990) 415-446 mentions, *inter alia*, the following behavioural disorders in children: "opponerend-uitdagende versteuring, vermydingsversteuring, oormatige-angsversteuring". These behavioural disorders mentioned can be caused in

The WHO defines physical violence as "the use of physical force against another person or group that results in physical, sexual or psychological harm".[28] Harassment or bullying, on the other hand, is defined as "intentional use of power against another person or group that can result in harm to physical, mental, spiritual, moral or social development".[29]

From this, it can be seen that violence has a more serious physical effect, whereas bullying has a more serious psychological effect.[30] However this is not necessarily a mutually exclusive occurrence. The definition pertaining to bullying mentioned here, defines workplace bullying. The only difference between workplace and school bullying is, in most instances the milieu (when considering educator bullying, however, it is similar); the elements and the most important effects[31] remain the same. It should be borne in mind, however, that this study is about a horizontal power imbalance (learner on learner) and not a vertical power imbalance, as would be the case with workplace bullying, educator-on-learner or learner-on-educator bullying.

2.4.4 Bullycide

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victims as a result of bullying, and in bullies as a result of a negative home environment. Chapter 3 discusses the link between child law, bullying and psychology and will look more closely at the psychological effects of bullying.

27 Anon "Bullying vs Violence" (2009) accessed on 2011-06-23 from http://www.bullyingstatistics.org/content/bullying-vs-violence.html.

28 European Foundation for the Improvement of Living and Working Conditions "Violence, bullying and harassment in the workplace" (2007) report compiled on behalf of the European Union (EU) by Eurofound, a tripartite EU agency that provides expertise on living and working conditions, industrial relations and managing change in Europe.

29 *Ibid.*

30 This statement was inferred from the definitions given of violence and harassment or bullying in the paragraph above. However, De Wet "The voices of victims and witnesses of school bullying" 2005 *Koers* 705-725 makes the point that bullying has various negative long and short tern effects on the learners involved. These effects could even extend to affect their mental and physical health owing to the fact that bullying can place a child under immense stress. Therefore it is clear that there is a fine line between violence, bullying and the physical and psychological effect these phenomena have on people.

31 A victim of bullying will suffer emotional, psychological and more often than not physical damage as a direct result of the bullying behaviour and these elements are the same, whether school or workplace bullying.

Bullying has gone so far as to cause young people to take their own lives. This phenomenon is known as "bullycide".[32] If one takes a look at the definition of bullycide, a direct nexus can be drawn between the bullying behaviour and the eventual suicide and thus it can be argued that such a bully could be held criminally liable for the death of the victim.[33]

2.4.5 Suicide, murder and culpable homicide

Suicide, culpable homicide and murder all result in death and when linked to bullying behaviour, can also be called "bullycide". The loss of life results in severe trauma for those left behind.

2.4.5.1 Suicide

Suicide means to take your own life.[34] Synonymous with suicide is the archaic Latin expression *felo de se*.[35] However, when reading the

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32 Definition of bullycide accessed on 2011-09-20 from http://dictionary.reference.com/browse/bullycide and states the following: "bullycide –n the act or an instance of killing oneself intentionally as a result of bullying [C21:from bully + (sui)cide]". Another definition for bullycide accessed on 2011-09-20 from http://www.jaredstory.com/bully.html correlates with the abovementioned definition. It is thus stated that bullycide ought not to be applied exclusive to "bully" and "suicide" but in some instances, to "homicide" as well.

33 However, in this instance, the concept of *novus actus interveniens* must be taken into account. The *Trilingual Legal Dictionary* 243 defines it as "a new cause intervening". Burchell *Principles* 213 describe *novus actus* as: "The *novus actus* (or *nova causa*) *interveniens* concept is often described in terms of an 'abnormal' intervening act or event which will serve to break the chain of causation. The normality or abnormality of an act or event is judged according to the standards of general human experience." This would mean that, if a victim of bullying died by his or her own hand later in time and not at the hand of a bully during a bullying incident, a defence of *novus actus interveniens* can be raised thus absolving an accused of criminal liability. However, there is no hard and fast rule as each case is judged upon its own merit. See *Road Accident Fund v Russell* (656/98) [2000] ZASCA 66; 2001 (2) SA 34 (SCA); [2001] 1 All SA 160 (A) (24 November 2000); *S v Haileka* (CA92/2006) [2006] NAHC 62; *The Premier of the Western Cape Province v Loots* (214/2010) [2011] ZASCA 32. It must be stated that these cases explain *novus actus interveniens* and do not link to bullycide. A more in depth discussion of *novus actus interveniens* and the possibility of criminal liability due to bullycide will be dealt with in chapter 5. See also footnote 37.

34 The *Oxford English Dictionary* 759 defines suicide as "1 the action of killing yourself deliberately. 2 a person who commits suicide".

definition of suicide in conjunction with the definition of bullycide,[36] the general picture changes. It can be argued that a direct nexus is present between the bullying behaviour and the ultimate suicide. This can be proven by asking whether, if the bullying behaviour where to be removed from the equation, the youth would still have committed suicide. The answer would probably be no. This raises the issue of liability. If a bully's actions are the cause of another youth's suicide, he or she could be held liable for the death of the victim.[37]

2.4.5.2 Murder

Murder[38] is conventionally defined as killing someone.[39] It ought to be borne in mind that murder consists of a few elements, namely, causation of death, whether through an act or omission, of another human being, which is unlawful and intentional.[40] When regarding these elements in

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35 Burrill *Law Dictionary and Glossary* (1987) 612 defines *felo de se* as: "a felon of himself; a self murderer".

36 See par 2.4.4.

37 To illustrate the seriousness of the matter, consider section 241 of *Canada's Criminal Code* which states: "Every one who counsels a person to commit suicide, or aids or abets a person to commit suicide, whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years." Burchell *Principles* 212 note that where the questioned conduct took place in the form of a positive act, it begs the question as to whether, without the accused actions, the consequence would have occurred. If the answer is yes, then the conduct is a factual cause of the consequence (*conditio sine qua non*). However, where an omission instead of conduct is under scrutiny, a hypothesis is created of the action which should have been performed. If, after addition of the hypothetical action, the consequence disappears, omission is a factual cause of the consequence. Snyman *Strafreg* 81 states that in certain cases the *conditio sine qua non*-formula may be used in order to ascertain whether the act is a factual cause of the position after the act has been carried out. According to this formula, one has to ask what would have happened had X not acted; would the eventual position (as it currently stands) still be the same? If the answer is no, then X's action is indeed a factual causation of the current position. If, however, the answer is yes, the action is not a factual causation of the current position, as it would not have changed the circumstances. See also footnote 33 in this regard.

38 Burchell *Principles* 667 notes the interesting evolvement of the word murder. It originates from its stem which means death. The Latin word, '*mori*', (mortality), followed by the Germanic word '*mord*', Afrikaans 'moord', Old English 'mothor' and 'murdre' all play a part in what is now murder.

39 Burchell *Principles* 667 describe murder as: "the unlawful and intentional killing of another person". Snyman *Criminal Law* 447 defines murder as: "the unlawful and intentional causing of the death of another human being".

40 Snyman 447.

the milieu of a school yard, it could be argued that a minor would foresee that his actions or lack thereof could lead to the death of a fellow learner. Consider the following real-life scenario: A 16-year-old girl was allegedly forced to drink "Jik" by three school bullies and as a result of this, she died.[41] This poses the issue of premeditated action. A court needs to apply the reasonable person test in order to resolve such an issue.[42]

2.4.5.3 Culpable homicide

A human life can also be taken by culpable[43] homicide.[44] Culpable homicide and murder differ from each other by virtue of the difference in culpability required to distinguish the separate offences.[45] In the instance of culpable homicide, negligence is required; whereas, when dealing with murder, intention is required.[46] In this instance it can be argued that if someone knew of a bullying incident or ongoing bullying relating to a specific child, then that person can be charged with culpable homicide.

2.4.6 Restorative justice

In a bullying incident there will be a victim and a bully.[47] More often than not these participants are children. Therefore alternative means other than a punitive system of justice needs to be sought. Restorative justice can be defined as dealing with issues of both victim and transgressor in

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41 De Wet "The voices of victims and witnesses of school bullying" 2005 *Koers* 705-725.

42 This test will be discussed in more detail in chapter 5; however, it basically encompasses the following: would a reasonable person (a person of similar age, circumstances and with the same mental capacity) have acted the same? This test is objective.

43 Culpable can be defined as: "adjective deserving blame or censure; blameworthy. Origin: 1275–1325; Middle English < Latin *culpābilis,* equivalent to *culpā* (*re*) to hold liable (derivative of *culpa* blame) + *-bilis* -ble; replacing Middle English *coupable* < Middle French < Latin as above". Definition accessed on 2011-11-18 from http://dictionary.reference.com/browse/culpable.

44 Snyman 451 defines culpable homicide as "the unlawful, negligent causing of the death of another human being".

45 Snyman 452 further makes the point that all the elements of culpable homicide and murder are the same, except for negligence (with regard to culpable homicide).

46 Snyman 452.

47 These are, however, not always the only role players, see chapter 4.

such a way that there is healing on both sides, as well as communal healing.[48] The concept of *ubuntu*[49] is critically important when dealing with restorative justice, as the aim of restorative justice through healing is to cement core values such as mutual respect, love, sympathy and empathy.[50]

2.4.7 Child

This study involves children. Conventionally, a child is seen as a person under the age of 18. The Constitution defines a child as - "In this section "child" means a person under the age of 18 years".[51] The CRC states the following in article 1: "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."[52] The ACRWC defines a child as follows in article 2: "For purposes of this Charter a child means every human being below the age of 18 years". The Children's Act 38 of 2005 describes a child as: "a person under the age of 18 years". The Child Justice Act 75 of 2008 defines a child as:

> any person under the age of 18 years and, in certain circumstances, means a person who is 18 years or older but under the age of 21 years whose matter is dealt with in terms of section 4(2).

For the purposes of this study, it will be accepted that a child is a person under the age of 18.

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48 Batley "Restorative Justice in the South African Context" in Maepa (ed) *Beyond Retribution Prospects for Restorative Justice in South Africa* (2005) 21-32. Skelton *The influence of the theory and practice of restorative justice in South Africa with special reference to child justice* (LLD thesis 2005 UP) 12 is of the view that it is difficult to fully conceptualise and define restorative justice as such, since it means different things to different people. Further more, people take different approaches to restorative justice, as some advocates and theorists prefer a wide definition in order to leave room for development whereas others prefer parameters to be laid down. Chapter 6 deals with restorative justice in schools.

49 See chapter 1, footnote 4 for a definition of *ubuntu*.

50 *Ibid*.

51 Section 28(3) of the Constitution.

52 See par 7.3.1.

2.4.8 Learner

Following the definition of a child, the correct definition of the term "learner" is also paramount.[53] The South African Schools Act 84 of 1996 defines a learner[54] in section 1 as – "any person receiving education or obliged to receive education in terms of this Act".[55] The Schools Act takes it a step further and states in section 3(1) that it is compulsory for a learner to attend school from the first day of the school year in which he or she turns seven up to and until the last school day of the year in which he or she turns 15 (or ninth grade), whichever occurs first.[56]

2.4.9 Educator

An educator is commonly known as a teacher, the legally correct term is, however, "educator".[57] For the purposes of this study, the definition adopted in the Schools Act will be deemed correct.

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53 It is thus stated that a child can be a learner, but a learner is not necessarily a child.

54 Bray "Law, Education and the Learner" in Boezaart (ed) *Child Law in South Africa* (2009) 456-474 adds to this definition of a learner: "Descriptions of a learner may include a person in the Early Childhood Development (ECD) stage or a person receiving Adult Basic Education and Training (ABET), who is involved in any kind of formal or non-formal education and training activity."

55 South African Schools Act 84 of 1996.

56 Bray in Boezaart (ed) *Child Law in South Africa* (2009) 456-474.

57 The National Education Policy Act 27 of 1996 describes an educator in section 1 as: "any person who teaches, educates or trains other persons at an education institution or assists in rendering education services or education auxiliary or support services provided by or in an education department, but does not include any officer or employee as defined in section 1 of the Public Service Act, 1994 (Proclamation No. 103 of 1994)"; the South African Schools Act 84 of 1996 defines an educator in section 1 as: "any person, excluding a person who is appointed to exclusively perform extracurricular duties, who teaches, educates or trains other persons or who provides professional educational services, including professional therapy and education psychological services, at a school". The Employment of Educators Act 76 of 1998 states in section 1 that an educator is: "any person who teaches, educates or trains other persons or who provides professional educational services, including professional therapy and education psychological services, at any public school, further education and training institution, departmental office or adult basic education centre and who is appointed in a post on any educator establishment under this Act".

2.4.10 Policy

Drafting and successful implementation of certain policies are imperative for good governance on any level, also in an educational context. The *Oxford English Dictionary* defines policy as – "(n) (pl. policies) a course of action adopted or proposed by an organization or person."[58] It is thus stated that a policy is a guideline, setting out basic compulsory elements to be adhered to, but leaves space for schools to adapt it to their own circumstances.[59] For the purposes of this study, policy will be regarded as an action plan adopted and implemented by schools, specifically pertaining to bullying.

2.4.11 Code of conduct

Section 8 of the South African Schools Act 84 of 1996 governs a code of conduct for learners.[60] A code of conduct contains disciplinary rules for learners and is thus imperative to the maintenance of proper school discipline.[61] The aim of a code of conduct is to promote proper, positive behaviour and to help instil a sense of responsibility and pride in learners.[62] However, a code of conduct also deals with negative discipline in addressing unacceptable behaviour and the consequences

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58 *Oxford English Dictionary* 576.

59 Mollo *A Legal Perspective on the Establishment of Anti-Bullying Policies in Public Schools* (MEd dissertation 2009 UP) 11 adds the following, with regards to the implementation of an anti-bullying policy in schools: "The policy itself is a statement of intent that guides action and organisation with the school. The policy therefore establishes a clear set of agreed aims that provide learners, staff and parents with a sense of direction and an understanding of the commitment of the school to do something about bullying behaviour."

60 This section states *inter alia* the following: "(1) Subject to any applicable provincial law, a governing body of a public school must adopt a code of conduct for the learners after consultation with the learners, parents and educators of the school. (2) A code of conduct referred to in subsection (1) must be aimed at establishing a disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process." This section has seven more subsections and will be discussed in more detail in chapter 5.

61 Bray "Codes of conduct in public schools: A legal perspective" 2005 *South African Journal of Education* 133-138.

62 *Ibid*.

thereof.[63] Duly important in the instance of a code of conduct is the incorporation of the principle of due process.[64] Therefore, a code of conduct is a set of rules which sets the standard for learner behaviour, encouragement of self-discipline and mutual respect but it also includes negative discipline (conduct that will not be tolerated) and the procedures that go along with learner misconduct. However, a code of conduct rarely, if ever explicitly mentions bullying.[65]

2.5 Conclusion

By determining a conceptual framework of definitions, an outline is drawn of what exactly the study entails. It is also evident that bullying is far more complex than mere name-calling or pushing and shoving. Bullying has become a serious matter, to such an extent that it has acquired a criminal element when regarding terms such as bullycide, suicide, murder and culpable homicide. Restorative justice is a cornerstone to this study, as it encompasses not only the philosophy of *ubuntu*,[66] but could also, if applied correctly, instil values in the youth of South Africa as stipulated in the Constitution.[67] Therefore, bullying could

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63 *Ibid*.

64 Due process is explicitly mentioned in section 8(5)(a) of the South African Schools Act 84 of 1996, but is also enshrined in section 33 of the Constitution of the Republic of South Africa and will be discussed in more detail in chapter 5.

65 Mollo *A Legal Perspective on the Establishment of Anti-Bullying Policies in Public Schools* (MEd dissertation 2009 UP) 93 found that schools rarely use separate anti-bullying policies but opt to discipline bullies by using the measures as stipulated in the code of conduct. It is worrying to note that some of the aspects as stipulated in the codes of conduct have nothing to do with bullying. In order to address bullying sufficiently, a separate policy is needed, as an addendum to the code of conduct. This bullying policy should include guidelines on how to induce positive classroom and playground behaviour to minimise bullying, how to deal with a bullying incident and steps to take afterwards, as well as support for victims and bullies. The underlying principles of such a policy should be *ubuntu*, restorative justice and human dignity.

66 Skelton *The influence of the theory and practice of restorative justice in South Africa with special reference to child justice* (LLD thesis 2005 UP) 1.

67 Section 1 of the Constitution contains the founding provisions and states: "1. The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. (b) Non-racialism and non-sexism. (c) Supremacy of the constitution and the rule of law. (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-

ultimately be eradicated if a shift in perspective is achieved through the correct implementation of restorative justice in schools.[68] This framework now serves as the basis for the rest of the study, as it is imperative to know exactly what one is dealing with and the limitations[69] must be clear.

party system of democratic government, to ensure accountability, responsiveness and openness."

68 See par 2.4.6.

69 Limitations of this study can be found in par 2.2.

Chapter 3: Violence and bullying in South African schools

3.1 Introduction

Bullying touches upon various fields of study.[1] In order to address bullying[2] properly the causes of bullying, as well as its psychological effects on both the bully and victim must be understood.[3] The approach of this study is holistic in nature and therefore it is imperative to discuss the psychological aspect of bullying as well.[4] The aim of this chapter is to look at the root of the problem and to place it in context. Furthermore, chapter 3 sketches the *status quo* of what a South African school currently looks like, in order to highlight the importance of this study.

3.2 The relationship between child law and psychology

Psychology can be defined as –

> The scientific study of the nature, functions, and phenomena of behaviour and mental experience. The etymology of the word [psychology] implies that it is simply the study of the mind, but much of modern psychology focuses on behaviour rather than the mind, and some aspects of psychology have little to do with the mind.[5]

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1 See par 2.2.

2 See par 1.4.3.

3 *Loc cit*. It must be borne in mind that, when working with children, especially in the instance of a bullying incident, various disciplines come into play such as law (child law, criminal law, education law and law of delict), psychology, sociology etc. These disciplines must work in conjunction with one another to ultimately find a cohesive solution. It takes a village to raise a child (see chapter 1, par 1.4.3 and footnote 35) and therefore, it would also take a multi-disciplinary effort to eradicate bullying.

4 The psychological aspect of bullying will not be delved into too deeply, as this is not a psychological study. However, it is necessary to place bullying into context, by broadly examining its psychological roots. This may ultimately help to find a solution for bullying from a legal perspective.

5 Swanepoel *Law, Psychiatry and Psychology: A Selection of Constitutional, Medico-Legal and Liability Issues* (LLD thesis 2009 UNISA) 89 also defines behaviour: "The term 'behaviour' has a much wider meaning for the psychologist than for the layman. Both use the term to refer to those actions which are overt and directly observable by other people, such as social interaction, speech and motor skills. In addition, most psychologists extend 'behaviour' to include also 'private' experiences and processes, such as

The modern approach to child law is multi-disciplinary in nature[6] and a more holistic means of looking at child law has been sought.[7] There is a link[8] between child law and social sciences, *inter alia* psychology.[9] When a child's rights are affected, in that same instance, he or she will be affected psychologically.[10] Thus, in order to ensure that minimal damage is done to a child, or to rectify damage already done, law and psychology are two disciplines that need to be applied in conjunction.[11]

3.3 The relationship between child law and bullying

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thoughts and emotions. The importance of the term 'behaviour' in psychology is that it emphasises *how* the phenomena under consideration should be studied. The main technical problem in psychology is therefore to devise behavioural indices of private experience such as thoughts and feelings."

6 Boezaart "Child law, the Child and South African Private Law" in Boezaart (ed) *Child Law in South Africa* (2009) 4.

7 *Ibid.*

8 Currie and De Waal *Bill of Rights* 292 make the point that section 12 of the Constitution not only guarantees a person personal freedom and security, but also bodily and psychological integrity. Currie and De Waal 600 also state that section 28 of the Constitution affords children protection additional to the overall protection guaranteed by the Bill of Rights. Therefore, it is evident that children also have the right to bodily and psychological integrity. Section 2(b) of the Children's Act 38 of 2005 stipulates that one of the objectives of the Act is to provide structures to promote, monitor and protect the stable development of children, physically, psychologically, emotionally, intellectually and socially. This makes it abundantly clear that law; specifically child law, and psychology are co-dependent, intertwining fields of study.

9 Boezaart in Boezaart (ed) *Child Law in South Africa* 4.

10 The preamble to the UN Convention on the Rights of the Child *inter alia* states the following: "Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding." An extract from the preamble to the African Charter on the Rights and Welfare of the Child states the following: "RECOGNIZING that the child occupies a unique and privileged position in the African society and that for the full and harmonious development of his personality the child should grow up in a family environment in an atmosphere of happiness, love and understanding." Section 28 of the Constitution aims to afford children, specifically, protection, additional to the rights protected as in the Bill of Rights The preamble to the Children's Act 38 of 2005 *inter alia* states the following: "AND WHEREAS it is necessary to effect changes to existing laws relating to children in order to afford them the necessary protection and assistance so that they can fully assume their responsibilities within the community as well as that the child, for the full and harmonious development of his or her personality, should grow up in a family environment and in an atmosphere of happiness, love and understanding." Therefore, it can be said that legislation, regional and international documents are used to protect the psychological integrity of children and thus the link between child law and psychology is evident.

11 See par 1.4.3.

Children make up an important societal group.[12] Therefore, the promotion and protection of their rights are equally important.[13] As stated above, bullying is a very serious issue, transgressing a myriad of constitutional rights.[14] Section 7(2) of the Constitution determines that the state is obliged to respect, protect and promote the rights set out in the Bill of Rights.[15] Because bullying infringes upon the constitutionally protected rights of children, it is clear that this instance ought to be regulated by both child law and education law as bullying often transpires between learners (children) at school.

3.4 The relationship between bullying and psychology

Bullying is a phenomenon that is hard to pin down; because, people differ, some learners might be more susceptible to become bullying victims than others and some learners might be more likely to bully, than others.[16] When considering the above definition of psychology, it is clear that psychology deals with behaviour and behavioural problems. Bullying is a behavioural problem.[17] Bullying is not limited to physical violence.[18] It also encompasses name-calling, verbal abuse, social exclusion, being treated differently *et cetera*.[19] Bullying can have an

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12 Boezaart in Boezaart (ed) *Child Law in South Africa* 3.

13 Not only does the Bill of Rights apply to children (where applicable), section 28 encompasses children's rights. Flowing from section 28, is the Children's Act 38 of 2005, a piece of legislation aimed at furthering protection of children as set out in the Constitution.

14 See chapter 1, footnote 5, 12 and par 1.2.1 in this regard. Also see chapter 2 par 2.4.2 and footnote 30.

15 Constitution of the Republic of South Africa, 1996.

16 The possible causes of bullying will be discussed in more depth in par 3.5.

17 See par 3.5. Korbin "Children, childhoods, and violence" 2003 *Annual Review of Anthropology* 438 makes the point that children "absorb" aggression and violence, in other words, if a child grows up in violent surroundings, he or she will in turn become a violent and/or aggressive person. Wolke, Woods, Bloomfield *et al* "The association between direct and relational bullying and behaviour problems among primary school children" 2000 *Journal for Child Psychology and Psychiatry* 998 state the following: "A key finding is that behaviour problem ratings of parents for children involved in direct bullying according to individual interviews with the children were increased. All groups involved in direct bullying had significantly higher scores than neutral children on total difficulties, conduct problems, and hyperactivity and lower scores than neutral children for prosocial behaviour." Therefore, it is evident that bullying is in fact a behavioural problem not only among bullies, but also among victims.

18 See par 2.4.2.

19 *Ibid.*

adverse effect on a child's mental and physical health.[20] A person's sense of self-worth is tied into his or her "good name" and dignity and once that has been infringed upon, he or she is affected psychologically.[21] This is where bullying and psychology ties into one another.

The fact that bullying[22] is a behavioural problem, which has a psychological effect on the victim, relates bullying directly to psychology.[23] It must be borne in mind that not every instance of bullying has a psychological root.[24] However, it is hypothesised that, in most instances, the source is psychological.[25] It is thus stated that bullying is a psychologically motivated act with legal consequences.

3.5 Causes of bullying

There is no single set of rules that applies to every child, as each set of circumstances differ. It is acknowledged that, because this study focuses purely on children, it is hard to delimit a single set of rules and factors, as each child is different. However, through research, commonalities have been distilled and it is not too hard to spot a "bully in the making". It has

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20 Wolke, Woods, Bloomfield *et al* 2000 *Journal for Child Psychology and Psychiatry* 989-1002; De Wet 2005 *Koers* 705-725.

21 Neethling and Potgieter *Visser Deliktereg* 17 note that a claim for pain and suffering can be instituted in instances where pain, suffering and deformity are caused by an act or omission. This course of action is aimed at rectifying the physical and psychological infringement upon personality rights. Therefore it is evident how important a person's psychological integrity is, as it is protected through law.

22 Wolke, Woods, Bloomfield *et al* 2000 *Journal for Child Psychology and Psychiatry* 990 point out that bullies as well as bullying victims are more susceptible to behavioural problems and when tests were conducted both bullies and victims scored higher on neuroticism and psychoticism scales than children who were not involved in acts of bullying. Further studies found that children involved in bullying behaviour, whether as victim or bully, had much more behavioural problems than those children who were not involved in bullying behaviour.

23 See footnote 5 for a definition of behaviour.

24 See par 3.5.

25 It must be reiterated at this point that this study is not a psychological study, but legal research. As stated earlier, it is imperative to give a psychological overview as well, to place bullying in context. As the basis of this study is holistic, it is necessary to determine the source of the problem in order to provide a proper solution.

been argued that bullying is a direct result of competitiveness.[26] More specifically, it has been noted that bullying behaviour can be attributed to frustration due to failure in school.[27] It is doubtful that this could be the most significant characteristic of bullying.

For the purposes of this study, it is hypothesised that the causes of bullying behaviour can be broken down into two categories, namely externally influenced causes and those of internal origin.

3.5.1 Externally influenced causes of bullying behaviour

Olweus identified four important factors that may lead to bullying behaviour.[28] These are:

i) The emotional attitude of the parents (specifically the primary care-giver) towards the child, particularly in the child's developing years. When the parents' attitude is negative, this increases the risk that the child might become aggressive later in life.[29]

ii) The extent to which the primary care-giver has allowed aggressive and negative behaviour in the child is equally important. If the primary care-giver is tolerant without setting boundaries, the child's aggression levels will most likely increase.[30]

iii) If parents use aggressive child-rearing methods such as spanking, it could also lead to heightened aggression in a child.[31]

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26 Mollo *A Legal Perspective on the Establishment of Anti-Bullying Policies in Public Schools* (MEd dissertation 2009 UP) 23.
27 *Ibid*.
28 Mollo 24. Note that the fourth factor will not be discussed under 3.5.1 but rather 3.5.2 which discusses causes of internal origin.
29 Mollo 24.
30 *Ibid.*
31 *Ibid*.

iv) A child's temperament also plays a role in how he or she develops. A child with a more volatile temperament is more likely to be aggressive and thus the chances are higher for such a child to ultimately bully. It must be stated however, that this factor has a much smaller effect than the abovementioned causes.[32]

Furthermore, the community a child grows up in also plays a major role in his or her aggression levels.[33] If a child grows up in an aggressive environment, he or she will ultimately "absorb" that aggression and become aggressive.[34] This would also mean that such a child is more likely to bully than a child living in a peaceful community.

Another external factor is exposure to aggressive and violent television and movies and violent video games.[35] Exposure to violence in these ways puts children at risk of developing aggressive and antisocial problems.[36] It must be stated, however, that it is not the media in themselves that catalyse violent behaviour in children, but what they express (murder, assault *et cetera* are portrayed as normal in many television shows, movies and games). Therefore, it is evident that violence[37] underpins bullying behaviour and is also an external catalyst to possible bullying behaviour.

3.5.2 Causes of bullying behaviour of internal origin

A cause of bullying behaviour of internal origin refers to psychological causes, where the stimuli are not external, but internal. These problems are referred to as conduct problems.[38] It can be further distilled down to

32 *Ibid*.
33 Korbin "Children, childhoods, and violence" 2003 *Annual Review of Anthropology* 438.
34 *Ibid.*
35 Nelson and Israel *Abnormal Child and Adolescent Psychology* 199.
36 *Ibid.*
37 See par 2.4.1 for a definition of violence.
38 Mash and Wolfe *Abnormal Child Psychology* 156.

rule-breaking[39] and aggressive[40] behaviour.[41] The former encompasses behaviour that would put a child in conflict with the law, for instance vandalism, drug and alcohol abuse *et cetera*.[42] This is commonly seen as the aftermath of bullying, if it is not stopped.[43] Aggressive behaviour can be depicted as classic bullying behaviour. It is characterised as including fighting, disobedience, defiance, threats and disruptive behaviour at school.[44]

Children who persistently fight (physically) are at a high risk of psychiatric problems later in life.[45] A few psychological disorders will be briefly discussed.[46]

3.5.2.1 Oppositional Defiant Disorder

Children with oppositional defiant disorder (ODD) display recurring stubbornness, hostility and defiance that is unnatural for their age.[47]

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39 Nelson and Israel *Abnormal Child and Adolescent Psychology* 195 ascribe the following characteristics to this behavioural problem: "drinks alcohol, lacks guilt, breaks rules, bad friends, lies, cheats, prefers older kids, runs away, sets fires, sex problems, steals at home, swearing, thinks of sex too much, tardy, uses tobacco, truant, uses drugs, vandalism".

40 Nelson and Israel *Abnormal Child and Adolescent Psychology* 195 describe aggressive behaviour as having the following main attributes: "argues a lot, defiant, mean to others, demands attention, destroys own things, destroys others' things, disobedient at home, disobedient at school, gets in fights, attacks people, screams a lot, explosive, easily frustrated, stubborn, sullen, mood changes, sulks, suspicious, teases a lot, temper, threatens others, loud".

41 Mash and Wolfe *Abnormal Child Psychology* 156. Nelson and Israel 195 make the point that the aforementioned behavioural problems are in fact empirically derived syndromes, falling within a wider variety of syndromes, they have been given more names, wider treatment measures have been employed and as such, efforts have been taken to narrow down the field.

42 Mash and Wolfe *Abnormal Child Psychology* 156.

43 Mollo 25; Sampson *Bullying in Schools* (2009) 2.

44 Mash and Wolfe *Abnormal Child Psychology* 156.

45 *Op cit* 157. Bullies commonly fight, whether physically or verbally and are therefore at risk of major psychological damage.

46 These disorders might not be the only disorders linked to the cause of bullying in children; however, it must be borne in mind that this study is not a psychological study, but legal in nature. Thus, a brief overview is given of the psychological side of bullying.

47 Mash and Wolfe *Abnormal Child Psychology* 158. Nelson and Israel *Abnormal Child and Adolescent Psychology* 193 describe ODD as developmentally extreme.

These children are also antisocial and aggressive.[48] It is a common yet practical problem specifically pertaining to discipline.[49] To diagnose ODD, at least four of the following criteria must be present for at least six months:

i) regular temper tantrums;
ii) frequent arguments with adults;
iii) defiant attitude to adults;
iv) deliberately annoying people;
v) blaming other people for his or her own faults or misbehaviour;
vi) becoming annoyed easily;
vii) regular resentment; and
viii) vindictiveness.[50]

When looking at these factors or signs, it is not hard to spot a bully or "bully in the making". Therefore, it is imperative that such a child gets help as soon as possible.[51]

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48 *Ibid.*

49 Nelson and Israel *Abnormal Child and Adolescent Psychology* 194.

50 Mash and Wolfe *Abnormal Child Psychology* 159; Nelson and Israel *Abnormal Child and Adolescent Psychology* 193.

51 The most important question in this instance, is who is responsible for getting a child help. Section 18 of the Children's Act 38 of 2005 *inter alia* reads as follows: "18. (1) A person may have either full or specific parental responsibilities and rights in respect of a child. (2) The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right- *(a)* to care for the child". It is thus stated that a person with parental rights and responsibilities (which can include parents, grandparents, family, a guardian or educator) have a legally imposed duty to care for their child or children is enforced by the Children's Act. When it comes to their attention that their child has a problem, the duty lies with the person (or persons) who have parental rights and responsibilities in respect of that child to have a professional examine the child and to prescribe a course of action. Neglecting this duty would mean that such parents failed to carry out their parental responsibilities in terms of s18(2)(a) of the Children's Act 38 of 2005. Chapter 4 of the Act deals with the provisions pertaining to the children's court. Section 45 states that a children's court may adjudicate matters regarding care, protection, support, instances of maltreatment, neglect, abuse, excluding criminal proceedings against the child; temporary safe care, etc. Furthermore, a children's court may convict an individual based upon non-compliance with a children's court order or similar order. Section 150 of the Act *inter alia* states that a child is in need of care and protection when he or she displays uncontrollable behaviour, has been exposed to psychologically detrimental circumstances, has been physically or psychologically neglected or is a victim of maltreatment or abuse. According to section 151, where it is evident that a

3.5.2.2 Conduct Disorder

Conduct disorder (CD) can generally be characterised as repetitive, persistent severe aggression, antisocial acts, inflicting pain, causing harm, infringing upon the rights of others through physical and verbal violence, stealing and vandalism.[52] Criteria for CD revolve around the repetitive pattern of infringement upon the rights of others over a period of at least three months, with at least one of the following present:

1 Aggression to people or animals
i) bullying behaviour and frequent threats to others
ii) initiation of physical fights
iii) use of weapons that can cause serious physical harm
iv) history of physical cruelty towards people
v) history of forcing a victim into sexual activity.[53]

2 Destruction of property
i) deliberate fire-setting with the intention to cause serious damage
ii) intentional destruction of property.[54]

3 Deceitfulness or theft
i) Breaking into someone else's property
ii) often deceives people;
iii) history of stealing nontrivial items.[55]

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child is in need of care and protection, the case must be referred to a social worker for further investigation. If need be, the child must be removed to be temporarily placed in safe care, pending the outcome of the investigation. See also par 5.3.1.1.6 for an overview of parental rights and responsibilities, as well as a description of the word 'care'.

52 Mash and Wolfe *Abnormal Child Psychology* 159.
53 *Op cit* 160; Nelson and *Israel Abnormal Child and Adolescent Psychology* 194.
54 Mash and Wolfe *Abnormal Child Psychology* 159; Nelson and Israel *Abnormal Child and Adolescent Psychology* 194.
55 *Ibid*.

4 Serious violation of rules

i) Freaking breaking of parental curfew even before age 13;

ii) Running away from home on more than one occasion, staying overnight, whilst staying with parents;

iii) Frequent absence from school, starting before the age of 13.[56]

When considering the aforementioned criteria, it is evident that a bully could possibly suffer from CD and that it is a far more serious problem than mere competition for marks or a hot-tempered, disobedient child.[57]

3.5.2.3 Conduct disorder and antisocial personality disorder

The question must be asked what happens if the aforementioned behaviour is not addressed.[58] What happens if it escalates and a child continues to display a pattern of violent behaviour?[59] It could lead to adult antisocial personality disorder (APD).[60] It is worrying to note that as many as 40% of children with CD develop APD.[61] APD sufferers could also display signs of psychopathy.[62]

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56 *Ibid.*

57 Barlow and Durand *Abnormal Psychology* 445 note that a child diagnosed with CD will more often than not become a child offender.

58 Barlow and Durand 446 point out that antisocial behaviour becomes a lifelong pattern, because children who display antisocial behaviour continue to display this pattern of behaviour as they grow older. Furthermore, Barlow and Durand note that adults with APD or psychopathy, had CD as children. It has also been found that the misdemeanours committed as a youth, will be committed on a larger scale as an adult.

59 Mash and Wolfe *Abnormal Child Psychology* 160; Nelson and Israel *Abnormal Child and Adolescent Psychology* 191.

60 *Ibid*. APD is described as: "a pervasive pattern of disregard for, and violation of, the rights of others, as well as involvement in illegal behaviours". This is yet another very important link between the law, bullying and psychology. It is evident that bullying behaviour more often than not has a psychological cause and if it is not treated in time (see footnotes 39 and 40 in this regard), it can escalate into criminal behaviour, which will be dealt with by the criminal justice system. It is reiterated that a holistic approach is needed to prevent bullying from ultimately spinning out of control. See chapter 1 footnote 70.

61 Mash and Wolfe *Abnormal Child Psychology* 160.

62 Mash and Wolfe *Abnormal Child Psychology* 161 define psychopathy as "a pattern of callous, manipulative, deceitful, and remorseless behaviour".

It has been noted that lack of conscience or psychopathy could occur in children, but little is known about this phenomenon.[63] Children who lack behavioural inhibition[64] are characterised by their attraction to danger and desensitisation to punishment.[65] Children displaying these behavioural problems will come into trouble with law enforcement more frequently[66] than those not displaying such behavioural problems.[67] Callous-unemotional[68] traits could lead to adult psychopathy.

3.5.2.4 Treatment and prevention

It is of crucial importance to treat these disorders the moment they become evident. A very common treatment strategy when dealing with children is parent training.[69] It provides parents with the necessary knowledge to recognise behavioural patterns early on and teaches them how to deal with these.[70] There are, however, risks involved, such as

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63 *Ibid*.
64 *Ibid*.
65 *Ibid.*
66 Barlow and Durand 446 note that genetic influences also play a role. Alcoholism or drug dependency can be hereditary, for example. In the same instance, a genetic influence on APD and criminality is evident. There is a relationship between genes and the environment in which a child grows up. Thus, if a child with a higher propensity towards criminality grows up in a stable home, the tendency towards criminality plummets drastically. This is not a psychological study, but for the sake of completeness, it ought to be mentioned as a possible catalyst to bullying behaviour in children.
67 Mash and Wolfe *Abnormal Child Psychology* 161.
68 *Ibid.*
69 Barlow and Durand 450.
70 *Ibid.* Research has shown that implementing this type of strategy drastically improves the behaviour of children with behavioural problems. It is thus stated that, if parents are obliged to take part in training programmes, it would ultimately lead to a better understanding of a very serious issue and it could help solve bullying. This can be achieved through not only legislation, but also existing restorative justice provisions. One possible solution might be to incorporate parent training into diversion programmes as set out by Chapter 6 of the Child Justice Act 75 of 2008. Section 51 states that the objectives of diversion are *inter alia* to find alternative means by which to deal with a child other than the criminal justice system, to hold a child accountable for his or her actions, to cater for a program suited to the individual child's needs, rehabilitation of the child offender, reconciliation between offender and victim, promotion of emotional well-being, sense of self and dignity of the child offender. If parent training is added to such a programme, parents will understand the situation and their child better, as well as how to deal with any possible future incidents. The National Institute for Crime Prevention and the Rehabilitation of Offenders has a programme called Partners in Parenting. This programme is tailor-made for the parents of child offenders and teaches

families not following through with these programs, therefore rendering them useless.[71]

It is worrying to note that the aggressive behaviour of children is gradually increasing.[72] This means that a child, who behaves aggressively, will continue to do so as an adult, if he or she does not get appropriate help.[73] The main emphasis is being placed on schools and preschools, to implement programmes that focus on positive behaviour and skills training to improve social skills.[74]

3.6 The effect of bullying on the victim

It has to be borne in mind that bullying adversely affects not only the bully but also the victim.[75] Research now shows that bullying victims are

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positive parenting skills, conflict management and proper, positive discipline techniques. "Research shows a definite link between parenting styles and techniques and the likelihood of the child engaging in problem behaviour." Information accessed from http://www.nicro.org.za/interventions/programmes/ on 2012-07-19. See also chapter 6 for a comprehensive overview of restorative justice.

71 Barlow and Durand 450 note that families might not cooperate owing to financial strain, fear of not succeeding, family dysfunction, parental history of antisocial behaviour etc. However, if this process is governed by law and/or policy, it becomes mandatory and it is less likely that people will stop training. It ought to be borne in mind that South Africa is a developing country and expecting the government to fund each and every initiative would lead to budgetary constraints. Therefore, if large corporations such as banks, food chains, universities etc partner up, professional services with regard to training and awareness can be rendered *pro bono*. See also http://www.idasa.org/media/uploads/outputs/files/Parliament,%20the%20Budget%20and%20Poverty%20in%20South%20Africa%20-%20A%20Shift%20in%Power.pdf#page=14 accessed on 2012-09-25; as well as http://0-onlinelibrary.wiley.com.innopac.up.ac.za/doi/10.1111/1468-2397.00183/abstract accessed on 2012-09-25 for an overview of the socio-economic position in South Africa pertaining to social services and children.

72 Barlow and Durand 450.

73 *Ibid*. Barlow and Durand further state that it is alarming that violence in behaviour escalates over time and children with CD and young adults with APD are more often than not the people who commit assault and homicide.

74 Barlow and Durand 450 are of the view that the results of these programmes, especially early intervention programmes look promising, since when aggression levels plummet, social skills improve and these results are generally maintained. It is also stated that it might be best to work with children, as dealing with adults has proven ineffective.

75 See par 3.5 for the causes of bullying.

more likely to manifest signs of depression than non-victims.[76] Both bullies and victims, however, are at a higher risk of depression than learners not involved in bullying.[77] A direct nexus has been drawn between continuous victimisation through bullying, depression, suicidal ideation and suicide; which also places a bullying victim at a much higher risk of depression and related mental disorders than non-victims.[78] In order to obtain a better understanding of the devastating effects of bullying, it is necessary to conceptualise these terms further.

3.6.1 Depression

Depression encompasses a myriad of terms and symptoms.[79] For the purposes of this study, the emphasis will be on the general concept of depression, as the aim of this chapter is a mere psychological overview rather than an in-depth analysis. Quite a few syndromes encapsulating depressive symptoms also include characteristics of anxiety and withdrawal.[80] Statistics show that one in four young people experience depression somewhere between childhood and adolescence.[81]

The long-term effects of depression are severe.[82] However, the short- and midterm effects of depression range from a definite drop in

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76 Brunstein Klomek, Marrocco *et al* "Bullying, Depression, and Suicidality in Adolescents" 2007 *American Academy of Child and Adolescent Psychiatry* 40-49.

77 *Loc cit.* The above-mentioned authors also state that it is worrying to note that bullying victims are prone to show much higher levels of suicidal ideation than non-victims and victims of bullying are more likely to attempt suicide than non-victims.

78 *Op cit* 47. Bullies, however, are also at higher risk of depression, suicidal ideation and suicide than non-victims and learners not involved in bullying.

79 Mash and Wolfe 235, classify depression into three classes, as a symptom, where a person feels sad or miserable; as a syndrome, where it is much more than a mere mood and encompasses various symptoms; a disorder, which comes in two types: major depressive disorder which is most common, and dysthymic disorder, less common and less severe.

80 Nelson and Israel 159. Mash and Wolfe 238 also point out that some disorders co-occur with depression, such as anxiety disorders (general or specific) and specific phobias. (See par 1.1 footnote 6 for example.) See also Barlow and Durand 226.

81 Nelson and Israel 161.

82 Mash and Wolfe 238 state that children and adolescents who have depression are at greater risk of becoming child offenders, dropping out of school and

intellectual and academic performance to the ultimate destruction of self-esteem and social behavioural problems.[83] Depression is also related to a few associated characteristics and problems. These will be discussed briefly below.

3.6.1.1 Intellectual and academic functioning

Children with depression perform comparatively more poorly than others in school.[84] Teachers rate these children as lower achievers who score lower grades than other learners.[85] Other characteristics *inter alia* include lack of concentration and thinking ability, slower movement, agitation, fatigue, insomnia, failing grades, truancy from school, failing to complete homework and refusal to go to school.[86]

3.6.1.2 Cognitive disturbances

Children who suffer from depression also experience distorted thinking; this would typically encapsulate feelings of worthlessness, negative beliefs and attributes of failure.[87] One of the biggest problems is the fact that people believe it can be solved by simply telling such a child to lighten up, when the problem is much more serious than a mere bad mood.[88]

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being unemployed later. The risk of substance abuse, tobacco use, suicidal ideation, poor work ethic, marital problems etc is great. See also par 3.2, 3.3 and 3.4 regarding the link between the law, bullying and psychology. It is imperative that a multi-disciplinary approach be sought in order to address bullying properly, to ensure that children do not end up in the criminal justice system.

83 Mash and Wolfe *Abnormal Child Psychology* 242.

84 *Op cit* 243. One of the most important rights infringed upon, coming into play here, is the right to education, protected by section 29 of the Constitution. The right to education is of crucial importance since it lays the foundation for a child's future and when this right is infringed upon in any way that child's future is in jeopardy. Bullying is a phenomenon that places a child's future at risk, because of the severity of the effects of bullying and the brutal nature of some of the bullying incidents, physically as well as emotionally. See par 5.2.7.

85 Mash and Wolfe *Abnormal Child Psychology* 243.

86 *Ibid*.

87 *Ibid.*

88 *Ibid.*

3.6.1.3 Negative self-esteem

Negative and low self-esteem are key characteristics associated with depression in children and adolescents.[89] All adolescents and children with depression experience negative self-esteem issues.[90] Peer approval plays an important role in building a positive self-image; incompetence in these areas may lead to a higher risk of depression.[91]

3.6.1.4 Social and peer problems

Children and adolescents diagnosed with depression often have difficult overall relationships and few friends and may feel lonely and isolated.[92] They feel that others do not like them and lack proper social skills.[93] Children and adolescents who do not have proper friendships are less than likely to recover from depression.[94]

3.6.1.5 Family problems

It is evident that youths who suffer from depression have strenuous relationships with their families.[95] These children and adolescents feel isolated but choose to be alone rather than with their families.[96] This is not a lack of social skill, but rather a desire to avoid conflict.[97]

3.6.2 The causes of depression in young people

It has already been established that there is a definite relationship between bullying and depression.[98] It is submitted that there are more

89 *Op cit* 244.
90 *Ibid*.
91 *Ibid*.
92 *Ibid*.
93 *Ibid*.
94 *Op cit* 245.
95 *Ibid.*
96 *Ibid.*
97 *Ibid.*
98 See par 3.6.

than one cause for adolescent depression.[99] However, one possible cause and catalyst is worthy of further exploration, namely peer relations.[100] Bullying is a relational, behavioural problem between peers; therefore a logical conclusion would be that peer relations and bullying are linked. There is a relationship between peer status and maladjustment, especially regarding depression.[101] Peer relation difficulties can be seen as a double problem, as they may contribute to causing depression as well as being a consequence thereof.[102]

Depression may also play a contributory role with regards to relational problems.[103] Depression distorts self-perception and young people with depression see themselves as unworthy and less competent and have negative overall views of themselves.[104] The negative perceptions these young people carry around are a catalyst to social exclusion, as others might become annoyed by them therefore rejecting them.[105] When a learner is subjected to repeated bullying, it is likely that he or she may suffer from depression as a result of the bullying. This in turn isolates the child and has a negative overall effect on his or her life.[106]

3.6.3 Suicide and suicidal ideation

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99 Nelson and Israel *Abnormal Child and Adolescent Psychology* 164-169 note that the following factors play a definite role in the onset of adolescent and child depression: biological influences such as genetics, brain functioning and neurochemistry; social-psychological influences such as separation and loss, cognitive behaviour; parental depression. Mash and Wolfe *Abnormal Child Psychology* 250 state that it is a culmination of factors that could cause a vulnerable predisposition towards depression but further state that it is possible for a single traumatic event to lead to depression. Depression is also triggered by interpersonal stress and personal loss. It must be borne in mind that a "single traumatic event" will differ from child to child and in this instance, a single traumatic event refers to bullying. When regarding "interpersonal stress", it is thus stated that bullying can and does cause interpersonal stress.

100 Nelson and Israel *Abnormal Child and Adolescent Psychology* 171 point out that peer relation difficulties do in fact contribute to the onset and maintenance of depression in adolescents.

101 Nelson and Israel *Abnormal Child and Adolescent Psychology* 172.

102 *Ibid*.

103 *Ibid*.

104 *Ibid.* See also par 3.6.1.2.

105 Nelson and Israel *Abnormal Child and Adolescent Psychology* 172.

106 Constitutional rights infringed upon when a child is bullied are, *inter alia*: equality (section 9), human dignity (section 10), freedom and security of the person (section 12), various rights of the child (section 28) and education (section 29).

Studies show that bullying victims show higher suicidal ideation than non-victims.[107] Furthermore, actual suicide attempts among bullying victims are much higher than among those not involved in bullying.[108] However, not only victims, but also bullies, are susceptible to depression, suicidal tendencies and suicide attempts.[109] It is also evident that there is a link between bullying and depression among adolescents and children.[110]

One third of the youths who think about suicide actually attempt it.[111] Actual suicide attempts are more common among children and adolescents who suffer from depression.[112] Furthermore, it is interesting to note that there is a gender difference regarding suicidal ideation, suicide attempts and completed suicides.[113]

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107 Brunstein Klomek, Marrocco *et al* "Bullying, Depression, and Suicidality in Adolescents" 2007 *American Academy of Child and Adolescent Psychiatry* 41.

108 *Ibid.*

109 *Ibid*. See also par 3.6.

110 See par 3.5.

111 Mash and Wolfe *Abnormal Child Psychology* 245. Barlow and Durand 250 warn that the first step to suicide is to start thinking about it. A research study found that between 16% and 30% of adolescents who thought about suicide actually attempted it. "Thought" refers to serious and in-depth contemplation of the act of suicide.

112 Mash and Wolfe *Abnormal Child Psychology* 246.

113 *Ibid*. Female adolescents show a higher tendency towards suicidal ideation than adolescent males and more often attempt suicide than their male counterparts. Brunstein Klomek, Sourander *et al* "Childhood Bullying Behaviors as a Risk for Suicide Attempts and Completed Suicides: a Population-Based Birth Cohort Study" 2009 *American Academy of Child and Adolescent Psychiatry* 254-261 corroborate this finding and add that the incidence of suicidal ideation and suicide attempts among boys drop later on, whereas this is not necessarily the case with girls. A possible reason for this is a difference in coping strategies, but also the fact that girls might be more vulnerable to stressful life events. It is thus stated that boys are more likely to be subjected to direct bullying (physical fighting, for example pushing, shoving, kicking, punching etc), whereas girls are more susceptible to be bullied indirectly (name-calling, social exclusion, spreading of rumours etc). Even though direct bullying does have a psychological impact, the psychological impact of having one's self-worth infringed upon is far more devastating. See also http://www.youtube.com/watch?v=KRxfTyNa24A accessed on 2012-10-16 with regard to the recent suicide (2012-10-10) of Amanda Todd, an American youth following severe bullying, specifically including name-calling and spreading of malicious rumours.

Suicide[114] is the third leading cause of death among young people in the United States of America and a leading cause of psychopathy among youths, globally.[115] It has also been established that bullying cannot be said to be the single cause of suicide; however, little research has been done in this field and it remains a grey area.[116] It is thus stated that, even though many risk factors ought to be taken into account when assessing suicidal ideation[117] it remains undeniable that bullying is a major catalyst in suicidal ideation, suicide attempts and completed suicides of victims and or bullies.[118]

3.7 South African schools

The South African Schools Act 84 of 1996 lays the foundation for basic education in South Africa.[119] Section 8 of the Schools Act prescribes a basic outline for a code of conduct for learners as to positive behaviour and conduct as well as how to deal with misbehaviour.[120] In general,

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114 See par 2.4.5.1 for a definition of suicide. See also chapter 2 footnotes 32 and 36 in this regard. The legal nature of suicide and possible criminal liability will be discussed in chapter 5.

115 Kim "Bullying and Suicide. A review" *2008 International Journal of Adolescent Medicine and Health* 133-154.

116 *Op cit* 151.

117 See chapter 3 footnote 113.

118 Nelson and Israel *Abnormal Child and Adolescent Psychology* 185 note that bullying, school stress, social relationships, availability of firearms etc greatly contribute to a heightened risk of suicidal behaviour.

119 The Schools Act is not the only piece of legislation governing education in South Africa. Other legislation of importance is *inter alia* the Education Laws Amendment Act 31 of 2007, National Education Policy Act 27 of 1996, the Employment of Educators Act 76 of 1998, as well as government notices such as Government Notice 776 of 1998.

120 See also par 2.4.11. *GG* 18900 of 1998-05-15 lays down guidelines for the drafting of a code of conduct for learners in schools. Joubert "School Discipline" in Boezaart (ed) *Child Law in South Africa* (2009) 502-520 denotes three types of discipline: "(1) Preventive discipline: This type of discipline is concerned with basic rights and clear rules and consequences. (2) Corrective discipline: This refers to educator action that is carried out to correct disruptive, anti-social or deviant behaviour. (3) Supportive discipline: This type of discipline is concerned with ensuring that 'correction' is received fairly and that positive working relationships are established with disciplined learners." Discipline (as enforced by a code of conduct for learners – see par 5.3.2.1.1, 5.3.2.1.3 and 5.3.3.2) is a means by which to correct inappropriate behaviour. Corporal punishment as a means of punitive punishment is no longer legal in South Africa (see section 10 of the South African Schools Act 84 of 1996) and therefore, other, positive and more creative means of enforcing discipline must be sought.

schools depend upon their code of conduct to address bullying even though bullying is not explicitly mentioned in most instances.[121] Even though these legislative measures have been taken, schools are by no means safe.[122] Bullying behaviour occurs on school grounds and often endangers the lives of learners. South African schools have become the centre of criminal behaviour among children, with violence taking on *inter alia* the following forms:

i) stabbings, resulting in death;[123]
ii) assault leading to hospitalisation;[124]
iii) family stress, drug and alcohol abuse and child abuse culminating in behaviour that leads to a learner going on the rampage, killing a teacher;[125] and
iv) racial tension flaring up among not only black and white, but other cultures as well.[126]

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121 See chapter 2 footnote 64.

122 Van Jaarsveld "Violence in schools: A security problem?" 2008 *Acta Criminologica* 175-188 states that schools have become "arenas of violence" and have become synonymous with terms such as "dangerous" and "war zone". Steyn and Roux "Aggression and psychological well-being of adolescent tae kwon do participants in comparison with hockey participants and a non-sport group" 2009 *African Journal for Physical, Health Education, Recreation and Dance* 32-43 report that South African schools have become one of the most dangerous places for young people to be, as violent acts committed range from assault to firearm-related injuries. See also chapter 1 footnote 12.

123 Smit "School violence: Tough problems demand smart answers" 2007 *South African Professional Society on the Abuse of Children* 53-59.

124 *Ibid*.

125 *Ibid*.

126 *Ibid*. The consequences of the escalation of school violence are devastating. Smit 54 notes that if the use of drugs or alcohol and violence are allowed to become accepted conduct, the following is to be expected: gang-related violence in schools will escalate, school violence will increase as the age of child offenders decreases, more learners will be at risk of unstable and violent behaviour, gang involvement in the selling of drugs and weapons in schools will increase, as will the exploitation of learners by drug sellers and there will be an escalation in violence, intimidation and bullying, as well as an increase in incidents of violence at school. It must be pointed out that ignoring a problem of such magnitude is not only ignorant, but will lead to greater damage in the long run. Section 29 of the Constitution clearly states that everyone has the right to basic education (see footnote 84), whereas section 24 regulates matters pertaining to the environment. Disregarding the fact that the general school environment has become dangerous transgresses a learner's fundamental rights. Joubert in Boezaart (ed) *Child Law in South Africa* (2009) 502-520 states that schools have a legal duty to provide learners with a safe, secure environment, protecting them against harm that might adversely affect

It must be borne in mind that certain acts not only transgress the provisions of a school's code of conduct, they are also criminal and punishable by law.[127] These acts include:

i) possession of a dangerous weapon;[128]
ii) assault;[129]
iii) theft;[130]
iv) breaking and entering and vandalism;[131]
v) rape;[132] and
vi) murder.[133]

Therefore, it is of crucial importance to address this issue adequately. However, in order to do so, the cause ought to be established. A few aspects will be discussed below.

3.7.1 Disruptive behaviour

Some educators argue that, with the abolishment of corporal punishment, they have no means by which to discipline learners.[134] It has also been noted that because educators are no longer allowed to administer corporal punishment, they feel powerless and see no other means by which to rectify misconduct.[135] The biggest challenge facing

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their physical and psychological well being, or infringe upon any basic human rights.

127 Joubert in Boezaart (ed) *Child Law in South Africa* 519.
128 *Ibid*.
129 *Ibid.*
130 *Op cit* 520.
131 *Ibid*.
132 *Ibid*.
133 *Ibid.* Such criminal acts perpetrated by learners could constitute criminal as well as civil action. See chapter 5.
134 Naong "The impact of the abolition of corporal punishment on teacher morale: 1994-2004" 2007 *South African Journal of Education* 283-300.
135 *Supra*. Other means by which to establish and enforce discipline require time, skill and patience, something that many educators lack. It is stated that corporal punishment is an inhumane and degrading form of punishment and is forbidden by section 12(1)(e) of the Constitution which stipulates that every person has freedom and security of the person and has the right to be free of any form of inhumane, degrading punishment. In *S v Makwanyane and*

educators is dealing with disruptive[136] learners within the new legal structure where corporal punishment is forbidden and health and well-being are promoted.[137]

Surface behaviour[138] is generally perceived as being harmless as it is, in general, not a result of a learner's psychological issues, but rather developmental behaviour of children.[139] On the other hand, more serious disruptive behaviour gives rise to bigger challenges, as it is much harder to deal with.[140] Serious disruptive behaviour includes fighting and physical violence.[141] In essence, this constitutes a threat to the safety of not only learners, but educators as well.[142] Another very

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Another 1995 (3) SA 391 CC par 26, the question before the court pertained to the constitutionality of capital punishment. The court *inter alia* ruled, per Chaskalson at par 26 that death is a cruel and inhuman punishment as it "involves, by its very nature, a denial of the executed person's humanity". Further, in par 88 it was contended that "a punishment may be degrading simply by reason of its enormity". Even though capital and corporal punishment are two dissimilar forms of punishment, the common factor lies in the fact that both these instances strip a person of his or her dignity. See also par 5.3.2.1.3 as well as http://www.unicef.org/southafrica/media_10381.html for UNICEF's view on corporal punishment.

136 Marais and Meier "Disruptive behaviour in the Foundation Phase of schooling" 2010 *South African Journal of Education* 41-57 define disruptive behaviour as a general result of disciplinary problems at school, which in turn adversely affects the rights and safety of fellow learners in the learning environment. Four types of disruptive behaviour have been identified, namely: behaviour interfering with teaching in general, conduct which interferes with other learners' right to education, behaviour that is psychologically unstable or unsafe, conduct that leads to destruction of property.

137 Naong 2007 *South African Journal of Education* 284 notes that in general, educators are inexperienced at implementing new measures of enforcing discipline and fostering positive social behaviour in learners. It is thus argued that skills training and development in this regard would not only help educators to understand disruptive behaviour better (see par 3.5), but it might also drastically improve learner conduct.

138 Marais and Meier 2010 *South African Journal of Education* 44 describe surface behaviour as "common" disruptive behaviour in class, passing of notes, loud talking, moving around etc.

139 Marais and Meier 2010 *South African Journal of Education* 44.

140 *Ibid*. See par 3.4.2.2 for the characteristics of CD.

141 Marais and Meier 2010 *South African Journal of Education* 44.

142 Naong 2007 *South African Journal of Education* 294-295 collected the following opinions of educators with regard to violence and discipline in schools: "…'learners do not respect teachers any more, how can they perform?' 'Parents have shifted their children's lack of discipline to schools, and yet they are not co-operating with us'. 'School children are druggies; they abuse all sorts of drugs, especially cigarettes and marijuana – that is why they are so disrespectful'. 'Children bring knives and drugs to school, and their parents know about these things and want us to solve these problems for them'. 'Discipline begins at home, and yet parents are not willing to help us,

serious form of disruptive behaviour is bullying, which has severe negative effects on the learning experience of learners.[143]

3.7.2 Causes of disruptive behaviour

Various risk factors are involved when determining what precisely causes disruptive behaviour.[144] These factors are dependent upon internally motivated factors and factors of external origin.[145] The societal role[146] as a whole is very important in this regard.[147] Interpersonal relationships and situations regarding family, society and community play a major role in awareness, vulnerability and susceptibility to violence.[148]

Disruptive behaviour as displayed by a learner ought to be viewed in the context of the learner's life, in order to understand properly what

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they only know how to blame when we discipline their children'. 'What is happening overseas, with children shooting one another, is the result of the abolition of corporeal punishment, and South Africa is going that route, I am telling you; when these things start happening, I don't want to be here'. '…children's rights are obviously far more important than teachers' rights, so what must we do – you just get in class, teach those who want to learn, and get the … out when your time is over'."

143 *Ibid*. See par 2.4.2 for a description of bullying and par 3.6 for the effects of bullying on the victim.

144 Marais and Meier 2010 *South African Journal of Education* 44. Naong 2007 *South African Journal of Education* 288 states that behaviour is influenced by *inter alia* the environment; physiological, physical, psychological and biological factors such as drugs, alcohol, illness, nutrition, temperament, genetics, physical disabilities and medication; present day living: conditions at home and in the community, school factors, the general mood in the classroom and instructional tools.

145 *Ibid*. See par 3.5.1 for externally influenced causes of bullying behaviour and par 3.4.2 for causes of bullying of internal origin.

146 Marais and Meier 2010 *South African Journal of Education* 48 point out that the moral deterioration of society, racial and interracial conflict, socio-economic shortcomings, readily available firearms, poor law enforcement and unemployment could lead to disruptive behaviour in learners.

147 See footnote 17 – children "absorb" aggressive surroundings.

148 Marais and Meier 2010 *South African Journal of Education* 47 further point out that dysfunctional families also contribute to possible disruptive behaviour. When parents act and react violently and aggressively to educators and school staff, their children display the same violence and aggression, as well as antisocial behaviour. When a child is exposed to violence and aggression at home, it will imprint upon the mind of the child. Lack of parental involvement is another huge contributory factor to disruptive conduct. See also par 3.4.

motivates and causes this type of behaviour.[149] A study in the United Kingdom found that in response to a much more informal general environment (whether at home, socially or elsewhere), learners find the concept of appropriate behaviour hard to understand in terms of addressing peers and educators.[150] There is a universal desire among educators to make learning fun and informal; however, this may lead to problems with enforcement of discipline and teaching self-discipline.[151] When the general school climate is negative, educators act unprofessionally, school grounds are ill maintained and there is a heightened inclination towards disruptive behaviour.[152]

3.7.3 Theoretical exploration of violence in South African schools

Many empirical studies have been done to pinpoint exactly what is wrong with the schooling system in South Africa. However, for the sake of completeness, the position ought to be highlighted from a philosophical point of view as well. There are a number abstract theories regarding the decline in the quality of education in South Africa and in order to provide a sustainable solution, theory and practice must correspond.

Everyone has an inherent right to dignity.[153] The importance of this right is underpinned in section 1 of the Constitution, which states that dignity is, *inter alia*, one of South Africa's founding values.[154] In South African jurisprudence, the right to life, equality and freedom and security of the

149 Naong 2007 *South African Journal of Education* 290.
150 *Ibid*.
151 *Ibid*. Naong also noted that the state of the South African education system is not yet at the same point of deterioration as in the United Kingdom. However, if proper measures are not taken, it might soon happen.
152 Marais and Meier 2010 *South African Journal of Education* 48.
153 Section 10 of the Constitution.
154 Reyneke "Dignity: The missing building block in South African schools?" 2010 *Journal for Juridical Science* 71-105 further notes that the concept of dignity is hard to define and that it will never cease to evolve. Dignity is not only a constitutionally enshrined value, but also a right. See also chapter 2 footnote 65 and chapter 5 par 5.2.2.

person are directly related to human dignity.[155] According to Dworkin, everyone is of equal value and should therefore be treated as such.[156] Dignity also serves as a means by which to demarcate areas between personal and social demands.[157] Dignity is often at stake when the bodily and psychological integrity of a human person has been infringed upon.[158]

There is a general misconception that children[159] have only rights and no obligations under the Constitution. However, this presumption is unfounded.[160] Since children are classified as a vulnerable group, they need extra protection.[161] This does not mean that their intrinsic worth is higher than that of educators. It is, however, necessary to protect children against harm.[162] Violence in schools is a reality and is commonly instigated by learners.[163] The impact violence has on all of the people involved is severely negative, as it also has a negative impact on their dignity.[164] Even though educators should cultivate young minds,

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155 Reyneke 2010 *Journal for Juridical Science* 75 asserts that human dignity underpins most, if not all, human rights. See also Malherbe "The impact of constitutional rights on education" in Boezaart (ed) *Child Law in South Africa* (2009) 420-455.

156 *Loc cit*. Reyneke further states that marginalised groups whose dignity is infringed upon regularly include victims of sexual harassment, violence and bullying.

157 Reyneke 2010 *Journal for Judicial Science* 80 goes further by giving an example of a symbiotic educator/learner relationship: a learner ought to have the freedom (within bounds) to realise his or her full potential, whereas the educator has the right to be treated humanely. See footnote 160 below.

158 *Ibid*. An example here would be assault, where one learner viciously beats another. Not only has the physical integrity of the learner been damaged (section 12 of the Constitution), but damage is also done in terms of his/her dignity (reputation, good name, self-worth, etc). Dignity, in this instance, is used to "enrich" other rights with the idea of protecting human worth.

159 Any person under the age of 18 years of age in terms of section 28 of the Constitution. See par 2.4.7 for a definition of the term "child".

160 Reyneke 2010 *Journal for Judicial Science* 89 notes that even children are obligated to protect and respect the rights and dignity of others. Section 16 of the Children's Act 38 of 2005 holds – "Every child has responsibilities appropriate to the child's age and ability towards his or her family, community and the state." The African Charter on the Rights and Welfare of the Child states in article 31 that every child has responsibilities to his family, society, the State and any other legally recognised communities. See footnote 157 above.

161 Reyneke 2010 *Journal for Judicial Science* 89.

162 *Ibid*. Section 28 of the Constitution on the rights of the child.

163 Reyneke 2010 *Journal for Judicial Science* 89.

164 *Loc cit*. The impact of violence in schools can be seen in a learner's performance, as concentration problems, poor overall performance, high

it is the duty of parents to instil these values (such as respect for dignity[165]) in their children.[166] Sadly though, the general consensus is, that parents are uncooperative, unresponsive and absent in terms of taking an active role in the education of their children.[167]

It has been established that little progress has been made to revive dignity in the South African schooling system.[168] In order to restore dignity fully within the educational system of South Africa, a total change in perspective and attitude pertaining to values is needed; it will also be a task undertaken by all stakeholders.[169] Education as it currently stands is too egocentric and therefore it will fail as a whole,[170] as neither respect for dignity nor the spirit of *ubuntu* is being pursued.

3.8 Bullying in context

Bullying[171] is not anger or psychological problems that develop overnight. It is evident that many factors play a role in cultivating an eventual bully.[172] However, one major factor to take into consideration is the environment.[173] Bullying takes place at school, an environment that is already dangerous.[174] A child absorbs his or her surroundings[175] and

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dropout levels etc start to occur. Being subjected to violence not only affects a victim's rights to bodily integrity, but it also adversely affects his/her right to dignity. The reason being that a perpetrator of violence often sees his/her victim as no more than an object against which to vent anger and frustration.

165 See par 1.1 and footnote 4 (chapter 1) for a definition of *ubuntu*.

166 Reyneke 2010 *Journal for Judicial Science* 96 points out that parents can instil these values and foster them, by setting an example – for instance by not aggressively engaging with educators and other authority figures or acting violently towards them. Showing respect is very important.

167 Reyneke 2010 *Journal for Judicial Science* 96. People talk about leaving our children a better world, but the focus should be on leaving better children for our world.

168 *Op cit* 99.

169 *Ibid.*

170 *Ibid*.

171 See par 2.4.2 for a description of bullying.

172 See par 3.5 for the causes of bullying and par 3.6 for the effects of bullying.

173 Smit "The bully/victim problem in schools" 2003 *Acta Criminologica* 81-88 states that three-quarters of all bullying incidents take place at school, in classrooms or on playgrounds or school grounds.

174 See par 3.7 for specific criminal behaviour perpetrated within school grounds.

175 Korbin "Children, childhoods, and violence" 2003 *Annual Review of Anthropology* 431-446.

a potentially volatile situation is worsened by the mere fact that it takes place in a setting where violence is an accepted practice.[176] Heightened violence and exposure to aggressive behaviour may lead to bullying behaviour spinning out of control. This, in turn, could lead to "bullycide"[177] becoming synonymous with homicide, whereas the conventional definition for bullycide combined only bullying and suicide.

3.9 Conclusion

Modern child law is holistic[178] in nature.[179] The important relationship that exists between child law and psychology cannot be overlooked, since the transgression usually has a psychological effect on the victim, especially if that victim is a child.[180] Bullying is a behavioural problem, which ties it to psychology. Several causes for bullying have been identified; *inter alia* competition for marks and frustration. Upon closer inspection, two categories emerge: externally influenced causes such as parental attitude, parental allowance of negative behaviour, negative child rearing methods, *et cetera*;[181] and causes of internal origin such as ODD, CD and APD.[182] It is worrying to note that a person with APD could develop psychopathy.[183]

In order to prevent possible tragedy, immediate treatment must be sought when a problem comes to light.[184] Aggressive behaviour in children continues throughout adulthood and worse, there is an escalation in the severity of their actions.[185] Bullying has an adverse

176 See par 3.7 for a list of violent acts commonly committed by learners. See also footnotes 158 and 164.
177 See par 2.4.4.
178 See 1.4.3 and footnote 36 in chapter 1 above for a definition of holistic.
179 Boezaart in Boezaart (ed) *Child Law in South Africa* (2009) 4.
180 See footnote 10.
181 See par 3.5 for the causes of bullying.
182 *Ibid*. These factors all culminate to bring bullying into existence. It is reiterated that a child of sound, healthy mind will not bully.
183 See par 3.5.2.3.
184 See par 3.6 and footnote 51.
185 Burchell *Principles of Criminal Law* 179 make the following statement regarding free will, linking it to a person's actions: "Modern western philosophy derives the notion of individual responsibility from the doctrine of free will. This holds

effect on the victim, to such an extent that bullying victims could, as a result of repeated bullying, develop depression.[186] This could potentially lead to suicidal ideation, suicide attempts and even suicides.[187]

Schools have become centres of aggression and violence, even with legislative measures in place.[188] Lashing out violently has become acceptable social conduct and it affects the rights of all involved adversely.[189] Lack of discipline and proper enforcement thereof leads to disruptive behaviour, which could potentially (and does on occasion) turn violent.[190] Society[191] plays a big role in fostering disruptive behaviour, since there is a symbiotic relationship between community, family and school, which lays a child's foundation.

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that all humans are born with the ability freely to choose between different courses of action. Having this freedom the individual can justifiably be held responsible for the consequences of his or her chosen actions … It follows from this that persons will be held criminally liable only if their actions are determined by their free will." Bullies ought to be held accountable for their actions, in such a manner, that the behaviour causing them to bully stops. Boezaart in Boezaart (ed) *Child Law in South Africa* (2009) 36 notes that an *infans* is regarded as *doli et culpae incapax* and thus cannot be held liable based on fault within the law of delict. A rebuttable presumption exists regarding the accountability of a minor between age seven and 12 for girls and 14 for boys, pertaining to unlawful acts. Robinson "Children's rights in the South African Constitution" 2009 *Potchefstroom Electronic Law Journal* 5-25 makes the point that there is a differentiation in pubescent age for boys and girls because the two sexes develop differently, physiologically. This differentiation might not be constitutional when regarding age in the light of private law accountability of minors (see Robinson footnote 25). For purposes of private law, there should be one age for both sexes - 14. Lowering the age of puberty by two years for girls, is discriminatory and the margin for error is too big, since children develop differently and some children (irrespective of sex) develop more slowly than others. A consequential enforcement of one pubescent age would be beneficial in terms of eliminating confusion and other technicalities. In terms of section 7 of the Child Justice Act 75 of 2008, a child below the age of 10 has no criminal capacity. A child between the ages of 10 and 14 is presumed to lack criminal capacity, unless the state can prove otherwise. Gallinetti "Child Justice in South Africa: The Realisation of the Rights of Children Accused of Crime" in Boezaart (ed) *Child Law in South Africa* (2009) 650 states that children 14 years of age and older have full criminal capacity. If proper steps are not taken, they will have to take criminal responsibility as adults for crimes they committed. Also note her justified criticism on the gender-based differentiation amounting to discrimination. See also par 5.4.1.1 for a discussion of the Child Justice Act in this regard.

186 See par 3.6 and 3.6.1.
187 See par 3.6.3 and footnote 114.
188 See footnote 122.
189 See footnote 126.
190 See par 3.7.1 and 3.7.2.
191 Society, in this context, must be seen as an umbrella term for parents (family), community and school.

From a more philosophical point of view, the general lack of respect for people and their dignity has brought the education system to where it currently stands.[192] Dignity is not only a value, underpinned by section 1 of the Constitution, but also a right, as stipulated by section 10 of the Constitution.[193] When other rights, associated with the human person[194] are infringed upon, dignity is an accompanying right that courts take into account.

It is imperative to note that children, like adults, have rights as well as obligations in terms of the Constitution. One of the obligations resting upon all is the duty to respect the dignity of others.[195] Bullying, a form of serious disruptive behaviour, takes place at school.[196] This gives rise to a potentially explosive situation, as the milieu is one filled with violence and aggression. The escalations of bullying incidents seem imminent. The South African education system will face dark days when bullycide becomes synonymous with homicide.[197]

192 See par 3.7.3.
193 *Ibid*.
194 These rights would typically include all personal security rights, see footnote 158.
195 See par 3.7.3.
196 See chapter 3 footnote 136.
197 See par 2.4.4.

Chapter 4: The key role players in a bullying incident

4.1 Introduction

It is important to know exactly what bullying is.[1] However, mere knowledge of what bullying entails is not sufficient ultimately to eradicate it altogether. Bullying has been placed into context, not only in terms of the milieu in which it takes place, but also internal and external elements contributing to bullying behaviour.[2] This chapter uses the foundation laid by the previous chapters to look at the dynamic of a bullying incident by dissecting it. The role players will be identified and discussed, as well as bystander behaviour, a possible catalyst to bullying behaviour. This, in conjunction with cause and effect, as well as environmental factors, will lay the foundation for legislative solutions to be proposed later in the study.

4.2 The importance of dissecting a bullying incident

Irrespective of personal external and internal factors,[3] other environmental causes contribute to bullying as a whole.[4] It has already been established in chapter 3 that schools are by no means safe.[5] It is also evident that children absorb their surroundings and will therefore become what they hear and see, thus, when left in violent surroundings, the chance of that child becoming aggressive and violent increases.[6] However, it is also imperative to know what triggers a bullying incident, what causes it to escalate and who takes part in bullying behaviour. By establishing what these variables are, they can be eliminated and

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1 In order to address a problem, it is important to know exactly what the problem entails, to provide proper, sustainable solutions. See par 2.4.2.
2 See chapter 3 for the causes and effects of bullying, as well as what a modern South African school looks like.
3 See par 3.4 for the causes of bullying. These causes refer to factors that motivate a child to become a bully.
4 Environmental factors in this regard ought to be understood as external factors contributing to the bullying incident rather than to the psychological psyche of the individual learner.
5 See par 3.7.
6 See chapter 3, footnote 17.

consequently, bullying can ultimately be eradicated in such a manner that *ubuntu*[7] can be achieved as the moral standard according to which fundamental rights are respected.

4.3 Role players in bullying

Bullying is much more complex than two learners fighting, or one learner hitting another.[8] Contrary to popular belief, research shows that bullying does not necessarily transpire between two people alone. More people can be, and often are, involved.[9] It is worrying to note that 60.2% of bullying incidents are initiated by more than one learner.[10] The role players in a bullying incident, whether active or passive, will be briefly discussed below.

4.3.1 Bully

A bully is commonly defined as - "a person who deliberately intimidates or persecutes those who are weaker".[11] In a bullying incident, a bully can be seen as the instigator, someone who takes the lead role and who actively takes part in bullying the victim or victims.[12] The motivation that drives a child to bully is subjective, as each case and each child has a different set of circumstances and risk factors to take into account.[13] However, one other recurring possibility for a bully's drive towards inflicting pain upon others ought to be included: the need for power.[14]

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7 See par 1.1 and footnote 4 (above).
8 See par 2.4.2 for a description of bullying.
9 Neser, Ladikos *et al* "Bullying in schools: An exploratory study" 2004 *CARSA* 5-18. Information accessed from http://olweus.org/public/bullying.page on 2012-01-28.
10 Neser, Ladikos *et al* 2004 *CARSA* 5 undertook research into bullying by means of a research questionnaire, given to students ranging from grade 6 to 11, from various schools in the Tshwane South area.
11 *Oxford English Dictionary* 184.
12 Information accessed from http://olweus.org/public/bullying.page on 2012-01-28.
13 See chapter 3 for an overview of the psychological side of bullying, inclusive of causes and effects of bullying.
14 Information accessed from http://olweus.org/public/bullying.page on 2012-01-28.

4.3.2 Henchmen, active and passive bullies

Olweus makes a definite distinction between henchmen[15] or followers, supporters[16] or passive bullies and passive supporters or possible bullies.[17] From a legal perspective, however, they are too closely related to draw too big a distinction.[18] Therefore, they will be seen as one; the only legal distinction will be drawn based upon how the learner contributed, whether through act or omission.[19] Research shows that just as many bullying incidents are instigated by a group of bullies as by a single bully.[20]

4.3.3 Passive bystanders

These learners neither take part in, nor do anything to stop the incident from occurring or escalating further.[21] Curiosity might drive them to stay, to watch what happens, but fear of getting involved keeps them from taking a stand.[22] Research shows that learners observe bullying at school frequently.[23] Even though these bystanders are passive in only

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15 These learners show support for the bullying incident, actively take part, but do not instigate bullying incidents on their own. Information accessed from http://olweus.org/public/bullying.page on 2012-01-28.

16 This would typically be the case where learners openly support a bullying incident by laughing or drawing attention to the situation. Information accessed from http://olweus.org/public/bullying.page on 2012-01-28.

17 These learners support the bullying but show no physical, outward support. This would be the case where learners placidly look on, for example. Information accessed from http://olweus.org/public/bullying.page on 2012-01-28.

18 Snyman *Criminal Law* 51-58 makes the point that, in order for criminal liability to be established, there must be conduct (an act or omission). An act is a positive action, whereas an omission is failure to act. When regarding the abovementioned role players of bullying (henchmen, active and passive bullies), the only distinguishing factor is how they contribute to the bullying incident – through an act or failure to act. Even on the basis of this distinction, both instances are punishable. See chapter 2, footnotes 33 and 37.

19 *Ibid*.

20 Neser, Ladikos *et al* 2004 *CARSA* 8 report that 60.1% are single individuals, whereas 60.2% are groups, bullying others.

21 Information accessed from http://olweus.org/public/bullying.page on 2012-01-28.

22 *Ibid*.

23 Neser, Ladikos *et al* 2004 *CARSA* 8 *inter alia* note the following statistics regarding the observation of peer victimisation: 91% of the interviewees reported victimisation in some or other form (whether observing or receiving); 32.8%-47.3% of the learners interviewed witness bullying daily; 45.1% have

observing the bullying incident, their mere presence serves as motivation for the bully or bullies to continue, owing to the fact that they have an audience.[24]

4.3.4 Defenders

These learners actively take part in the incident by showing their disapproval for what is transpiring and takes a stand against it, possibly protecting the victim or victims.[25] Neser *et aliter* reports that 55.1% of the learners interviewed were assisted by friends, after bullying.[26] Such a learner is not only giving life to *ubuntu*[27] through his or her actions, but he or she is also in line with the constitutional duties placed upon every citizen by the Constitution[28] and the Children's Act 38 of 2005.[29]

4.3.5 Victims

Children are exposed to very high levels of victimisation as victims and witnesses of crime.[30] Crimes committed against children vary, but studies have found that over 4 million learners have been exposed to some or other form of violence at school.[31] The *Oxford English Dictionary* defines a victim as – "(n) 1 a person harmed or killed as a result of a crime or accident. 2 a person who has been tricked: the

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borne witness to frequent teasing and name-calling; 26.1% report observing serious physical bullying daily.

24 See par 4.4 for a more in-depth discussion of the bystander effect.

25 Information accessed from http://olweus.org/public/bullying.page on 2012-01-28.

26 Neser, Ladikos *et al* 2004 *CARSA* 5.

27 See footnote 7.

28 Every citizen has the duty to respect the rights of others. In this instance, a defender will typically carry out this duty by not being a passive bystander, but actively stopping or diverting the bullying incident. In so doing, the victim's bodily integrity (section 12 of the Constitution) and dignity (section 10) stays intact. See chapter 2, footnote 65. See also par 3.7.3 and footnotes 158 and 160 of chapter 3 above.

29 Section 16 of the Children's Act states the following: "Every child has responsibilities appropriate to the child's age and ability towards his or her family, community and the state." See par 3.7.3 footnote 160.

30 Van der Merwe "Children as Victims and Witnesses" in Boezaart (ed) *Child Law in South Africa* (2009) 563-584.

31 *Ibid*.

victim of a hoax".[32] The *Service Charter for Victims of Crime in South Africa* widely interprets the term victim.[33] A victim of a bullying incident is someone whose fundamental rights[34] are infringed upon through continuous bullying behaviour by one or more bullies.[35] Neser reports that 53.1% of the students who were interviewed reported having been subjected to peer victimisation.[36] It is worrying to note that 44.3% reported to having been the victims of violent bullying, for example kicking, hitting *et cetera*.[37]

4.4 The legal relevance of the bully/henchman relationship

As seen above, there are various role players in a bullying incident. However, the relationship between a bully and henchmen is important not only from a criminal law point of view, but also delictually. The consequences of such a 'partnership' have serious legal implications.

4.4.1 Perpetrators and accomplices in criminal law

Generally, a bullying incident is lead or instigated by a bully. However, a bully is often assisted by so-called henchmen. This means that a henchman is complicit in acts which violate countless constitutional

32 *Oxford English Dictionary* 854.
33 For the purposes of the *Service Charter for Victims of Crime in South Africa,* a victim can be described as an individual who has suffered physical, mental, emotional and/or economic loss resulting in severe impairment of his or her fundamental rights through an act or omission that violates the South African criminal law system. Victims can also be persons assisting the police, or immediate family of the victim. Furthermore, victims are not limited to a single group in terms of age, race, gender etc. Information accessed from the Conceptual framework: Understanding the victims charter at http://www.justice.gov.za on 2012-08-13. See also Van der Merwe in Boezaart (ed) *Child Law in South Africa* 564.
34 See chapter 3 footnote 106.
35 See par 2.4.2 for a definition of bullying as well as par 4.3.1 and 4.3.2 for a description of bullies and henchmen.
36 Neser, Ladikos *et al* 2004 *CARSA* 8.
37 *Ibid*.

rights.[38] Therefore, not only a bully, but also henchmen can be held accountable for their actions and inactions.[39]

Criminal law draws a distinction between a perpetrator[40] and an accomplice.[41] The common law rule of *qui facit per alium per se*[42] is also relevant in this instance, as it ensures a bully's involvement and culpability. It does not, however, free a henchman from criminal liability. When more than one person commits a crime,[43] it is wrong to label a single individual as perpetrator.[44] For the purposes of practicality, it is not always the best option to identify the principal offender.[45] When a group of people commit a crime together (assault would suffice in this instance), identifying a principal offender is not necessary, as all involved are co-perpetrators.[46] A perpetrator and co-perpetrator's culpability is

38 See chapter 1 footnote 5.
39 See chapter 2 footnote 14 with regard to assault and its similarity to physical bullying. Thus, it could be argued that both bully and henchman could be charged with assault, depending on their age and depending on the scale of involvement of the henchman.
40 Burchell *Principles of Criminal Law* 572 define a perpetrator as someone who, with the necessary *mens rea*, commits a crime. With regard to co-perpetrators, three different situations can be applicable: (1) Where a person's conduct or negligence satisfies the elements of a crime in his or her personal capacity; which makes said individual a perpetrator in his or her own right. (2) Where such a person possesses the necessary capacity and *mens rea* but does not satisfy all of the elements of the crime. However; owing to a prior agreement or association, culpability can be attributed to such an individual. (3) Where an individual elicits the help of another, whether voluntary or unwillingly.
41 Snyman *Criminal Law* 273 defines accomplice liability by stating that a person is an accomplice even though he or she does not satisfy all the elements of a specific crime. However, through intentional conduct, such a person furthers the actual commission of a crime. When an accomplice "furthers" the commission of a crime, it means that he or she assists and/or encourages the commission of the unlawful act, gives advice pertaining to the crime as well as the creation of an opportunity to commit the crime. It is thus stated that to encourage and to incite are synonymous terms. Incite can be defined as "to provoke and urge on". Definition for incite accessed from http://thefreedictionary.com/incite on 2012-07-19. The relationship between a bystander and a bully in such an instance is parasitic in nature, as the bully feeds off the negative attention he or she receives from the crowd (encouragement). This can render the bystanders liable based upon failure to act.
42 This rule translates to, he who does an act through another, does it himself.
43 See footnote 39.
44 Snyman *Criminal Law* 261.
45 *Ibid*.
46 *Ibid*.

based on his or her own action; therefore his liability is independent and has nothing to do with the act of his co-perpetrator.[47]

When regarding the definition of an accomplice, it would be sufficient to say that by purely egging on a bully, such a learner or henchman furthered the unlawful act.[48] Therefore, while such an individual did not physically take part in the bullying (physically fighting or verbally abusing the victim), merely encouraging a bully or henchman to continue constitutes complicity.

An important doctrine when working with perpetrators is the doctrine of common purpose.[49] Therefore, when a bully and his or her henchmen have a common purpose to bully a victim, their acts, albeit individual, are imputed to the others.[50] The most important element of the doctrine of common purpose is that all involved in commission of the act, must have the same intention.[51] Thus, in this regard, the common purpose binding a bully and henchmen is causing harm to the victim, whether verbal or physical.

When one or more learners bully a fellow learner, they do not always foresee that their actions could have serious repercussions; they do, however, have the intent to cause harm.[52] Therefore, they are not

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47 *Ibid*.

48 Bullying as such is not yet recognised as a crime in South Africa; however, assault and *crimen iniuria* are crimes for which a person can be charged. Therefore, the unlawful acts referred to will be crimes such as assault, assault with the intent to cause grievous bodily harm, attempted murder, and murder, destruction of property and *crimen iniuria*.

49 Burchell *Principles* 574 ascribes the following definition to common purpose: "where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for the specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their 'common purpose' to commit the crime".

50 Snyman *Criminal Law* 265.

51 *Ibid.*

52 Snyman *Criminal Law* 268 notes that, even though a person might not have the intention of, for example the death of his or her victim, it is sufficient to establish guilt owing to the fact that the perpetrator could have foreseen harm brought to the victim. This is known as *dolus eventualis*. Therefore, even though a bully and his or her henchmen might not necessarily have foreseen

absolved from liability purely because they did not foresee that serious harm could be caused. Intention to act, knowing that it could ultimately cause damage, is sufficient to satisfy one of the crucial elements of many a crime, namely, a physical act.

It must be reiterated that the age of the perpetrators[53] plays a very important role with regard to criminal liability.[54] According to section 7(1) of the Child Justice Act 75 of 2008, a child who, at the time the offence was committed, was under 10 years of age, cannot be prosecuted.[55] In terms of section 7(2) of the Act, a child over 10 years of age but under the age of 14 is presumed to be *doli incapax.*[56] However, this assumption is rebuttable and if it were found beyond reasonable doubt that the child had the needed criminal capacity, he or she can be held criminally liable for his or her offence.[57] In essence, the *doli incapax* rule is still in force, but the minimum age has changed.[58] A child over the

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serious harm caused to the victim, this fact is irrelevant, because they had the intention to cause pain.

53 Perpetrators ought to be understood in this instance as a bully together with his or her henchmen.

54 According to the South African Law Commission, the term juvenile does not necessarily correlate with the definition of child (see par 2.4.7 for a definition of the word child). The following statement with regard to the difference between a juvenile and a child is made: "The present Correctional Service Act 8 of 1959 defines a juvenile as a person under the age of 21 years. Within the departmental practice, however, the category "child" has now been recognised as distinct from juvenile and children are those under the age of 18. In the new draft Correctional Service Bill, a definition of child has been incorporated, and the age limit of 18 is used. No definition of juvenile or youth or other than this has been included." This is relevant in view of the fact that for the purposes of this study and with regard to child law in general, the use of the word juvenile is explicitly avoided because it stigmatises the child offender. Furthermore, the Child Justice Act can protect young persons up until the age of 21. See also par 5.4.1.1.3. Information from the South African Law Commission accessed from http://www.saflii.org/za/other/zalc/ip/9/9-3_.html on 2012-07-20.

55 Gallinetti "Child Justice in South Africa: The Realisation of the Rights of Children Accused of Crime" in Boezaart (ed) *Child Law in South Africa* (2009) 650.

56 *Ibid.* See also par 5.4.1.1.4-5.4.1.1.7 for a discussion on the Child Justice Act's relevant provisions pertaining to criminal capacity.

57 *Ibid*.

58 *Ibid*. The minimum age has changed from 7 years of age to 10. See also chapter 3 for the psychology behind bullying, as well as the *status quo* of South African schools. It is thus stated that because of the current state of schools in South Africa, specifically pertaining to violence, the change in minimum criminal capacity is a good thing, as it affords children additional protection. Even young children can bully, be bullied or be onlookers at bullying and these children ought to be assisted by programmes similar to diversion programmes

age of 14 years has full criminal capacity in terms of the Child Justice Act 75 of 2008.[59]

4.4.2 Joint wrongdoers

The common law distinguished between joint and concurrent wrongdoers.[60] However, the current position in South African law of delict is that there is no distinction between these two instances.[61] A person can only be held responsible as joint wrongdoer based on a delict for the same damages incurred by the victim/plaintiff.[62] When joint wrongdoers satisfy the prerequisite, which is the instance where two or more people are liable to another for the same damage, they may be sued in the same action.[63] It is thus clear that intent or negligence is of little importance.[64]

Therefore, when regarding a bullying incident, it is clear that a bully and his or her henchmen can be regarded as joint wrongdoers. Unlike criminal law, liability imputed to each wrongdoer only includes his/her own actions and thus they can only be held delictually liable based on their own acts or omissions.[65]

4.5 An international dimension to the bystander effect

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mentioned in chapter 8 of the Child Justice Act. See par 5.4.1.1.8 for a discussion on diversion in the Child Justice Act as well as chapter 6 for a comprehensive overview of restorative justice.

59 Gallinetti in Boezaart (ed) *Child Law in South Africa* (2009) 650; see also par 5.4.1.1.4-5.4.1.1.7 for a discussion on the Child Justice Act's relevant provisions pertaining to criminal capacity.

60 Neethling and Potgieter *Visser Deliktereg* 279 point out that where people purposely worked together to commit an unlawful act, they are joint wrongdoers. Where people acted individually, but their actions contributed to the same unlawful act and ultimate damage, they are concurrent wrongdoers.

61 The Apportionment of Damages Act 34 of 1956 now governs this instance and defines joint wrongdoers as: "2. Proceedings against and contributions between joint and several wrongdoers.—(1) Where it is alleged that two or more persons are jointly or severally liable in delict to a third person (hereinafter referred to as the plaintiff) for the same damage, such persons (hereinafter referred to as joint wrongdoers) may be sued in the same action."

62 Neethling and Potgieter *Visser Deliktereg* 279.

63 See footnote 61.

64 *Ibid*.

65 Neethling and Potgieter *Visser Deliktereg* 279.

Various countries have enacted legislation aiming to curb the adverse effect of bystander behaviour. One such example is Argentina's *Argentine Penal Code* which *inter alia* determines –

> a person who endangers the life or health of another, either by putting a person in jeopardy or abandoning to their fate a person unable to cope alone who must be cared for … will be imprisoned for between 2 and 6 years.[66]

Canada has a "Good Samaritan Law/Doctrine" in force. This encapsulates the basic principle of voluntarily extending a helping hand and in so doing, such an individual cannot be sued or suffer any legal repercussions in respect of the said incident.[67]

In accordance with the principles of Judaism, a bystander's obligation to act is religious, ethical and legal in nature.[68] It is, however, not expected of such a person to give his life or put his life at risk to save another. The important element here is assistance of one's fellow man.

4.6 The bystander effect – a possible catalyst to bullying

It is evident that bullying takes place between a bully or bullies and a victim, or even more than one victim.[69] However, the question must be

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66 Article 106 of the *Argentine Penal Code*.

67 The *Quebec Charter of Human Rights and Freedoms* of 1975 contains a provision to the effect that every citizen is obliged to render aid if it does not pose serious risk to the "good Samaritan" or a third person. Under Quebec's Civil Code, every person is obliged to act as a *bon père de famille*, which can be encapsulated as a reasonably prudent person. Failure to act accordingly amounts to fault and negligence. Information accessed from http://www.canadianlawsite.ca/goodsamaritan.htm on 2012-07-20.

68 Kirschenbaum "The Bystander's Duty to Rescue in Jewish Law" 1980 *The Journal of Religious Ethics* 204 makes the following point: "Although failure to come to one's neighbor's rescue incurs no criminal sanction, the legal nature of the duty is evidenced by (1) the right of the rescuer to sue for all financial losses incurred as a result of the rescue operation, (2) the rescuer's immunity to liability, and (3) the exemption he enjoys from all positive legal, civil and ritual duties while he is actively engaged in the rescue operation."

69 See par 4.3.

asked – do bystanders contribute to bullying, even though they do not necessarily take part in it? If this is the case, what would happen if this catalyst is removed? It is thus stated that bullies thrive on attention[70] and therefore, will more often than not bully in front of an audience.

4.6.1 Defining the bystander effect

In order to understand the issue, it is imperative first to know what exactly the bystander effect encompasses. The bystander effect is defined as –

> "The term *bystander effect* refers to the phenomenon in which the greater the number of people present, the less likely people are to help a person in distress. When an emergency situation occurs, observers are more likely to take action if there are few or no other witnesses."[71]

In the context of a bullying incident, bystanders could be henchmen,[72] passive bystanders[73] or defenders.[74] The only distinguishing feature is in how they act or fail to act.[75] However, for the purposes of bystander behaviour, the focus will be placed on passive bystanders.

4.6.2 The mechanics of the bystander effect

There is a common misconception that by not physically taking part in bullying a fellow learner, no harm is caused. Through an omission, harm could indeed befall the victim.[76] Through not assisting the victim, whether physically or verbally, bullying behaviour is silently approved by

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70 See footnote 41.
71 Definition of the bystander effect accessed from http://psychology.about.com/od/socialpsychology/a/bystandereffect.htm on 2012-01-30.
72 See par 4.3.2.
73 See par 4.3.3.
74 See par 4.3.4.
75 See footnote 18.
76 Information accessed from http://www.anti-bullyingalliance.org.uk/pdf/Bystanders_and_Bullying.pdf on 2012-01-30.

the observing peers.[77] Therefore, bullying in essence can be seen as a group phenomenon; not only because bullying is not necessarily undertaken by a single bully,[78] but also because onlookers take part through their presence.[79]

Research has found that there are discrepancies between learner attitudes to bullying and their ultimate reactions to a bullying incident.[80] Morally, a learner might feel that bullying is wrong, but for unknown reasons, he or she does not get involved.[81] Studies have also found that bystanders can be placed into two categories: a victim bystander[82] and a bully bystander.[83] Even though these learners do not actively contribute to the incident, by firstly being present and secondly doing nothing to intervene;[84] they do in fact contribute to the bullying incident in a negative manner.[85]

In general, learners are aware of peer victimisation.[86] Uncertainty reigns with regard to readiness to assist[87] a bullying victim, as some learners

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77 *Ibid*.
78 See par 4.3.1 and 4.3.2.
79 *Ibid.*
80 *Ibid.*
81 Lenthall *Bystander Behaviour* as *an Influence on Bullying in High Schools* (DCom thesis 2003 Deakin University) notes that many students may say and in fact believe that they would intervene in a bullying incident, but they do not. The reason for this discrepancy is the fact that a bystander gets social reinforcement by supporting the bully, whether actively or passively.
82 Twemlow, Sacco *et al* "A clinical and interactionist perspective on the bully-victim-bystander relationship" 1996 *Bulletin of the Menninger Clinic* 296-313 point out that such a learner typically identifies with the bully victim and is often a victim of abuse at home.
83 Twemlow, Sacco *et al* 1996 *Bulletin of the Menninger Clinic* 301-302 describe a bystander as a child who engages in "voyeuristic, sadomasochistic fantasies" while observing a bullying incident. Such a child finds pleasure in the pain of the victim yet does not physically take part in the bullying.
84 Intervene, in this instance, is a broad term – a learner might get verbally or physically involved or get help from an educator. Merely walking away, however, does not constitute taking a stand against bullying.
85 Lenthall 34 argues that bystanders encourage bullying when they passively look on, as this sets the stage for a bully to "perform". It is thus stated that this makes a bystander guilty of contributory negligence in respect of the harm, loss or damage suffered by the victim, as a bystander could have intervened by merely calling an educator to stop the incident from escalating.
86 Rigby and Johnson "Expressed Readiness of Australian Schoolchildren to Act as Bystanders in Support of Children who are Being Bullied" 2006 *Educational Psychology* 425-440 did a research study into bystander behaviour among

would readily help, whereas others made it clear that they would not and the rest were unresponsive.[88] This generally passive attitude to bullying is one of the reasons why bullying does not stop, but escalates. The definition of the bystander effect makes it clear that a shift in responsibility is taking place.[89] Personal reasons for not getting involved are open to speculation.[90] However, the result is that passive onlookers do not get involved, but only observe. This eggs on the bully or bullies and irrespective of the purity of a bystander's intentions, by doing nothing, silent approval is given for the conduct of the bully.

4.6.3 The legal aspect of the bystander effect

The bystander effect not only has moral implications, but legal consequences as well. Section 1 of the Constitution contains the founding provisions.[91] When scrutinising these provisions, which ultimately encompass the values towards which all South Africans ought to strive, it is evident that in terms of bullying, these values are by no means applied.[92] Section 8 of the Constitution holds that all legal subjects are bound by the Constitution, whether as natural or juristic person or organ of state, insofar as the provision in question is applicable. This means that even school-going children have an

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learners and found that 90% of the interviewees indicated awareness of bullying.

87 Lenthall 33 mentions five cognitive steps giving rise to assistance given by bystanders. (1) The bystander must physically see the incident where help is needed. (2) He or she must see the situation as one in need of assistance. (3) The bystander must feel that it is his or her personal responsibility to take action. (4) He or she must decide what kind of action to take, whether get verbally or physically involved or to go for help. (5) The learner must act upon his or her decision to action.

88 Rigby and Johnson 2006 *Educational Psychology* 437 give the following statistics: 43% of the interviewed students would readily help a bullying victim; 23% indicated that they would not; the rest were unsure.

89 See par 4.5.1.

90 See footnotes 81 and 82.

91 These are, *inter alia*, human dignity, equality, advancement of human rights, freedom, non-racism, non-sexism.

92 See footnote 34. Therefore, based upon the stated rights infringed upon, the values set out in section 1 of the Constitution are rendered void by bullying behaviour, with regard to the rights of the victim.

obligation to respect and protect the rights of others, in this instance, the rights of their fellow learners.[93]

Bystanders have a legal duty to act where they witness incidents of bullying.[94] An omission can solely be punishable when a legal duty rests upon an individual to act in a certain manner.[95] A moral duty[96] does not necessarily constitute a legal duty.[97] Even though a particular situation might not be governed by legislation[98] it does not mean that such a person is alleviated from legal responsibility. The legal convictions of society also play a very important role with regard to what is expected of citizens.[99] Taking the legal convictions of society into consideration is reminiscent of the values stipulated in the Constitution.[100] The preamble

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93 See par 3.7.3.

94 See footnotes 28 and 29.

95 Snyman *Criminal Law* 59.

96 Definition of moral obligation accessed from http://www.thefreedictionary.com/moral+obligation on 2012-01-30 states the following: "moral obligation - an obligation arising out of considerations of right and wrong; 'he did it out of a feeling of moral obligation' duty, obligation, responsibility - the social force that binds you to the courses of action demanded by that force; 'we must instil a sense of duty in our children'; 'every right implies a responsibility; every opportunity, an obligation; every possession, a duty'- John D. Rockefeller Jr".

97 Snyman 59 contends that, for the purpose of the law, an omission does not purely constitute failure to act, but rather a failure to act where there was a legal duty to act.

98 Snyman 59-60 mentions the following situations where a legal duty to act rests upon a person or persons: if the instance is governed by statute, common law, a court order, agreement, acceptance of responsibility for the control of a dangerous object, protective relationship regarding someone else, pertaining to a previous positive act.

99 Snyman 61 gives the following example: A manhole in a street is left open by workers and X walks in the same street, towards the manhole, not noticing the hole because her thoughts are elsewhere. Y stands on the street corner and sees that X will walk right into the manhole. It is easy for Y to prevent X from falling into the hole, by merely shouting "watch out"; however, Y fails to warn X. X sustains serious injuries owing to the open manhole. Did Y have a legal obligation to act? The answer is yes, according to the convictions of society, also because of the severity of the consequences in failing to act where action is expected. One of the questions a court will typically ask is whether the act required of the person was difficult or hard and how severe the consequences would be for the other person, if this particular act had not been carried out.

100 Snyman 61. As previously stated, section 1 of the Constitution contains the founding provisions, which are, *inter alia*, human dignity, equality, advancement of human rights, freedom, non-racism, non-sexism. Neethling and Potgieter *Visser Deliktereg* 23 state that in terms of the law of delict pertaining to the infringement upon fundamental rights, open-ended judgments play a critical role in determining liability. Important in this instance are *inter alia* the *boni mores* test for unlawfulness, the imputability test for legal

to the Constitution contains yet another core value, *ubuntu*, as is evident from the following – "Respect those who have worked to build and develop our country; and believe that South Africa belongs to all who live in it, united in our diversity".[101] Taking this into account, it is evident that bystander behaviour cannot be condoned in any manner, as it goes against social convictions, constitutional values and the spirit of *ubuntu*.

It stands to reason that various reasons keep learners from getting involved in a bullying incident; however, as previously stated, by being a passive bystander, silent approval is given to unacceptable behaviour. This in turn gives approval for the infringement upon fundamental rights, something which the Constitution aims to protect. Thus, a legal duty rests upon learners to act with regard to a bullying incident where they are bystanders.[102]

4.7 Conclusion

Bullying is a complex phenomenon to deal with.[103] Various factors and role players are involved and certain elements may serve as a catalyst to bullying. It is important to know who are involved in bullying, whether active or passive. This in turn helps to dissect the dynamics of bullying, to pose possible solutions to the problem. In a typical bullying incident, there is a bully,[104] henchmen,[105] passive bystanders,[106] defenders[107] and a victim or victims.[108]

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causation and the reasonable person test with respect to negligence. Factors to be taken into account in these instances are reasonableness, equity and fairness. In terms of delictual liability, specifically *mens rea* and legal causation, constitutional values play an important role in adjudicating such matters. In terms of bullying, reasonableness, fairness and equity are crucial elements, seeing that the parties involved are more often than not children and even though there is delictual and criminal liability, any decision made must respect the rights of both bully and victim. See also par 5.3.1.1.2, 5.3.1.1.3, 5.4.2 and 5.4.3.

101 Preamble to the Constitution of the Republic of South Africa, 1996. See par 1.1 and footnote 4 of chapter 1 above for a definition of *ubuntu*.

102 See also the explanatory notes on *novus actus interveniens* and *conditio sine qua non*, chapter 2 footnotes 33 and 37. Further attention will be paid to the legal consequences of positive acts and omissions in chapter 5.

103 See chapter 3 and par 4.3.

104 See par 4.3.1.

In terms of learners who witness bullying, there is a phenomenon called the bystander effect.[109] The bystander effect not only has a cumulative psychological effect, but also sends the wrong message. By failing to act, learners are condoning the violation of fellow learners' rights and thus the message is clear: the rights of a victim are unimportant. It is thus stated that, if bystander involvement is controlled, bullying figures could dwindle. Bystanders have a legal duty to act, placed upon them by societal convictions and constitutional values.[110] In other words, from a philosophical stand point, it can be seen as "do unto others as you would have done unto you".

105 See par 4.3.2.
106 See par 4.3.3.
107 See par 4.3.4.
108 See par 4.3.5.
109 See par 4.5.
110 See par 4.5 for an international overview to place bystander behaviour in context, as well as 4.6.3.

Chapter 5: South African legal framework

5.1 Introduction

A framework has been laid for what bullying entails.[1] The mechanics of a bullying incident have also been exposed and examined.[2] This platform makes it possible to find a legal solution to an evidently serious[3] problem.[4] It is imperative to investigate the legal framework in order to find a sustainable solution to bullying that upholds the constitutional rights of all parties involved.[5] This legal framework will *inter alia* encompass the Constitution[6] as a basis, legislation,[7] case law[8] and common law.[9] The aim of this chapter is to look at the South African legal position with regard to bullying as it currently stands and building upon this, propose viable solutions to this problem. The legal framework compiled in this chapter will also be used to compare South Africa's legal position with that of Australia.[10]

5.2 The Constitution

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1 See chapter 2 par 2.4.2 for a definition of bullying.

2 See chapter 4 with regard to the role players in a bullying incident as well as the effect of bystander behaviour.

3 See chapter 1 footnote 12 for media coverage of bullying incidents in South African schools.

4 Section 7(2) of the Constitution holds that the state is obliged to respect, protect and fulfil the rights as set out in the Bill of Rights. It must be borne in mind that the law as such is not a static entity and is ever-changing. Therefore, where new *lacunae* in the South African legal system come to light, it is obligatory to find measures by which to bridge these gaps.

5 Parties involved should be understood as bully, henchmen, victim, bystander, parents and educators.

6 Sections of the Constitution to be incorporated in this study *inter alia* include sections 9, 10, 12, 14, 24, 28, 29, 33, 35(3)(*l*), 36 and 39.

7 Legislation to be examined is *inter alia* the South African Schools Act 84 of 1996, the Children's Act 38 of 2005 and the Child Justice Act 75 of 2008.

8 Case law to be included *inter alia* encompasses *Dowling v Diocesan College and others* 1999 (3) SA 847 (CPD); *High School Vryburg and the Governing Body of High School Vryburg v The Department of Education of the North West Province* (CA 185/99); *Le Roux v Dey* (CCT 45/10) [2011] ZACC 4; 2011 (3) SA 274 (CC) ; 2011 (6) BCLR 577 (CC) ; BCLR 446 (CC) (8 March 2011).

9 Common law principles to be examined are the principle of legality, *audi alteram partem*, aspects of criminal law, law of delict, due process, *in loco parentis*, *conditio sine qua non* and *novus actus interveniens*.

10 The legal comparative study will be done in chapter 8 (Australian law).

South Africa follows the doctrine of constitutional supremacy.[11] This holds that the Constitution as a whole is binding upon all state branches and holds priority over all rules and legislation.[12] Where legislation or conduct goes against the grain of the Constitution, it does not have legal force.[13] This principle is enforced by section 2 of the Constitution, which states – "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."[14] Therefore, it is imperative first to examine the applicable constitutional provisions before delving into legislation and case law.

5.2.1 Equality

Section 9 grants equal benefit and protection under the Constitution to all, guaranteeing a right to non-discrimination.[15] Within section 9 are five stages of enquiry to ascertain whether a constitutional right has been transgressed.[16] The questions to be asked are:

i) Does the law or conduct in question draw a distinction between people or categories of people? Does this violation have a valid government purpose? If not, it violates section 9(1).[17]

ii) This begs the question as to unfair discrimination. Firstly, it must be established whether such a distinction actually amounts to discrimination.[18] Discrimination will be present where a distinction has been drawn on a specific ground.[19] Secondly, it has to be ascertained whether the discrimination in

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11 Currie and De Waal *Constitutional and Administrative Law* 74.
12 *Ibid*.
13 *Ibid*.
14 Constitution of the Republic of South Africa, 1996.
15 Currie and De Waal *Bill of Rights* 234. Cheadle, Davis and Haysom *South African Constitutional Law* 59 make the following remark: "The Constitutional Court has endorsed an approach to interpretation that is both purposive and value-based." Purposive is understood as: "simply put, the right should be interpreted 'in the light of the interests [it]…is meant to protect'."
16 Currie and De Waal *Bill of Rights* 235.
17 *Ibid*. These stages of enquiry were laid down in *Harksen v Lane* 1998 (1) SA 300 (CC) par 53.
18 Currie and De Waal *Bill of Rights* 235.
19 *Ibid*.

question is unfair.[20] Discrimination will presumably be unfair when a distinction has been drawn on a specified ground.[21]

iii) Lastly, when it has been established that the conduct/legislation amounts to unfair discrimination, it has to be determined if such discrimination is viable under the limitation clause (section 36 of the Constitution).[22]

It must be borne in mind that the government is within bounds to differentiate between certain classes of people, for an equal outcome.[23] The criteria for unfair discrimination lie within section 9(3). Where legislation or conduct denies an individual equal rights and protection under the Constitution, it will be perceived as unfair discrimination.[24] Discrimination must be understood as differentiation on illegitimate grounds.[25] "Analogous grounds"[26] is one concept that has elements similar to the illegitimate grounds listed in section 9(3).[27] These elements have a propensity to transgress upon human dignity, or to affect an individual or group negatively and seriously.[28]

5.2.1.1 Legal relevance of equality to bullying

It has already been established that bullying transgresses a myriad of constitutional rights.[29] The list of illegitimate grounds as laid out in section 9(3) is race, colour, ethnic origin, gender, sex, pregnancy, sexual

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20 *Ibid*.
21 *Ibid*.
22 *Ibid*.
23 *Op cit* 239. Cheadle, Davis and Haysom *South African Constitutional Law* 59 point out the following: "This means that the equality right should be interpreted in the light of the constitutional values underlying a particular right as well as the interests that that right is meant to protect."
24 *Op cit* 239. Cheadle, Davis and Haysom *South African Constitutional Law* 61 note that the most important concern ought to be whether a person or group of persons had been treated with 'equal concern and respect', instead of focusing on substantive equality goals.
25 *Op cit* 243. Illegitimate grounds can be found in section 9(3).
26 *Op cit* 244.
27 *Op cit* 244. Cheadle, Davis and Haysom *South African Constitutional Law* 66-67 point out that differentiation could amount to either fair or unfair discrimination and where the differentiation is fair, it will not fulfil the prerequisites as set out in sections 9(3) and (4).
28 *Ibid.*
29 See chapter 1 footnote 5 and chapter 3 footnote 106 for a list of transgressed rights.

orientation, marital status, age, disability, religion, conscience and belief, culture, language, birth and social origin. The importance of the equality clause within the bullying phenomenon lies in why learners are bullied.[30] Reasons range from height, weight, age, race, gender, sexual orientation, socio-economic circumstances and sometimes simply the fact that a child is perceived as weak, or too academically inclined. Also, physical attributes such as red hair, freckles, wearing glasses, physical impairment or the manner in which a child dresses can contribute to a child being bullied since people in general fear and shun what they do not understand. Therefore, even though the grounds upon which a child is bullied might not be explicitly mentioned in section 9(3), it does not mean that the conduct in question (bullying) does not constitute unfair discrimination.[31] If bullying has a negative impact upon the life and constitutional rights of the victim, it gives rise to marginalisation, which could constitute unfair discrimination if the said conduct complies with the threefold test pertaining to unfair discrimination.[32]

It is thus stated that, because the criminal element in bullying,[33] it will not pass the test as laid out in the limitation clause encompassed by section 36 of the Constitution.[34] When considering the ultimate goal of bullying

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30 See chapter 3 for a psychological overview of bullying.

31 Cheadle, Davis and Haysom *South African Constitutional Law* 72 point out the following: "The minimum rationality test means that most claims based on 'mere differentiation' will be filtered out by the section 9(1) enquiry and will not be subject to any standard of justification greater than that under section 36. Indeed, it is difficult to conceive of a situation where arbitrary or irrational action by the state will be justified by section 36, and the courts have yet to find one."

32 *Op cit* 67-68. In order to test whether there has been unfair discrimination, a threefold test must be applied. This test comprises three questions, namely – does the conduct differentiate between individuals or a group; is there a legitimate government purpose; is there a rational link between the means and the purpose?

33 See par 2.4.1 and footnote 14 for a comparison between assault and bullying and the similarities between the two.

34 Section 36 states the following: "36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including a. the nature of the right; b. the importance of the purpose of the limitation; c. the nature and extent of the limitation; d. the relation between the limitation and its purpose; and e. less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

(showcasing power, intimidation, causing physical/emotional harm and humiliation), it ought to be clear that such conduct is unconstitutional, as it does not match up to the constitutional values of human dignity, freedom, equality, non-racism and non-sexism.

5.2.2 Human dignity

Section 10 encompasses the inherent right to human dignity and states the following – "10. Everyone has inherent dignity and the right to have their dignity respected and protected." Human dignity is a core value of the Constitution.[35] It has been established that human dignity is what gives a person intrinsic[36] worth.[37] Human dignity has been described as the source of a person's rights and values.[38] Dignity is not only a constitutional right, but also a value.[39]

Human dignity as a right is protected when people understand and respect that each and everyone has the right to make individual choices.[40] Not only should the right to freedom of choice be respected, but also the right to be a unique individual.[41] Basically, the right to human dignity ties into a myriad other constitutional rights.[42]

5.2.2.1 Legal relevance of human dignity to bullying

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35 Currie and De Waal 272. Cheadle, Davis and Haysom 5-15 make the point that human dignity is "pre-eminent" to all other fundamental rights.

36 The *Oxford English Dictionary* 745 defines intrinsic as "belonging naturally; essential."

37 Currie and De Waal 273.

38 *Ibid*.

39 Section 1 of the Constitution enshrines human dignity as a constitutional value, whereas section 10 protects human dignity as a constitutional right. Cheadle, Davis and Haysom 123 note the following: "The right to dignity, as a foundational value, has a significant role to play in the scheme of Chapter 2 of the 1996 Constitution. It serves to reinforce other rights and to underwrite their importance."

40 Currie and De Waal 274.

41 When considering the illegitimate grounds upon which unfair discrimination is based, it is clear that those grounds basically encompass everything that makes a person unique.

42 Currie and De Waal 273. Rights tied into the right to human dignity *inter alia* include the right to life, the right to bodily integrity etc. Cheadle, Davis and Haysom 125 note – "Fundamental rights such as the right to be free from cruel, inhuman or degrading treatment, the rights to privacy, to equal treatment and to security of the person are so closely linked to the concept of the intrinsic dignity of all human beings that they can hardly be treated separately."

As previously stated, human dignity is not only a right, but also a constitutional value. Dignity is what gives human life value. It highlights a person's uniqueness.[43] When looking at a bullying incident, it is clear that by being bullied, a victim is stripped of his or her dignity.[44] By bullying a fellow learner, a bully disregards the victim's inherent right to dignity. This in turn gives rise to other constitutional rights being transgressed, as human dignity ties into countless other constitutionally protected rights.

5.2.3 Freedom and security of the person

Section 12 protects the right to freedom[45] and security[46] of the person and states the following –

12. (1) Everyone has the right to freedom and security of the person, which includes the right

a. not to be deprived of freedom arbitrarily or without just cause;
b. not to be detained without trial;
c. to be free from all forms of violence from either public or private sources;
d. not to be tortured in any way; and
e. not to be treated or punished in a cruel, inhuman or degrading way.

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43 Cheadle, Davis and Haysom 129 point out that human dignity and all that it encompasses tie into the humanity of the individual. Dignity is not an alienable right and it is also not a privilege granted by the state.

44 See par 2.4.2 for a definition of bullying. When considering this definition, it is clear that dignity cannot remain intact when a learner falls victim to bullying. Through intimidation, physical and/or emotional harm and humiliation, such a learner is stripped of his or her human dignity.

45 Cheadle, Davis and Haysom 154 postulate the following: "While there is no definition of the word 'freedom' in Chapter 2 of the Constitution, it is submitted that the concept of freedom includes the freedoms guaranteed in the Chapter, such as the freedoms of worship, speech, association and thought and the right to privacy. These freedoms constitute a subset of the broad and overarching concept of freedom. But the concept may go further and constitute the point of entry for freedoms not expressly stated in Chapter 2, such as the freedom to contract."

46 *Op cit* 157. Cheadle, Davis and Haysom 157 further note that Canadian courts have had the propensity to limit the definition of security to the mental and physical integrity of the person. However, it has happened that courts extended this definition to everything human dignity encompasses.

Relevant to this study is the protection of individuals against violence, torture or cruel and inhumane punishment. Also important is the right to control over one's own body. Section 12(1)(c) places both a positive and negative obligation upon the State.[47] Firstly, in order to protect individuals, the State must refrain from arbitrary invasion of privacy; secondly, the State is obliged to take positive action in terms of protecting citizens against one other.[48] In terms of freedom from state violence, the use of unnecessary police force is unconstitutional. Furthermore, where horizontal violence comes into play, the State may use necessary force or violence in order to subdue the violent acts of private individuals.[49]

Section 12(1)(e) encompasses the right to be free and protected from "cruel, inhuman and degrading" treatment or punishment. These terms are to be used together – where one factor is present, it follows that all of them are present, as contravention infringes upon human dignity.[50]

The right to bodily and psychological integrity is governed by section 12(2) of the Constitution.[51] In essence, section 12 encapsulates the right to be left alone.[52] The State is obliged to protect individuals' bodily integrity against state interference and also, every person has the right to autonomy.[53] Thus, it becomes clear that section 12 is very important in terms of self-determination, to act out one's own choice and to have the

47 Currie and De Waal 304.
48 *Ibid*.
49 *Ibid*.
50 *Op cit* 306. Cheadle, Davis and Haysom 162 mention that all that is required to prove the transgression of the right encompassed in section 12(1)(e) is to establish failure on the part of the state to comply with its obligation to protect individuals or groups against the conduct mentioned. There can also be no justification for this kind of conduct.
51 *Op cit* 308. Section 12(2) of the Constitution follows Canada's Charter of Rights and Freedoms, which states the following in section 7: "7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."
52 *Op cit* 308.
53 *Ibid*. The *Oxford English Dictionary* 89 defines autonomy as "1 the possession or right of self-government. 2 freedom of action".

freedom to choose in terms of self.[54] It goes without saying that violence impairs the right to bodily integrity.[55] However, where a transgression of this right has been established, it must be determined whether the infringement is justifiable.[56]

5.2.3.1 International instruments on the right to freedom and security of the person[57]

The Charter of the United Nations 1945 inter alia holds that the United Nations must protect and promote human rights and fundamental freedoms.[58] *The International Covenant on Civil and Political Rights* 1966 protects the right not to be subjected to cruel, inhumane or degrading punishment;[59] and freedom and security of the person.[60] CRC *inter alia* governs the following relevant aspects: freedom of thought;[61] freedom from interference in family life and related matters, including his or her dignity and good name;[62] protection against sexual exploitation and abuse;[63] respect and protection of liberty and freedom from inhumane and degrading treatment and/or punishment.[64]

5.2.3.2 Legal relevance of freedom and security of the person, to bullying

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54 "Self" includes both physical and psychological elements. If one looks at assault or rape, for example, both of these crimes have a physical element, whereby the bodily integrity of a person is violated, but they also leave a person psychologically damaged. From this example it is evident just how important section 12 is. Each individual has the right to be free from physical and psychological violence.

55 *Op cit* 309.

56 *Ibid*. A simple test to determine the justifiability of the impairment of the right to freedom and security of the person would be to check on the procedural regularity of the conduct in question. Secondly, it ought to have been necessary and proportionate. Such bodily invasion must not cause unnecessary pain or anxiety, be detrimental to health or lead to disfigurement.

57 See chapter 7 for a brief overview of international and regional documents relevant to child law.

58 Section 55(c) of the *Charter of the United Nations* 1945.

59 Article 7 of the *International Covenant on Civil and Political Rights* 1966.

60 Article 9(1).

61 Article 14(1) of the CRC.

62 Article 16(1).

63 Article 34.

64 Article 37.

Section 12 of the Constitution guarantees protection against violence, torture and cruel and inhumane treatment.[65] This means that this specific section automatically encompasses the protection of learners against bullying.[66] It must be borne in mind; however, that section 12 not only protects the physical integrity of individuals, but also their psychological wellbeing.[67] This means that learners are also afforded constitutional protection against verbal bullying.[68] Each individual is afforded the right to control over his or her own body.[69] Therefore, every learner also has the right to control what is done to his or her body; since bullying also comprises a physical element, it is yet again evident how important section 12 is in this instance. Most important of all – where horizontal violence takes place (between individuals), the State has an obligation to subdue such violence.[70] Violence impairs the right to bodily integrity.[71] A parallel has already been drawn and a relationship established between violence and bullying.[72] It thus becomes clear that section 12 of the Constitution intricately ties into the bullying phenomenon, as the right to freedom and security of the person protects everything that bullying transgresses.

5.2.4 *Privacy*[73]

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65 See par 5.2.3.

66 In this regard, refer to chapter 2 par 2.4.1, 2.4.2, 2.4.3 and footnote 14, pertaining to violence, bullying, the relationship between violence and bullying, as well as how assault can be drawn parallel to bullying. Since bullying does in fact comprise a violent element in most cases, it is evident that section 12 of the Constitution is relevant.

67 Section 12(2) explicitly states that everyone has the right to physical and psychological integrity.

68 Bullying also comprises a psychological element. Indirect bullying encompasses name-calling, social exclusion, differentiation etc. When taking into account the definition of bullying (see par 2.4.2), it is evident that bullying is a complex, multi-dimensional phenomenon. See also chapter 2 footnote 30 and chapter 3 par 3.4 and footnotes 8 and 21 to place the seriousness of psychological integrity into context.

69 Section 12(2) of the Constitution. This also means that every individual has the right to be left alone, as well as guaranteed autonomy (see footnote 48 for a definition of autonomy).

70 See par 5.2.3.

71 *Ibid*.

72 See par 2.4.1, 2.4.2 and 2.4.3 in this regard.

73 The *Oxford English Dictionary* 594 defines privacy as: "a state in which you are not watched or disturbed by other people". In *Deutschmann and Another;*

The constitutional right to privacy is in line with the common law use thereof.[74] According to the common law, where a person's right to privacy has been infringed upon, it constitutes an *iniuria*.[75] This typically occurs where an individual's privacy has been unlawfully breached on a personal level or where private information regarding the specific person has been divulged.[76] To establish whether or not such an infringement is unlawful, use is made of *boni mores*.[77] It must be stated, however, that these two instances must be kept separate. The reason is that to establish a common law infringement only requires a single-stage enquiry, whereas a constitutional infringement requires a two-phase analysis.[78]

In *Bernstein v Bester*[79] it was held that a person's privacy only extends insofar as a legitimate expectation in terms of a right to privacy exists.[80] A legitimate expectation can be characterised as a "subjective expectation of privacy … that the society has recognised … as objectively reasonable".[81] Privacy closely ties into a person's identity.[82] Therefore the inference can be made that when an individual's right to privacy is infringed upon, it also damages his or her identity, which in turn transgresses the person's right to dignity.[83]

5.2.4.1 Legal relevance of a right to privacy to bullying

Shelton v Commissioner for the South African Revenue Service 2000 (6) BCLR 571 (E) it was held by the High Court that privacy is "an individual's condition of life characterised by seclusion from the public and publicity. This implies an absence of acquaintance with the individual or his personal affairs in this state."

74 Currie and De Waal 316.

75 *Ibid*.

76 *Ibid*.

77 *Ibid.* The *Trilingual Legal Dictionary* 161 defines *boni mores* as: "good morals". Therefore the test implies that a court needs to take into account the general communal consensus, sense of justice and moral fibre.

78 *Op cit* 317.

79 1996 (2) SA 751 (CC).

80 Par 71.

81 Par 75.

82 Currie and De Waal 319.

83 See par 5.2.2 for a discussion on dignity.

It has already been established that the right to dignity is intrinsic to each and every individual.[84] Furthermore, the right to dignity and the right to privacy are relational and dependent upon each other.[85] As previously stated, dignity as such encompasses both a value and a right and it is something with which people are born.[86] A person's right to privacy ties into his or her identity, which in turn influences one's sense of self and thus one's right to dignity.[87] Every bullying incident ought to be judged upon its own merit. It does frequently occur though, that a learner's right to privacy is transgressed in the midst of a bullying incident or series of bullying incidents.[88]

5.2.5 Environment

The right to a healthy environment is an individual right.[89] Where this right is transgressed by another individual, organisation or the State; it is challengeable.[90] Furthermore, an obligation rests upon the State to take appropriate measures to protect the environment.[91] In accordance with section 8 of the Constitution, section 24 is also horizontally applicable and enforceable.[92] The negative phrasing of section 24 implies a certain minimum standard, which should be upheld.[93]

What then, is the definition of environment[94] in this regard? Should an abstract definition be preferred? When considering it from a

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84 *Ibid.*
85 See par 5.2.4.
86 See par 5.2.2 and 5.2.2.1.
87 Own inference made. See also par 5.2.4.
88 There are a number of ways in which this could happen. For example, if the bully gets hold of the victim's cellular phone or personal diary or any kind of communication that the victim feels is private, it constitutes invasion of privacy. If the bully then goes further by making the personal details known to others, it would be sufficient to say that the victim's right to privacy and dignity has been infringed upon.
89 Currie and De Waal 522.
90 *Ibid*.
91 Section 24(b) of the Constitution.
92 Currie and De Waal 524.
93 *Op cit* 525.
94 Cheadle, Davis and Haysom 410 note that the term "environment" is very broad. Environment applies not only to the human-natural resources relationship, but also to cultural heritage and the urban environment.

anthropocentric[95] point of view, it is important to note that emphasis is placed not only upon inanimate objects and non-human entities.[96] Environment also encompasses a human element, which means that it includes relationships between people as well as the relationship between people and the natural environment.[97] This inadvertently broadens the dimensions of the term environment, as it not only includes a cultural element but also a socio-economic dimension.[98] Health and wellbeing[99] are important elements underpinning section 24.[100]

The second part of section 24 obliges the State to take positive action with regards to the protection of the environment.[101] The State can achieve this goal through, *inter alia*, enacting specific legislation.[102] The aim of the State can be summarised as the prevention of pollution, promoting conservation and ecologically sustainable development.[103]

5.2.5.1 Legal relevance of the environment to bullying

Bullying and violence in schools are common place.[104] When taking into account the ambit of section 24, it is clear that bullying and violence in schools ultimately create a harmful environment.[105] Therefore, bullying also transgresses the constitutionally protected right to a healthy

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95 Definition of anthropocentric accessed from http://www.thefreedictionary.com/anthropocentric on 2012-04-24 states: "1. Regarding humans as the central element of the universe. 2. Interpreting reality exclusively in terms of human values and experience."

96 Currie and De Waal 525.

97 *Ibid*. This is very important, since bullying generally transpires at school, where learners ought to be motivated to learn and to be educated. However, bullying as such is counterproductive to learning. This means that a psychologically motivated act (bullying), affects those involved negatively, creating a harmful and even dangerous school environment. See example in par 1.1.

98 Currie and De Waal 525.

99 Cheadle, Davis and Haysom 415 note that wellbeing could be tied to many cultural aspects such as paintings, buildings, art etc. Within a legal scope, wellbeing is a limitless term.

100 Currie and De Waal 526. Health and wellbeing encompass both psychological and physical health and wellbeing.

101 Section 24(b) of the Constitution. Currie and De Waal 526.

102 *Op cit* 527.

103 *Op cit* 527 and 528.

104 See par 1.2.1, chapter 2 footnote 30, chapter 3 footnote 122.

105 See par 2.4.1, 2.4.2 and 2.4.3 for a discussion on violence, bullying and the relationship between violence and bullying. These elements in conjunction ultimately create a counterproductive, unsafe school environment.

environment. Bullying does not disturb the ecology; it does, however, put the lives of learners in danger.[106] This leads to a further question: what is the obligation of the State in terms of bullying and the environment? Section 24(b) implies a positive duty upon the State to protect the environment.[107] What shapes a school environment?[108] A code of conduct as prescribed by the South African Schools Act 84 of 1996 and Government Notice 776 of 1998 lays the foundation for a healthy environment.[109] However, codes of conduct seldom incorporate bullying as intolerable conduct or anti-bullying policies to rectify the phenomenon so common in schools.[110]

5.2.6 Children[111]

The rights as encompassed in section 28 afford children additional protection, in conjunction with automatic protection under the rest of the Constitution where applicable.[112] The aim of this section is to protect children in areas where they are most vulnerable.[113] Various legislative measures have been enacted to give effect to the rights as set out in section 28.[114]

Section 28(1)(b) imposes a right to "family or parental care". When a parent neglects this duty, consequences can be severe.[115] In response

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106 See chapter 2 par 2.4.4 and footnote 32 for a definition and explanation of bullycide. The effect of bullying that takes place freely is severe psychological damage that could, if not stopped, lead to suicide.
107 Section 24(b) of the Constitution.
108 Section 24(b) also imposes a duty upon the State to enact legislation to preserve and protect the environment.
109 See par 2.4.11 and chapter 3 footnote 120 in this regard.
110 See chapter 2 footnote 64.
111 Section 28 of the Constitution.
112 Currie and De Waal 600 further note that even though children are afforded additional protection under section 28, this does not give them special status under the Bill of Rights.
113 *Op cit* 603.
114 *Ibid*. Examples of state-enacted legislation to promote and protect the rights of children are *inter alia* the Children's Act 38 of 2005 and the Child Justice Act 75 of 2008.
115 In *Howells v S* (1999) 2 All SA 233 (C), the court sentenced a mother of three minor children and even though it meant that they could be placed in state care, the court held that the best interest of the child had to be upheld; that children have the right to family and parental care or appropriate care when removed from their primary caregiver. However, in *S v M* 2008 (3) SA 232

to the moral demise of society, section 28(1)(d) of the Constitution seeks to protect children against abuse.[116] A particular dilemma is the issue of where state obligation starts and ends with respect to protecting a child against maltreatment, abuse and neglect.[117] It would appear as if the State is responsible for the wellbeing of children irrespective of whether they are in parental care or not.[118] In keeping with this right, corporal punishment has been abolished and found to be cruel, inhumane and degrading in schools and in the criminal justice system.[119] It is important to note that this section is horizontally applicable in respect of both educators (in administering corporal punishment) and learners (abuse, bullying in this instance).[120]

Underpinning not only section 28, but also fundamental principles of the Children's Act and the Child Justice Act, is the best interest requirement.[121] The best interest standard obliges courts, as upper

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(CC) par 26 the court held that the best interest of the child principle can be subject to limitation under section 36 of the Constitution. Considering par 66 and 67 the court contended that even though the primary caregiver was a repeat offender, it would not be in the best interest of the minor children to separate them from their mother, as they depended on her as primary source of emotional security. The court did not sentence the accused to imprisonment but rather to correctional supervision so as not to be separated from her children. Thus, it is evident that the best interest of the child generally plays a significant role, because any decision that affects a child, ought to be made with careful consideration of the effect the decision will have on the child.

116 *Loc cit*. This section also enforces art 19(1) of the CRC. Cheadle, Davis and Haysom 270 make the point that the State itself may be held directly accountable for the abuse or neglect of a child. This could, for instance, be the case where a child is bullied within the parameters of a state school and no restorative measures have been taken.

117 Cheadle, Davis and Haysom 518.

118 *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC). See also Cheadle, Davis and Haysom 518. Therefore, it can be argued that, where a child lives in less than ideal familial circumstances, the State is obliged to step in. When regarding the causes and effects of bullying (see chapter 3 in this regard), it is evident that in certain instances, state intervention is necessary in order to ensure the physical and mental wellbeing of a child.

119 *Loc cit*. See section 10 of the South African Schools Act 84 of 1996. This also ties into section 12 of the Constitution, which protects an individual's physical and psychological integrity. Cheadle, Davis and Haysom 170 note that the Constitutional Court ruled in *S v Williams and Others* 1995 (7) BCLR 861 (CC) that corporal punishment infringes upon the right to dignity and not subjected to cruel and inhuman punishment. See par 5.2.3.

120 See chapter 3 footnote 160 pertaining to the legal obligation resting on children to respect the rights as set out in the Constitution.

121 Sections 7 and 9 of the Children's Act 38 of 2005; sections 2 and 3 of the Child Justice Act 75 of 2008.

guardian of all minors, to focus on what is best for the child, rather than the parents.[122] The Children's Act expands upon the constitutional embodiment of the best interest standard by setting out factors to be taken into account.[123] The child's best interest in terms of health and wellbeing is always of paramount importance.[124] The inference can be drawn that because children fall within the most vulnerable groups, they need additional constitutional protection and therefore the best interest requirement is of crucial importance.

5.2.6.1 Legal relevance of children's constitutional rights to bullying

It has already been stated that children are afforded additional constitutional protection through section 28 of the Constitution because they are a vulnerable group.[125] Therefore it stands to reason that any conduct or omission that does not comply with *inter alia* the provisions of section 28 cannot be seen as conducive to the growth and development of a healthy, well-balanced child.[126] It can be argued that section 28(1)(c) also encapsulates education rights.[127] Education is paramount to the proper development of a child.[128] Bullying is counterproductive to learning and adversely affects a child's ability to grow and learn.[129] It is explicitly mentioned in section 28 that children have the right to be protected against maltreatment, neglect and abuse.[130] When reading sections 28(1)(c) and (d) together, it is therefore clear that bullying, in the

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122 Currie and De Waal 617.

123 Section 7 of the Children's Act 38 of 2005 encapsulates important factors to be taken into account when making a decision pertaining to the best interest of a child.

124 Section 9 of the Children's Act 38 of 2005. Cheadle, Davis and Haysom 530-531 further point out that the 'best interest' standard extends beyond the scope of section 28(1) of the Constitution. Where there is a reasonable and justifiable cause for the limitation of a child's right exists, it may be done.

125 See also footnote 112.

126 See chapter 1 footnote 2.

127 Section 28(1)(c) of the Constitution states the following: "Every child has the right to basic nutrition, shelter, basic health care services and social services". Section 29 of the Constitution encompasses education rights and will be discussed in par 5.2.7.

128 See par 1.2.2.

129 See par 2.4.1, 2.4.2 and 2.4.3 with regard to what violence and bullying entails. It is evident that such behaviour would ultimately stultify emotional growth, as well as impairing a child's ability to learn. See also chapter 3 footnote 164.

130 Section 28(1)(d) of the Constitution.

context of children's rights, is something that ought not to be tolerated.[131] When applying the best interest requirement,[132] it is thus stated that parents in conjunction with schools have an obligation to protect children against maltreatment, as it is in a child's best interest.[133] Not only adults, but also children have a legal obligation to respect the fundamental rights of others.[134] Based upon this fact, bullying can be seen as a constitutional infringement and when one or more learners bully another, they fail to carry out their legal duty of upholding the rights as set out in the Bill of Rights.

5.2.7 Education

The right to education[135] is governed by section 29 of the Constitution and *inter alia* states that "Everyone has the right (a) to basic education".[136] The right to education is a right to positive action, since it cannot be satisfied in isolation – collective action is necessary, whether by the State or private institutions.[137] Education is of crucial

131 See chapter 3 par 3.3 and footnotes 8 and 10.

132 Section 28(2) of the Constitution; sections 7 and 9 of the Children's Act 38 of 2005; sections 2 and 3 of the Child Justice Act 75 of 2008.

133 *Trilingual Legal Dictionary* 205. See also Prinsloo "Sexual harassment and violence in South African schools" 2006 South *African Journal of Education* 309 that defines *in loco parentis* as "in the place of the parent". This legal doctrine provides for instances where an individual can assume parental rights, responsibilities and duties without going through the formalities of legal adoption. This common law rule is applicable in this instance, since educators stand *in loco parentis* to their learners. See also chapter 3 footnote 51 for parental responsibilities.

134 See chapter 4 footnotes 28 and 29.

135 Cheadle, Davis and Haysom 534 note that the right to education is widely recognised both locally and internationally. Relevant instances *inter alia* entail the *Universal Declaration of Human Rights* (1948) article 36, the *American Declaration on the Rights and Duties of Man (*1948) article XII, the *European Convention on Human Rights* (1950) protocol 1 article 2, the *United Nations, Educational, Scientific and Cultural Organisation Convention against Discrimination in Education* (1960), the *Convention on the Elimination of all Forms of Discrimination* (1966) article 5(e)(v), the *Convention on the Elimination of all Forms of Discrimination against Women* (1979) article 10, the *African Charter on Human and People's Rights* (1981) article 17, the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* (1988) articles 28 and 29 and the *United Nations World Declaration on Education for All* (1990).

136 Section 29 of the Constitution.

137 In *Gauteng Provincial Legislature In re: Gauteng School Bill of 1995* 1996 (3) SA 165 (CC) par 9, the court held that the interim Constitution encapsulated both a positive and a negative right with regard to education in section 32(a). This means that education must be provided to all and a person should not

importance.[138] It lays the foundation and sets the trend for an individual's adult life.[139] Education forms the building blocks of morally upright citizenship.[140] Therefore, it is evident that the right to education by implication gives an individual access to other rights in the Bill of Rights.[141] The level of education of an individual is directly related to his or her life quality.[142] Children suffer for various reasons.[143] The suffering, whether physical or psychological ultimately has an impact upon a child's education.[144] The State is obliged to respect, protect and promote the right to basic education.[145] This holds that, at the bare minimum, the State must provide facilities for the enjoyment of the right to education as well as eradicating any elements transgressing the full enjoyment of this.[146]

5.2.7.1 The legal relevance of the right to education to bullying

Every child has a constitutionally protected right to education.[147] Ideally, children should be able to take advantage of this right without being perturbed. However the reality cannot be farther from the truth.[148]

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only be deterred from obtaining an education. The right to basic education is encapsulated within section 29(1)(a) of the 1996 Constitution. See also Currie and De Waal 636.

138 Malherbe "Education Rights" in Boezaart (ed) *Child Law in South Africa* (2009) 399-419 makes the point that the right to education is one of the most important rights with regard to the development of children, in order to allow them to reach their full potential. Cheadle, Davis and Haysom 535 also point out that the State is obliged to see to it that children are at least afforded primary education to ensure a foundation upon which they can build their own societal success.

139 See chapter 1 par 1.1 and 1.2.2.

140 *Brown v Board of Education* (1954) 347 US 483 at 493.

141 Malherbe in Boezaart (ed) *Child Law in South Africa* (2009) 399.

142 *Ibid.*

143 Less than ideal socio-economic circumstances, abuse, neglect, poor familial circumstances, violence, illness etc all contribute to the suffering of children.

144 *Loc cit*. This puts suffering children at a disadvantage, since a struggling child will not move forward at the same rate as someone who is not struggling in some way. Lack of education thus robs children and young people of opportunities to improve themselves and their quality of life. See chapter 2 footnote 30.

145 Sections 7(2), 29(1)(a) and (b) of the Constitution.

146 Malherbe in Boezaart (ed) *Child Law in South Africa* (2009) 407. See also footnote 137.

147 Section 29 of the Constitution. See also par 1.4.1.

148 See chapter 1 par 1.1, footnote 6 and 12 and chapter 3 par 3.6.1.1.

Various factors[149] come into play when children's right to basic education is infringed upon. Bullying is a phenomenon with severe consequences which adversely affects all those involved.[150] This means that it will have a negative impact upon a learner's academic performance, which goes against the grain of section 29. The right to education is a basic right, upon which countless other fundamental rights build. It goes without saying that the consequences of bullying can set up the bully, victim and bystander for lifelong problems.[151] The aim of the Constitution is to build up rather than break down and yet again, bullying behaviour cannot be justified, especially in view of section 29.

5.2.8 Just administrative action

Section 33[152] holds that each individual has the right to administrative action[153] which is lawful, reasonable and procedurally fair.[154] Schools[155] fall within the milieu of section 33.[156] The exercise of power must firstly be rational.[157] Secondly, the administrative action taken must be constitutionally acceptable.[158] Thirdly, the rules of natural justice must be followed to ensure procedurally fair action.[159]

5.2.8.1 Legal relevance of just administrative action to bullying

Just administrative action is indirectly relevant to bullying. The reason for this is that the section becomes applicable after a bullying incident has taken place, when disciplinary procedures are followed in terms of

149 See footnotes 143 and 144.
150 See chapter 2 par 2.4.4 and footnote 31; chapter 3 footnotes 22, 126, 164.
151 See chapter 3 for a psychological overview of bullying.
152 Of the Constitution.
153 See also section 1 of the Promotion of Administrative Justice Act 3 of 2000 for a definition of administrative justice.
154 Malherbe "The Impact of Constitutional Rights on Education" in Boezaart (ed) *Child Law in South Africa* (2009) 420-455.
155 School in this instance embodying all education departments, school governing bodies, principals and staff (teaching and non-teaching staff).
156 Malherbe in Boezaart (ed) *Child Law in South Africa* (2009) 443 points out that section 33 is applicable in respect of anybody performing an administrative action, encompassing all organs of state and private entities that are involved in unequal relationships or authoritarian relationships.
157 *Ibid.*
158 *Ibid*.
159 *Ibid*.

the bully and henchmen.[160] The underpinning term used when regarding disciplinary procedures, for example, is due process. When dealing with the procedural aspect of the law, due process[161] must be adhered to. Due process is not only explicitly mentioned in the South African Schools Act 84 of 1996[162] but also enshrined in section 33.[163] It is important to use due process as a keystone, since, when dealing with bullying, there will be disciplinary procedures. Due process must always be followed in order for the outcome to be regarded as objective, constitutional and procedurally fair.

5.2.9 Arrested, detained and accused persons

Section 35 governs the rights of arrested, detained and accused persons.[164] The principle of legality is enshrined in the Constitution under section 35(3)(l), which states that no person may be convicted of a crime if it was not a crime at that time.[165] Important here is the *trias politica*[166] doctrine, vested in section 165 of the Constitution.[167] Courts simply do not have the power to create new crimes. This duty falls upon

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160 See sections 8 and 9 of the South African Schools Act 84 of 1996 and GG 18900 of 1998-05-15. See also chapter 2 par 2.4.11 and footnotes 59 and 64.

161 See chapter 2, footnote 64.

162 The South African Schools Act states the following: "8(5)(a) A code of conduct must contain provisions of due process safeguarding the interests of the learner and any other party involved in disciplinary proceedings."

163 See par 5.2.8.

164 Section 35(3)(*l*) of the Constitution holds that an accused person has the right to a free trial, which includes the right not to be convicted of an offence that does not exist within South African law at the time of commission.

165 Section 35(3)(*l*) of the Constitution states the following – "(3) Every accused person has a right to a fair trial, which includes the right (l) not to be convicted of an act or omission that was not an offence under either national or international law at the time it was committed or omitted."

166 The *Trilingual Legal Dictionary* 297, defines *trias politica* as "the division of the body politic so as to distinguish between legislative, executive and judicial powers". This is also known as the separation of powers.

167 Section 165 of the Constitution states the following – "(1) The judicial authority of the Republic is vested in the courts. (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. (3) No person or organ of state may interfere with the functioning of the courts. (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts. (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies."

the legislature, to fill every void by either amending legislature or drafting new legislation. The principle of legality is relevant because when regarding the *status quo*, it is worrying to note that no perpetrator can be convicted of bullying, as it does not constitute an offence in South African law.

5.2.10 Interpretation of the Bill of Rights[168]

This study is legal comparative in nature.[169] Section 39 makes it possible to use international and foreign law to assist in making objective decisions.[170] Of equal importance are subsections 2 and 3, which state that common law[171] may be adhered to and developed as long as it is in keeping with the fundamental principles enshrined in the Constitution.

5.3 Legislative framework

The legal framework which South African law depends upon consists of a complex network of international law, the Constitution, national law,[172] provincial law, policy, government notices *et cetera*. None of these however, provide for a sustainable solution to the problem of school bullying in South Africa, even though it is cause for major concern.

There is the Constitution of the Republic of South Africa,[173] the South African Schools Act 84 of 1996,[174] which creates the framework on

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168 Section 39 of the Constitution *inter alia* holds that a court or tribunal must take into account international law and may consider foreign law while upholding the fundamental values of the Constitution as set out in the Bill of Rights

169 See chapter 1 footnote 23. See also chapter 8 – Australian law.

170 Sections 39(1)(b) and (c).

171 See footnote 9.

172 The following acts are examples of legislation that could also be used in an instance such as bullying. This list is, however, not exhaustive or complete since the subject is vast: The Intimidation Act 72 of 1982 (which prohibits all forms of intimidation); Firearms Control Act 60 of 2000 (putting in place a system to control firearm usage, manufacture etc).

173 See discussion in par 5.2.

174 Important sections of the South African Schools Act to be explored are section 8: A code of conduct for learners; section 8A: Random search and seizure and drug testing at school; section 10: Prohibition of corporal punishment; section 10A: Prohibition of initiation practices; section 30: Committees of governing body; section 60: Liability of State.

which all public schools function; the Child Justice Act 75 of 2008[175] a ground-breaking piece of legislation, which holds child offenders accountable for their acts, and the Children's Act 38 of 2005,[176] which covers a vast area of child law-related matters and aims at protecting the rights of children. None of these, however, explicitly mentions bullying. One can argue that bullying can be inferred or read into these acts, but that would create too big a margin for error. Current legislation, such as the Child Justice Act 75 of 2008 or the Schools Act 84 of 1996, ought to be amended to include bullying, or an entirely new piece of legislation should be drafted encompassing this entire problem in an effort to eradicate violent behaviour in schools. It is submitted that legislative reform will be necessary to address the issue adequately.

The South African Schools Act 84 of 1996, together with the Children's Act 38 of 2005 and the Child Justice Act 75 of 2008, creates a protective wall around South African children. However, from time to time, something slips through the cracks, whether through an act or an omission. This would typically be the case where no legislative provision is made to rectify or control issues affecting the lives of South African citizens (especially children in this instance). The question is how one goes about solving the problem of bullying. Where there is no policy or existing policy is enforced incorrectly, chaos ensues. In the case of *High School Vryburg and the Governing Body of High School Vryburg v The Department of Education of the North West Province*[177] the crucial

175 Sections to be looked at more closely in the Child Justice Act will be section 2: Objects of Act; section 3: Guiding principles; chapter 2: Application and criminal capacity; section 69: Factors to be considered before sentencing.

176 Applicable sections of the Children's Act are, *inter alia*, section 6(2): this section encompasses proceedings, actions and decisions in all matters pertaining to a child; section 9: best interest of the child paramount; section 14: access to court – any child involved in a legal matter has the right of access to a court; section 15: enforcement of rights – this section gives anyone listed in this section the right to approach a court and allege infringement of a right in the Bill or Rights or Children's Act; section 18(2): parental rights and responsibilities; and various special child protection measures.

177 Unreported case (CA 185/99) - This case highlighted the crucial importance of following due process. A grade 9 pupil was charged with assault with the intent to do grievous bodily harm after he allegedly stabbed another pupil with a pair of scissors. The grade 9 pupil appeared before the governing body. He was

importance of correctly enforced policy became quite clear. Not only legislation and policy are important, but also the continuous, consequent enforcement thereof.

The law is not a static entity, but one that is ever-changing with the times and according to the needs of the legal subjects of South Africa. One has to address the needs of the people, in this particular instance keeping children safe from harm, inside and outside schools. Children have the right to a safe and healthy environment that is conducive to healthy emotional and physical growth and learning, whether they are victims or bullies.[178]

5.3.1 Child law

Child law covers a vast legal terrain.[179] Children in South Africa are afforded additional legal protection through section 28 of the Constitution.[180] In view of the vastness of children's rights, it goes without saying that the coverage is extensive and not exclusively limited to the Children's Act 38 of 2005 and the Child Justice Act 75 of 2008.[181]

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also charged criminally and upon his arrival back at school was told to leave, as he had been suspended. He later arrived with members of the ANCYL and Congress of South African Students (COSAS), demanding his reinstatement. He was tried before the school board again and suspended again. The matter went to the High Court, where it was found that the disciplinary hearing's outcome was to be regarded as null and void. The reason for this was that the disciplinary hearing could not be seen as fair and just and therefore he could not be expelled. His parents had not been notified and the rules of natural justice had not been applied. This case is of vital importance when dealing with bullies, since one needs to follow due process to the letter in order for change to take effect.

178 According to section 28 of the Constitution, children have the right to be protected against maltreatment, neglect, abuse, or degradation. It also states that the best interest of the child is paramount in all matters concerning that child.

179 Boezaart in Boezaart (ed) *Child Law in South Africa* (2009) 3 makes the point that child law is no longer limited to private law (status of minors, parental responsibilities etc) and public law (rights of victims of crimes, child offenders etc) but rather cuts across the traditional divide and can therefore be seen as relevant within both private and public law. Through the Constitution it has become evident that children have a plethora of enforceable rights against their parents as well as the state.

180 See par 5.2.6.

181 Boezaart in Boezaart (ed) *Child Law in South Africa* (2009) 3. The Child Justice Act 75 of 2008 will be discussed in 5.3.3 below.

It must be reiterated at this point that the focus of this study is bullying in schools and therefore only the applicable child law statutes will be discussed.

5.3.1.1 The Children's Act 38 of 2005

Section 2 of the Children's Act encompasses the objects of the Act and *inter alia* highlights the importance of family, the protection of children against maltreatment, abuse and neglect and very importantly, the best interest of the child.[182] It is imperative to note that the best interest of the child is also constitutionally underpinned in section 28(2) of the Constitution.[183]

5.3.1.1.1 *Section 6 – general principles*

Section 6 of the Children's Act contains the general principles. Applicable to this study are sections 6(2) and (3),[184] which governs all proceedings, actions and decisions in matters concerning a child. The approach followed in section 6(2) correlates with both the Constitution as and international trends.[185] The general principles are all-inclusive, as section 6(2)(a) encompasses fundamental rights as enshrined in Chapter 2 of the Constitution, the best interest of the child principle as well as all other principles upon which the Act was written.[186] Section 6(2)(b) incorporates the crucial importance of dignity.[187] This has the implication that children have the right to be treated as people, to be

182 Section 2 of the Children's Act 38 of 2005.
183 See par 5.2.6; section 28 of the Constitution; Skelton and Proudlock "Interpretation, objects, application and implementation of the Children's Act" in Davel and Skelton (ed) *"Commentary on the Children's Act"* (2010) 31.
184 Section 6(3) of the Children's Act is critically important in view of the fact that it *inter alia* notes that a conciliatory and time-saving approach ought to be favoured. These principles are in keeping with the fundamental principles of restorative justice. See chapter 6.
185 Davel "General principles" in Davel and Skelton (eds) *Commentary on the Children's Act* (2010) 2-3.
186 *Ibid.*
187 *Loc cit* 2-4. See also par 5.2.2.

taken seriously and not to be seen as mere objects.[188] Section 6(2) also includes a reference to equality, yet another important fundamental right enshrined in section 9 of the Constitution.[189] Furthermore, children have the inherent right to develop, fulfil their full potential and to be carefree.[190] Upon closer inspection, it is thus clear that section 6(2) is reminiscent of key fundamental rights as enshrined in the Constitution.[191] It is also clear that section 6(2) follows section 7 of the Constitution, which *inter alia* stipulates that the State needs to respect, protect, promote and fulfil the rights of South African citizens.[192] Children's rights as enshrined in section 28 of the Constitution also find resonance within section 6(2).[193] It is also stated that parental rights and responsibilities fall on parents and only when they fail to realise the rights of their children, does the burden fall upon the State.[194]

The applicability of section 6(2) with regard to bullying in schools rests upon disciplinary matters after a bullying incident has taken place.[195] A child has the right to participation in all matters concerning him or her.[196] The right to participation is an underpinning theme to the Children's Act.[197] This gives a child the opportunity to voice his or her opinion.[198] According to one of the rules of natural justice, one must always listen to the other side, namely, *audi alteram partem*.[199] In order to adhere to all

188 *Ibid*.
189 Sections 6(2)(c) and (d) of the Children's Act. Davel in Davel and Skelton (eds) *Commentary on the Children's Act* (2010) 2-4. See also par 5.2.1.
190 Sections 6(2)(e) and (f) of the Children's Act. Davel in Davel and Skelton (eds) *Commentary on the Children's Act* (2010) 2-4. Sections 6(2)(e) and (f) of the Children's Act.
191 Sections 7, 9, 10 and 29 of the Constitution. Bosman-Sadie and Corrie *A practical approach to the Children's Act* 20. See also par 5.2.
192 See section 7 of the Constitution.
193 See section 28 of the Constitution.
194 Bosman-Sadie and Corrie *A practical approach to the Children's Act* 20.
195 See par 5.2.8 and footnote 162 in this regard.
196 See sections 6(2) and 10 of the Children's Act.
197 Du Toit "Legal Representation of Children" in Boezaart (ed) *Child Law in South Africa* (2009) 8.
198 *Ibid*.
199 In *De Lange v Smuts* 1998 (3) SA 785 (CC) par 131 Mokgoro said the following regarding *audi alteram partem*: "Everyone has the right to state his or her own case, not because his or her version is right, and must be accepted, but because, in evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed about the points of view of both parties in

the values enshrined in the Constitution, it is of crucial importance to remember that there is a victim and a bully – each with his or her own circumstances and a story of his or her own.

Therefore, decisions made in disciplinary hearings need to take into account the opinions of the children involved. Children should also be present in such cases and must not be excluded. Both sides must be heard in order to make a decision that is constitutionally valid.[200]

5.3.1.1.2 *Section 7 – Best interest of the child standard*

The best interest of the child principle has been present in South African law for a number of years.[201] Section 28(2) of the Constitution protects the best interest of the child.[202] The Children's Act built upon the constitutional provision by expanding upon what the best interest of the child entails.[203]

This principle has also been underlined in international law; in *inter alia* the CRC[204] and the ACRWC.[205] It is thus evident that the scope of the

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order to stand any real chance of coming up with an objective justifiable conclusion that is anything more than chance." The *Trilingual Law Dictionary* 159 defines *audi alteram partem* as "hear the other side", or alternatively *audiatur et altera pars* – "let the other side be heard also".

200 See section 10 of the Children's Act 38 of 2005.

201 Skelton "Parental Responsibilities and Rights" in Boezaart (ed) *Child Law in South Africa* (2009) 62 notes that this principle has been present in South African case law since 1948 and has become more prominent over the years. Davel "General Principles" in Davel and Skelton (eds) *Commentary on the Children's Act* (2010) 2-5 states that a court having to make decisions in the best interest of a child, is a long established common law principle.

202 Section 28(2) reads as follows: "(2) A child's best interests are of paramount importance in every matter concerning the child."

203 Skelton in Boezaart (ed) *Child Law in South Africa* (2009) 63 makes the point that section 7(1) of the Children's Act encapsulates an important list of factors that a court must take into account when dealing with the best interest of a child in terms of the Act and the Constitution. See also footnote 123.

204 Article 3(1) holds the following: "1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." See also chapter 7 for an overview of important international and regional documentation pertaining to child law.

205 Article 4(1) states: "1. In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary

best interest principle is wide and far-reaching. To set parameters and to distil the best interest of the child down to a single standard is an intricate process.[206] The best interest of the child standard is a factual question, therefore the determination of what is in the best interest of a child is subject to the facts of every case and a single standard can consequently not be applied in the same way in every instance.[207] The Children's Act lists at least 23 factors to be taken into account when determining what the best interest of a child entails, as set out in section 7(1).[208] A noteworthy provision set out in section 7 is subsection (2), which expands upon the definition of parent.[209]

It is evident that child law is multi-disciplinary in nature, not only with regards to other fields of study, but also various areas within the law. The best interest of the child standard can be applied in various areas, from adoption and custody to education, these being but a few applicable areas. This principle is also further expanded upon in section 9 of the Children's Act which will be discussed below.

5.3.1.1.3 *Section 9 – Best interest of the child paramount*

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consideration." See also chapter 7 for an overview of important international and regional documentation pertaining to child law.

206 Davel in Davel and Skelton (eds) *Commentary on the Children's Act* (2010) 2-6 makes the point that it has been said that the best interest standard perceived as being too vague. Furthermore, people in different professional capacities may deem different issues as being of paramount importance when dealing with children. Other factors that influence the interpretation of this principle are *inter alia* culture, history, political, social and economic conditions.

207 *Op cit* 2-7. Heaton "An individualised, contextualised and child-centred determination of the child's best interests, and the implications of such an approach in the South African context" 2009 *Journal for Juridical Science* 1-18 also makes the point that an individualised approach is needed, tailored to the needs of every individual child; however, there are instances where limitations are valid, for instance limited litigation capacity in order to protect children, not to punish them.

208 *Op cit* 2-8. See also section 7 of the Children's Act. For purposes of this study, listing the factors as set out in section 7 is unnecessary.

209 This subsection reads: "In this section 'parent' includes any person who has parental responsibilities and rights in respect of a child." See also footnote 132. This subsection can be regarded as the incorporation of the doctrine *of in loco parentis*. This is crucial to the study, as educators stand *in loco parentis* to their learners. Therefore not only parents, but also schools, have to protect the rights of children (learners).

Section 7 lays the foundation for section 9.[210] This section reads: "9. In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied."[211] First and foremost, the term paramount ought to be defined.[212] This section should be regarded as the most important principle in the entire Act.[213] It is however, imperative to ascertain whether the best interest of the child is a right, a standard, or both.[214]

The best interest of a child can be seen as a right.[215] It ought to be borne in mind that the best interest of a child is not an unlimited right, albeit constitutionally protected.[216] As it happens, rights cannot be considered in a vacuum and in practice it happens that various rights come into play, often competing in terms of importance.[217] The rights of children do not work against the rights of parents and educators and do not necessarily challenge the rights of people in authoritarian positions.[218] When different fundamental rights have to be considered in one instance, it can be argued that the best interest of the child lays the foundation for the pending decision.[219] The best interest of the child is

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210 See par 5.3.1.1.2. The importance of the best interest of the child principle has been underlined internationally, and constitutionally, as well as being encapsulated in common law.

211 Act 38 of 2005.

212 The *Oxford English Dictionary* 540 defines paramount as: "1 more important than anything else. 2 having supreme power".

213 Article 3(1) of the United Nations Convention on the Rights of the Child, article 4(1) of the African Charter on the Rights and Welfare of the Child and section 28(2) of the Constitution. Bosman-Sadie and Corrie 23. Chapter 7 deals with international instruments and the international influences on the perception of best interest of the child, which will also be discussed in this chapter.

214 Davel in Davel and Skelton (eds) *Commentary on the Children's Act* (2010) 2-10.

215 *Ibid*. Children have the right to have their best interests regarded as paramount. *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) par 18 supports this supposition by *inter alia* stating that section 28(2) of the Constitution requires that a child's best interest always enjoys paramount importance in all matters concerning that child. Section 28(2) is a right independent of section 28(1).

216 Davel in Davel and Skelton (eds*) Commentary on the Children's Act* (2010) 2-10 further notes that the best interest of the child principle has vertical and horizontal applicability; however, it is qualified by section 36 of the Constitution.

217 *Op cit* 2-11.

218 *Ibid*.

219 *Ibid*.

both a right and a standard.[220] Sections 7 and 9 of the Children's Act are interdependent and should be read in conjunction with each other.[221]

5.3.1.1.4 *Section 14 – Access to court*

Section 14 of the Children's Act stipulates that every child has the right to bring a matter to court, or to be assisted in such an instance, provided that it falls within the jurisdiction of the said court.[222] With regard to bullying, section 14 does not have direct application, but the underlying principles pertaining to justice are important.

Victims[223] have the right to be heard.[224] They have the right not to be disregarded, or having their pain ignored. The Constitution obliges the State to respect, protect and promote the rights of citizens.[225] It is thus argued that in terms of the rules of natural justice, victims of bullying have the right to justice being served.[226] In order to comply fully with section 7(2) of the Constitution and 14 of the Children's Act, administrative procedures must be in place to facilitate the maintenance of rights.[227]

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220 *Ibid*. Ngidi "Upholding the Best Interests of the Child in South African Customary Law" in Boezaart (ed) *Child Law in South Africa* (2009) 237. See also section 7 of the Children's Act where the best interest of the child is regarded as a standard.

221 Ngidi in Boezaart (ed) *Child Law in South Africa* (2009) 237. See also par 5.3.1.1.2.

222 Sections 28(1) and 34 of the Constitution and section 14 of the Children's Act 38 of 2005.

223 Role players during a bullying incident are discussed in chapter 4, specifically par 4.3. It must be reiterated that this study is not biased and both sides (victim and bully) are equally important. However, it is of crucial importance to protect the rights of victims in order to preserve societal trust in the South African justice system. Therefore, the focus of 5.3.1.1.4 will mainly fall on the victim. The common law rule of *audi alteram partem* also plays an integral part and therefore, neither bully nor victim will be disregarded.

224 See footnote 222.

225 Section 7(2) of the Constitution.

226 Rules of natural justice relevant in this instance *inter alia* include due process and *audi alteram partem*. See also par 5.2.8.1 and footnotes 160 and 161 with regard to due process and par 5.3.1.1.1, together with footnote 199 pertaining to *audi alteram partem*.

227 See par 5.2.8 and footnotes 160 and 161.

Further adherence to these duties is manifested in *inter alia* the South African Schools Act under section 8.[228] The State is also bound by section 60 of the Schools Act which stipulates that the State can be held liable on account of damage, loss or injury incurred by a learner through the activities of a public school.[229] Means by which justice can be sought and achieved in this instance include restorative justice.[230] It must always be borne in mind that seeking and serving justice in the context of a bullying incident by no means aims at discriminating against any of the parties involved However, when a balance is disturbed (when one learner causes another learner harm, whether physical, emotional or both), equilibrium needs to be re-established. Accountability is of crucial importance in this regard.[231]

5.3.1.1.5 *Section 15 – Enforcement of rights*[232]

Section 15 of the Children's Act is reminiscent of section 38 of the Constitution.[233] However, section 15 of the Children's Act specifically applies to children. This specific section is very important, since that it does not limit people able to approach the court, to only a child or his or her parents or guardian.

Educators stand *in loco parentis* with regard to their learners and thus have the right to approach a court if deemed necessary, regarding the

228 Act 84 of 1996. See footnotes 159 and 161. The relevant sections in the South African School's Act will be discussed in 5.4.1.
229 Act 84 of 1996. See par 5.4.1.
230 See par 2.4.6 for a definition of restorative justice. Restorative justice in the context of schools and bullying will be dealt with in chapter 6.
231 See chapter 6.
232 Act 38 of 2005.
233 Section 38 of the Constitution reads as follows: "38. Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are – a. anyone acting in their own interest; b. anyone acting on behalf of another person who cannot act in their own name; c. anyone acting as a member of, or in the interest of, a group or class of persons; d. anyone acting in the public interest; and e. an association acting in the interest of its members."

rights of a specific learner (child).[234] Therefore interested parties[235] have more leverage with regard to *locus standi.* In bullying cases, it is very important to note that parents do not necessarily see the harm caused by or to their child;[236] since bullying mainly takes place in and around schools.[237] Therefore, school staff[238] can also approach a court, specifically with regard to the protection of the rights of learners.

5.3.1.1.6 *Section 18(1) and (2) – Parental rights and responsibilities*[239]

This section is of vital importance, as the focus shifts from authority to rights and responsibilities.[240] Furthermore, parental rights and responsibilities can be shared by various people.[241] Parental rights and responsibilities incorporate four elements: caring for the child, maintaining contact with the child, acting as guardian for the child and contributing to the maintenance of the child.[242] For the purposes of this study, care is an imperative element with regard to bullies and victims of bullying.[243] The Children's Act defines care very broadly, including all the important aspects of caring for a child.[244]

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234 See par 5.2.6.1, 5.3.1.1.2 and footnotes 132 and 208 with regard to the doctrine of *in loco parentis*.

235 See section 15(2) of the Children's Act.

236 See chapter 3 for a psychological overview of bullying.

237 See par 3.7 for an overview of the *status quo* in South African schools.

238 School staff could include educating and non-educating staff, social workers and school psychologists, managed by the principal of the school. Furthermore, organisations such as the Centre for Child Law, CALS and the Legal Resources Centre etc. can also approach a court.

239 Act 38 of 2005.

240 Skelton "Parental Responsibilities and Rights" in Boezaart (ed) *Child Law in South Africa* (2009) 63; Bosman-Sadie and Corrie 34.

241 *Ibid*. Parental rights and responsibilities can be either full or specific rights or responsibilities. This is of high importance, when taking into account the doctrine of *in loco parentis*, specifically pertaining to educators. The Children's Act provides for parental rights and responsibilities to be afforded to any person; thus, it is not necessary for a biological or legal relationship to exist between child and adult. See par 5.2.6.1, 5.3.1.1.2, 5.3.1.1.5 and footnotes 133, 209, and 234.

242 Skelton in Boezaart (ed) *Child Law in South Africa* (2009).

243 It is thus stated that a duty to care not only rests upon parents to act in the best interest of their child, but upon schools as well. See footnote 241.

244 Section 1 of the Children's Act *inter alia* defines care as providing a child with a suitable place to live; living conditions which influence the child in a positive manner; safeguarding the wellbeing of the child; protecting the child against maltreatment, neglect, abuse, exploitation as well as any emotional, physical or moral harm; fulfilling and promoting the rights of the child as set out in section

However, it is submitted that when an educator stands *in loco parentis* towards a learner or learners, the educator has specific duties to the child, not full parental rights and responsibilities. It is imperative to note that an educator has to act in the best interest of his or her learners, as a parent would act regarding his or her child.[245]

5.3.1.2 Child law and bullying

As previously stated,[246] there is a definite legal link between child law and bullying. Bullying is a psychologically motivated act with legal consequences.[247] Since this study has been delimited to learner-on-learner bullying,[248] the principles of child law are very important. It is submitted that the Children's Act does not explicitly mention bullying; however, the principles contained in the Act are of such a nature that they aim to protect children against all forms of abuse, *inter alia* bullying.[249]

5.3.2 Education law

A child is born a complete human being; however, as the child grows up, his or her reality changes.[250] A child finds security within an adult (educator), to lead him or her in the right direction.[251] Therefore the inference can be made that this is the perfect setting for proper education and learning. However, evidence shows that it is not the case in modern-

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28 of the Constitution; giving guidance and support with regard to the education of the child and ensuring that the best interest of the child is always of crucial importance in all aspects pertaining to the specific child.

245 See footnote 241

246 See par 3.3.

247 Chapter 3 gives an overview and insight into the psychology behind bullying. See par 3.4.

248 See par 2.2 for the limitations.

249 See the following relevant provisions in the Children's Act: Preamble; sections 2(b)(iii),(iv),(d),(f)(i); 6(2); 7; 9; 16; 18(2)(a); 150(1)(f),(i).

250 Oosthuizen "Security as a *sine qua non* for education" in Oostuizen (ed) *Introduction to Education Law* (2011) 2 notes that this reality is synonymous to education.

251 *Ibid*.

day South Africa.[252] The escalation of school violence is devastating and counterproductive to proper education.[253]

5.3.2.1 *The South African Schools Act 84 of 1996*[254]

The South African Schools Act 84 of 1996 (hereafter Schools Act) lays the foundation for basic education in South Africa.[255] Section 8 of the Schools Act prescribes a basic outline for a code of conduct for learners as to positive behaviour and conduct, as well as how to deal with misbehaviour.[256] In general, schools depend upon their code of conduct to address bullying even though bullying is not explicitly mentioned in most instances.[257] Even though these legislative measures have been taken, schools are by no means safe.[258] Bullying behaviour occurs on school grounds and it generally lowers the quality of life of learners. Relevant sections of the Schools Act will be discussed below.

5.3.2.1.1 *Section 8 – Code of Conduct*

A code of conduct ought to establish a safe, secure, disciplined and purposeful learning environment.[259] It must also improve and maintain the quality of the educating process.[260] In the context of a school or learning environment, discipline ought to be seen as something positive

252 See chapter 1 footnote 12 and chapter 3 par 3.7 and footnotes 123 and 126.
253 See chapter 3 footnote 126.
254 The South African Schools Act 84 of 1996.
255 The Schools Act is, however, not the only piece of legislation governing education in South Africa. Other pieces of legislation of importance are *inter alia* the Education Laws Amendment Act 31 of 2007, National Education Policy Act 27 of 1996 and the Employment of Educators Act 76 of 1998, as well as government notices such as Government Notice 776 of 1998. It must be stated, though, that not all the above-mentioned pieces of legislation are relevant with regard to bullying.
256 See chapter 3 footnote 120.
257 See chapter 2 footnote 65.
258 See chapter 3 footnote 122.
259 Section 8(2) of Act 84 of 1996.
260 *Ibid*.

and not punitive.[261] Punishment and discipline should not be seen as synonymous terms, as discipline aims to instil positive behavioural values whereas punishment is negative.[262] Discipline can be broken down into three categories.[263]

A code of conduct also deals with negative discipline in addressing unacceptable behaviour and the consequences thereof.[264] Duly important in the instance of a code of conduct is the incorporation of the principle of due process.[265] Therefore, a code of conduct is a set of rules that sets the standard for learner behaviour, encouragement of self-discipline and mutual respect but it also includes negative discipline (conduct that will not be tolerated) and the procedures that go along with learner misconduct. However, a code of conduct rarely, if ever, explicitly mentions bullying.[266] It is evident that discipline is an imperative, complex aspect of proper education, excluding punishment.[267] Discipline forms the foundation of a code of conduct; this in turn forms part of the domestic legislation of every school.[268]

5.3.2.1.2 *Section 8A – Random search and seizure and drug testing at schools*

It is imperative to carry out random searches in the school context.[269] Search and seizure is carried out in the context of the *in loco parentis*[270]

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261 Joubert in Boezaart (ed) *Child Law in South Africa* (2009) 502. Definition of punitive accessed on 2012-07-05 from http://www.thefreedictionary.com/punitive states "inflicting or aiming to inflict punishment".
262 Joubert in Boezaart (ed) *Child Law in South Africa* (2009) 503.
263 See chapter 3 footnote 120.
264 *Ibid*.
265 Due process is explicitly mentioned in section 8(5)(a) of the South African Schools Act 84 of 1996, but is also enshrined in section 33 of the Constitution. See par 5.2.8.
266 See footnote 257.
267 Discipline does not always include punishment, but there are many instances where discipline is synonymous with punitive justice. Solutions in this regard will be proposed in the conclusion.
268 Section 8 of Act 84 of 1996; Joubert in Boezaart (ed) *Child Law in South Africa* (2009) 507.
269 News 24 10 September 2009 "Sword killer gets 20 years". Morne Harmse, an 18-year-old learner from Nic Diederichs Technical High School in Krugersdorp,

relationship between an educator and a learner. Because sensitivity ought to underwrite the matter; due process ought to be followed to the letter in this regard to ensure that an educator cannot be held liable for any damages *ex post facto*.[271] The aim is to establish a disciplined learning environment (much like the provisions as set out in section 8).[272] Furthermore, the wellbeing and safety of learners are of crucial importance.[273] Physical bullying can take the form of a full-on weapon-assisted assault and can be avoided if the proper search and seizure procedures are carried out regularly.[274]

5.3.2.1.3 *Section 10 – Prohibition of corporal punishment*

Section 10 of the Schools Act prohibits corporal punishment.[275] However, the term corporal punishment ought to be defined in order to establish parameters. The United Nations Committee on the Rights of the Child adopted a comprehensive definition of corporal punishment in 2006 which *inter alia* holds that corporal or physical punishment is any kind of punishment where force is used and is intended to cause harm or

killed a fellow learner and, wounded three other people, with a sword. This tragedy could have been avoided if stricter search and seizure policies had been followed. Terblanche and Davel "Safety measures and the rights of learners" 2004 *De Jure* 85-96 make the following point: "The law therefore recognises that searches are a means of maintaining discipline and enforcing school rules." See *inter alia* footnotes 10, 18, 78 and 79 with regard to violence in South African schools.

270 See footnote 133.

271 See footnote 267.

272 South African Schools Act 84 of 1996, Devices to be used for Drug Testing and the procedure to be followed. Annexure B: Guidelines for random search and seizure and Drug Testing at Schools.

273 The introduction to the abovementioned Annexure B *inter alia* reads: "The focus is on identifying the drug abuse problem, and learners who are victims of a dependency must be assisted, as provided for in the system." Although this particular instance applies to drug use, the inference can be made that school safety with regard to weapons and dangerous objects (as set out in section 8A) is regarded as equally important.

274 See footnote 269 for an example.

275 Section 10 states: "(1) No person may administer corporal punishment at a school to a learner. (2) Any person who contravenes subsection (1) is guilty of an offence and liable on conviction to a sentence, which could be imposed for assault."

pain.[276] This mostly involves smacking or spanking, whether with a hand or a punishment device.[277] It is however not limited to mere spanking, but may include kicking, throwing, pinching (basic assault) *et cetera*.[278] This form of punishment is degrading, strips a person of his or her inherent dignity and ridicules the child.[279]

Therefore, it is evident that corporal punishment encompasses not only verbal, but also physical degradation, as stated in the definition above. However, this study focuses purely on learner-on-learner bullying and thus educator-on-learner bullying has been excluded.[280] For the sake of completeness, though, it is imperative to include section 10 in this study, as corporal punishment can also be regarded as synonymous to bullying.[281] Corporal punishment further infringes upon the right to freedom and security of the person, as corporal punishment transgresses an individual's personal integrity.[282]

Section 10 makes mention of "no person"[283] and "any person".[284] Thus it is unclear whether this section excludes anyone from liability. It stands to reason that, if a learner physically harms another learner and the act complies with the abovementioned definition of corporal punishment, such a learner could possibly be held liable under section 10 of the School's Act and therefore, for example, it is prohibited for a prefect to beat a learner. As the School's Act is unclear as to the definition of corporal punishment, as well as whom corporal punishment applies to, it

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276 *United Nations Convention on the Rights of the Child General Comment No 8* (2006): The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment.
277 *Ibid*.
278 *Ibid*.
279 *Ibid*.
280 See par 2.2.4.
281 Malherbe in Boezaart (ed) *Child Law in South Africa* (2009) 425 notes that human dignity is an extremely important element of a balanced school environment. This balance is disturbed and human dignity infringed upon through acts of bullying, school violence, corporal punishment, initiation practices etc. See also par 5.2.2. Initiation practices as parallel to bullying will be discussed in 5.3.2.1.4.
282 See par 5.2.3.
283 Section 10(1) of Act 84 of 1996.
284 Section 10(2) of Act 84 of 1996.

is thus stated that it is not only vertically[285] applicable, but also horizontal.[286] Therefore, section 10 does not apply vertically within this study, but horizontally.

5.3.2.1.4 *Section 10A – Prohibition of initiation practices*

When considering section 10A of the School's Act, it is clear that bullying is not explicitly mentioned. However, all the necessary elements are there:

i) Endangerment of mental or physical wellbeing[287]
ii) Undermining of human dignity[288]
iii) Humiliation[289]
iv) Undermining of the rights as set out in the Bill of Rights[290]
v) Destruction of private property.[291]

When comparing the abovementioned elements with the definition of bullying,[292] the inference can be made that an initiation practice is merely a pseudonym for bullying.[293] Initiation practices that entail the abovementioned elements are prohibited because they strip a learner of his or her intrinsic human dignity, which is not only a constitutionally

285 Vertical applicability in this instance should be understood as educator-on-learner punishment.
286 Horizontal applicability in this regard can be seen as learner-on-learner punishment. It is thus stated that corporal punishment and bullying are closely related terms and as such, deviation from the norm of vertical application can occur where for example prefects beat or humiliate other learners (see par 5.5.1.2). See par 2.4 for a conceptual framework and the relationship between violence and bullying. If one compares the definition of bullying to the definition of corporal punishment, it ought to be clear that these terms are very similar.
287 Section 10A(3)(a) of Act 84 of 1996.
288 Section 10A(3)(b) of Act 84 of 1996.
289 Section 10A(3)(c) of Act 84 of 1996.
290 Section 10A(3)(d) of Act 84 of 1996.
291 Section 10A(3)(f) of Act 84 of 1996.
292 See par 1.
293 Not all initiation practices are harmful, where a Grade 8 learner has learn the school anthem or the names of their educators, it cannot be seen as harmful. However, it must be judged against the elements as stated above. See also par 5.3.2.1.3 and footnote 287-291.

protected right, but also a founding value to the Constitution.[294] Thus, the School's Act could be amended to include the term bullying in either section 1, or 10A, as the two phenomena are very similar and the effect of both disrupt the orderly functioning of schools and threaten school safety as such.

5.3.2.1.5 *Section 60 – Liability of State*

It stands to reason that when a learner is injured, whether physically or emotionally, or incurs damage to his or her private property, someone has to be held accountable. According to section 60 of the Schools Act, the State can be held liable in instances where a learner has been harmed or has incurred loss or damage through school activity.[295] It has furthermore been noted that section 60(1), in particular, has been formulated so widely, that it may include not only delictual, but also contractual liability.[296] However, for the purposes of this study, the focus will fall solely on delictual liability of the state with regard to the victims of bullying.[297] Liability of the State pertaining to public schools is complex, owing to the various factors involved.[298] Children are exposed to the misconduct of not only educators, but also fellow learners.[299] Educators, in turn, may be subject to misconduct or the abusive behaviour of a learner.[300]

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294 Malherbe in Boezaart (ed) *Child Law in South Africa* (2009) 425 states that human dignity underwrites most if not all fundamental rights. See also par 3.1.2.

295 Act 84 of 1996.

296 This was held by the court in *Technofin Leasing & Finance (Pty) Ltd v Framesby High School* 2005 6 SA 87 (SECLD). Visser "Education Law – Liability of State for Contractual Damages Payable by Public School – Section 60(1) of South African Schools Act 84 of 1996" 2006 *THRHR* 185.

297 Delictual and criminal liability regarding bullying will be discussed in depth in 5.4, therefore the Roman-Dutch foundation of the law of delict will not be discussed under section 60 of SASA.

298 Visser "Some Thoughts on Aspects of Delictual Liability in Relation to Public Schools in South Africa" *IJELP Special Conference Edition* (2004) 283 notes that these factors *inter alia* include large numbers of children of various age groups entering and using the same premises (school). Furthermore, the conduct of educators when working with learners is assessed, as well as the conduct of children seven years or older, pertaining to contributory negligence.

299 *Ibid.*

300 *Ibid*.

Relevant rights pertaining to delictual liability *inter alia* entail the freedom and security of the person;[301] privacy;[302] good name and dignity;[303] and a high standard of education.[304] As previously stated, a code of conduct is of crucial importance regarding the enforcement of discipline in schools.[305] It can be said that the purpose of a code of conduct is to prevent the commission of delicts by learners.[306] The issue of accountability surfaces in the instance where a learner is injured at school. If it can be proven on a preponderance of probabilities that strict enforcement of specific rules would have prevented harm or loss, such failure constitutes a delict, giving rise to a delictual action.[307]

Initiation practices in schools are prohibited by section 10A of the Schools Act.[308] Section 10A(2)(b) explicitly states that "a learner may institute civil action against a person or group who manipulated and forced that learner to conduct or participate in any initiation practices".[309] This implies that delictual liability is ensured, in conjunction with disciplinary steps as set out in the code of conduct.[310] Civil action in the context of section 10A(2)(b) ought to be seen as common law actions for recovery of damages or satisfaction.[311] However, the school can only be held liable if there is proof that initiation practices were carried out in connection with educational activities directly linked to the school.[312] If, in the milieu of initiation practices, the requirements of section 60(1) of the Schools Act are fulfilled, the State can be held liable for damages.[313]

5.3.3 Policy and Government Notices

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301 *Ibid.* See also par 5.2.3.
302 *Ibid.* See also par 5.2.4.
303 *Ibid.* See also par 5.2.2.
304 *S*ection 29 of the Constitution and SASA. See also par 5.2.7.
305 Section 8 of SASA. See also par 5.3.2.1.1.
306 Visser 2004 *IJELP Special Conference Edition* 284.
307 *Ibid*. Note that this action will then be instituted against the state. However, since the school is an organ of state, the sited party will be the school governing body.
308 See par 5.3.2.1.4.
309 Section 10A(2)(b) of SASA.
310 Visser 2004 *IJELP Special Conference Edition* 285. See also par 5.3.2.1.1.
311 *Ibid*.
312 *Ibid*.
313 *Ibid*. See the discussion on *Dowling v Diocesan College and others* 1999 (3) SA 847 (CPD) in par 5.5.1.2.

The South African legal system consists of an intricate network of various elements. These elements *inter alia* include the Constitution, national legislation, provincial legislation, policies,[314] case law and common law. Therefore, it is important to examine relevant policies and government notices as well, as these serve to assist current legislation.

5.3.3.1 The National Policy on Whole-school Evaluation

It goes without saying that the education system is not a static entity but an ever-changing organisation of elements. Therefore, thorough and continuous evaluation is necessary to maintain a high quality of education. The National Policy on Whole-school Evaluation *inter alia* aims to evaluate the effectiveness of a school based upon national criteria.[315] Areas where improvement is necessary, as well as areas of excellence, are to be identified.[316] This policy is relevant to bullying because bullying has a negative impact on the quality of education learners receive.[317] Furthermore, schools have a duty to provide a high standard of education, which implies that bullying must be addressed.[318]

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314 See par 2.4.10. The provincial legislature *inter alia* has the following policy measures in place: Gauteng Province has General Notice 6903 of 2000: "Misconduct of learners at public schools and disciplinary proceedings". This notice builds upon *inter alia* section 8 of SASA and Government Notice 776 of 1998 by setting out specific disciplinary procedures with regard to misconduct in schools. In the Eastern Cape Province General Notice 32 of 1999 applies: "Regulations relating to behaviour by learners in public schools which may constitute serious misconduct, the disciplinary procedures to be followed and provisions of due process safe-guarding the interests of the learner and any other party involved in disciplinary proceedings". The regulations drafted by the Eastern Cape Province are similar to those of Gauteng and also encapsulate the essence of *inter alia* section 8 of the Schools Act and Government Notice 776 of 1998. This begs an important question – would the problem of bullying be adequately addressed if policy were to be mandatory nationwide? If every province had to have an anti-bullying/serious misconduct policy in place, would this contribute to the eradication of bullying? As it stands, the question cannot be answered, as there is no unanimity within provincial legislature.

315 National Policy on Whole-school Evaluation accessed from http://www.education.gov.za on 2012-07-10.

316 *Loc cit*. Areas of excellence serve as examples of good education practice, whereas areas in need of improvement ought to be identified and worked on.

317 See chapter 3 for the psychology behind bullying.

318 See par 5.2.7 and SASA.

The whole-school evaluation concept is parallel to the whole-school approach used by Olweus[319] to combat bullying in schools. The Olweus intervention programme can be illustrated as follows:

i) School level:

a) Learner surveys on perceptions regarding bullying
b) School conferences on bullying
c) Better supervision on playgrounds during recess
d) More attractive school grounds
e) Learner-friendly telephone on school grounds
f) Parent-educator meetings on a regular basis
g) Parent-to-parent meetings.[320]

ii) Class level:

a) Class rules with praise and sanctions
b) Class meetings
c) Role playing, literature and art concerning bullying
d) Positive class activities
e) Communal meetings with educators, parents and learners.[321]

iii) Individual level:

a) Serious talks with every learner involved
b) Serious talks with every parent involved
c) Combined effort of parent and educator to solve the issue
d) Assistance from neutral students or bystanders
e) Parental support;
f) Discussion groups for all parties involved (learners, parents, educators);
g) Change of class or school.[322]

319 See chapter 2 footnote 18.
320 Strategy accessed from http://www.anti-bullyingalliancetoolkit.org.uk on 2012-07-10.
321 *Ibid*.

This detailed strategy does not focus solely on parties involved in a bullying issue, but rather aims at creating an environment where bullying is discouraged through positive and supportive behaviour. Similarly, a whole-school evaluation can gain from such a strategy, as it would surely improve the school morale, which in turn will improve the quality of education. It is thus submitted that the abovementioned whole-school approach as created by Olweus, ought to be drafted into a South African education policy on bullying. In so doing, the first step will be taken in the eradication of bullying.

5.3.3.2 Guidelines for a code of conduct for learners

The adoption of a code of conduct is governed by section 8 of the School's Act.[323] This has brought about the drafting of Government Notice 776 of 1998, which provides the guidelines for a code of conduct for learners.[324] It must be reiterated that the aim of a code of conduct is to establish a disciplined environment conducive to learning.[325] A code of conduct must uphold democracy and constitutionally protected rights and be transparent in terms of communication.[326]

A code of conduct must nurture a standard of moral behaviour enabling learners to become responsible citizens.[327] Discipline must be positive and not punitive and facilitate constructive learning.[328] The code of conduct must contain a set of moral values and principles, which must be upheld by the school.[329] Furthermore, behaviour that respects the rights of both learners and educators is to be prescribed.[330] A code of conduct must be clearly visible and every learner must possess a copy in his or her chosen language.[331] Learners are not exempted from compliance

322 *Ibid*.
323 See par 5.3.2.1.1.
324 GG 18900 of 1998-05-15. See also chapter 3 footnote 120.
325 Section 8 of SASA; GG 18900 of 1998-05-15.
326 *Ibid*.
327 GG 18900 of 1998-05-15.
328 *Ibid*.
329 *Ibid*.
330 *Ibid*.
331 *Ibid*.

with the code of conduct.[332] A code of conduct must also guarantee freedom from violence and the security of learners and educators.[333]

In order to nurture young minds, the environment must be accommodating towards learning and conducive to education. The right to a clean, safe and healthy[334] environment for learners and educators is ensured by not only the Constitution, but also Government Notice 776 of 1998.[335] Learners do not have only rights, but also responsibilities.[336] Learners have the duty to adhere to class rules, do their school- and homework, protect school property, attend school regularly and respect fellow learners and educators.[337] Parents are responsible for their children's behaviour as they are also expected to respect school rules as set out in the code of conduct.[338] Parents are obligated to take an active role and interest in their children's school career and attend meetings regularly.[339] Parents do, however, have the right to instigate legal action against any party transgressing the constitutional rights of their children.[340]

In terms of offences against the school and code of conduct, minor offences are treated by means of verbal warnings, supervised schoolwork, assisting the offended person in some or other manner, compensation, replacement of damaged property and suspension from certain school activities.[341] It is possible for a learner to be suspended from school. This would be the case where the conduct of the learner endangered the safety of others, violating their rights; where the learner possessed, threatened to use or used a dangerous weapon; used, possessed or distributed narcotics or drugs; was involved in fighting,

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332 *Ibid*.
333 *Ibid*. See also par 2.4.1, 2.4.2, 2.4.3, 3.7 and 5.2.3 in this regard.
334 Healthy in this instance applies to both physical and mental health. See also chapter 2 footnote 30.
335 GG 18900 of 1998-05-15. See also par 5.2.5.
336 GG 18900 of 1998-05-15. See also chapter 4 footnotes 28 and 29.
337 GG 18900 of 1998-05-15.
338 *Ibid*.
339 *Ibid*.
340 *Ibid*.
341 *Ibid*.

assault or battery; or was guilty of profanity, hate speech, sexism, racism, theft, vandalism, verbal abuse, repeatedly violating the code of conduct, rape or bullying.[342]

The principle of due process is vitally important.[343] This becomes relevant in terms of disciplinary hearings. Every learner accused of an offence or infringement of the code of conduct has the right to a fair hearing.[344] However, when the offence is of a criminal nature, the police must investigate the matter and refer it to court if necessary.[345]

Government Notice 776 of 1998 is a comprehensive tool, which must be applied by South African schools. In the context of bullying, this is a very important document. Bullying is mentioned, but not explicitly as a separate occurrence. It is thus submitted that guidelines to create individual anti-bullying policies ought to be drafted and read in conjunction with a school's code of conduct. Bullying as such is too big a problem to be put under the ambit of general misconduct.[346] Such an anti-bullying policy should serve as an annexure to the school's code of conduct.[347]

5.3.3.3 Regulations to prohibit initiation practices in schools

Section 10A prohibits initiation practices in schools.[348] Government Notice 7589 of 2002 expands upon section 10A.[349] In these regulations, important definitions are highlighted, such as assault,[350] *crimen iniuria*,[351]

342 *Ibid.* It is evident that the list of offences is quite comprehensive. Most of these offences tie into bullying when regarding the definition of bullying and the relationship of bullying and violence (see par 2.4.1-2.4.3).
343 See par 5.3.2.1.1 and footnote 266.
344 GG 18900 of 1998-05-15.
345 *Ibid*.
346 See chapter 1 footnote 14.
347 See chapter 2 footnote 65.
348 See par 5.3.2.1.4.
349 GG 24165 of 2002-13-12.
350 GG 24165 of 2002-13-12 defines assault as "the unlawful and intentional – (a) application of force, directly or indirectly, to another person, or (b) threatening another with immediate personal violence in circumstances which lead the threatened person to believe that the other intends or has the power to carry out the threat".

degradation,[352] harassment,[353] humiliation,[354] intimidation[355] and peer pressure.[356] Furthermore, the regulations are underpinned by constitutional rights such as equality, dignity, privacy, freedom and security of the person, protection from maltreatment and a healthy school environment.[357] These regulations also underline the importance of the fact that learners have a duty to respect the rights of other learners, with regard to fulfilling their own potential.[358] It is further highlighted that initiation practices are illegal and that a principal, together with the school governing body, has a duty to ensure that no initiation practices take place at school.[359] Importantly, it is further noted that disciplinary hearings (with regard to initiation practices) are underpinned by human dignity and respect; such a hearing ought not to be founded on fear or assault.[360]

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351 *Loc cit*. *Crimen iniuria* is described as "the unlawful intentional violation of the dignity or privacy of another, in circumstances where such violation is not of a trifling nature".

352 *Loc cit*. Degradation is conceptualised as "any behaviour towards humiliating another, causing loss of respect or standing in the school community".

353 *Loc cit*. Harassment is encapsulated as "behaviour which is hostile or offensive to a reasonable person and which unreasonably interferes with an individual's work, academic performance or social life and any behaviour that creates an undermining of the integrity or dignity of an individual. Such behaviour can make a reasonable person feel uncomfortable, unsafe, frightened, embarrassed, and may be physical, verbal or non-verbal. The common link is that the behaviour would be unwanted by any reasonable person and could not be justified through a personal or family relationship".

354 *Loc cit*. Humiliation is described as "any word or act which causes another to lose self-respect or the respect of others".

355 *Loc cit*. Intimidation is defined as "any act by a person with the intent to compel or induce a particular person to do or to abstain from doing any act or to assume or to abandon a particular standpoint by means of (a) assault, injury or causing damage to that person or any other person; or (b) threat to kill, assault, injure or cause damage to that person or any other person".

356 *Loc cit*. Peer pressure is conceptualised as "the influencing factor (a) whereby a learner feels pressured by any learner to act or not to act and to participate or not to participate in an activity in order not to be ostracised; (b) whereby a learner would not come forward after being initiated for fear of victimisation".

357 It has previously been hypothesised that bullying and initiation practices are synonymous terms to be used in conjunction rather than separately. Neither of these phenomena is conducive to a healthy school environment and as such, these regulations are also important with regards to bullying. See also par 5.3.2.1.4.

358 See footnote 336.

359 GG 24165 of 2002-13-12.

360 *Loc cit*. In *Rusere v The Jesuit Fathers* 1970 (4) SA 537 (R), the court held per Beck that the duty of care owed to learners by schools can be likened to a "careful" father taking care of his children. Davel "The standard of care

5.3.3.4 Regulations for safety measures at public schools

It stands to reason that the State is obliged to take sufficient measures to ensure the safety of all South African citizens,[361] especially children,[362] seeing that they are a vulnerable group.[363] As previously stated, South African schools have become centers of violence and substance abuse.[364] The regulations for safety measures at public schools build upon section 61 of the South African Schools Act 84 of 1996 relating to safety matters in schools.[365] It is stated in the regulations that all public schools are declared free from drug and dangerous objects.[366] It is further explicitly stated that no person may cause violence or a cause disturbance resulting in the disruption of school activity.[367] Under these regulations, a police official has the right to search school premises without a warrant if a reasonable suspicion exists that dangerous weapons or illegal drugs are present on the school grounds.[368] It is important to note that under these regulations, parents are allowed to visit their children at school, if no disturbance is caused.[369] Violence and bullying are parallel phenomena and therefore, bullying can also fall within the ambit of the regulations for safety measures at public schools.[370]

5.4 The law of delict versus criminal law with regard to bullying

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applicable to educators: the reasonable educator" 2003 *De Jure* 409 further points out that a higher degree of care may be demanded of the people who possess knowledge, experience or skills.

361 See footnote 4, chapter 4 par 4.5.3 and footnote 28.

362 See par 2.4.8.

363 See par 5.2.6.

364 See chapter 3 par 3.7 and footnote 126.

365 Section 61 *inter alia* stipulates the following: "(1) The Minister may make regulations – (a) to provide for *safety measures* at public and independent schools". (Own emphasis added.)

366 GG 22754 of 2001-12-10.

367 *Ibid.*

368 *Ibid*.

369 *Loc cit*. This is important, because parents may feel that they want to take matters into their own hands and directly a bully directly. Even though such a parent acts out of concern for his or her own child, he or she acts unlawfully in doing so.

370 See par 2.4.1-2.4.3 for an analytical comparison between violence and bullying.

Bullying is a widely defined and far-reaching phenomenon.[371] Bullying can comprise a physical or psychological element or both.[372] This means that different aspects of the law become relevant, following a bullying incident. Depending on age,[373] a bully can be held criminally liable for a myriad of criminal acts including assault,[374] intimidation,[375] murder,[376] culpable homicide,[377] *crimen iniuria*,[378] theft,[379] malicious injury to property[380] and arson.[381] Suicide[382] and bullycide[383] as criminal offences will be discussed separately, as South African law needs evolvement in this regard.

However, following a bullying incident, there can also be delictual liability.[384] Important aspects regarding delictual liability are accountability and claiming for damages. Instituting a claim against a wrongdoer based on a delict is governed by civil law, whereas criminal

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371 See par 2.4.2 for a definition of bullying.
372 See chapter 3 with regard to bullying and psychology.
373 With regard to age of criminal capacity, the Child Justice Act 75 of 2008 is of crucial importance and relevant sections will be discussed.
374 See chapter 2 footnote 14 for a definition of assault.
375 Snyman Criminal Law 463 notes that intimidation is defined as a crime in section 1(1) of the Intimidation Act 72 of 1982 which states: "Any person who – (a) without lawful reason and with intent to compel or induce any person or persons of a particular nature, class or kind or persons in general to do or to abstain from doing any act or to assume or to abandon a particular standpoint – (i) assaults, injures or causes damage to any person; (ii) in any manner threatens to kill, assault, injure or cause damage to any person or persons of a particular nature, class or kind; or (b) acts or conducts himself in such a manner or utters or publishes such words that it has or they have the effect, or that it might reasonably be expected that the natural and probable consequences thereof would be, that a person perceiving the act, conduct, utterance or publication – (i) fears for his own safety or the safety of his property or the security of his livelihood, or for the safety of any other person or the safety of the property of any other person or the security of the livelihood of any other person".
376 See par 2.4.5.2.
377 See par 2.4.5.3.
378 Burchell 746 defines *crimen iniuria* as "unlawfully and intentionally impairing the dignity or privacy of another person".
379 Theft can *inter alia* be defined as the unlawful and intentional appropriation of movable property that belongs to another person. See also Snyman 483.
380 Burchell 849 defines malicious damage to property as intentional and unlawful damaging of the property of another person.
381 Snyman 548 describes arson as the unlawful and intentional setting of fire to the immovable property of another person.
382 See par 2.4.5.1.
383 See par 2.4.4.
384 Neethling, and Potgieter *Visser Law of Delict* 25 defines a delict as an instance where "one person (the doer or actor) must have caused damage or harm to another person (the person suffering the loss) by means of an *act* or *conduct*."

proceedings pertaining to crimes against the victim are governed by criminal law. It must be borne in mind that civil proceedings can be instituted irrespective of criminal proceedings.[385]

5.4.1 Criminal law

As previously mentioned, many crimes could fall within the ambit of bullying. These crimes are committed within the confines of school grounds on a regular basis.[386] These crimes moreover comprise the physical element of bullying,[387] with the exception of *crimen iniuria* which encompasses a more psychological element.[388] It is imperative to study these crimes in order to perfect the definition of bullying and also to draw upon existing crimes to create a possible new crime: bullying.

However, merely exploring the criminal aspect of bullying encompasses much more than studying existing offences. It is also imperative to know what exactly the criminal responsibility of a minor accused of a crime is. The Child Justice Act 75 of 2008 ensures a separate criminal justice system for minors.[389] This piece of legislation divides persons to which it applies into three categories: children below 10 years;[390] children older

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385 *Loc cit*. There are fundamental differences between criminal law and the law of delict. The difference lies in the fact that private law governs law of delict, which protects private interest, whereas public law governs criminal law, protecting public interest. Delictual remedies are compensatory in nature, whereas criminal sanctions are punitive. Furthermore, one act can have both delictual as well as criminal consequences; however, not all delicts are criminal acts and not all criminal acts are delicts.

386 See par 3.7 for a comprehensive overview of the *status quo* of South African schools.

387 Assault, murder, culpable homicide and damage to property have two elements: they not only cause emotional harm, but also physical damage. In the case of murder and culpable homicide, life is taken away that can never be replaced, thus resulting in physical loss.

388 See par 2.4.2 above for the definition of bullying.

389 Gallinetti "Child Justice in South Africa: The Realisation of the Rights of Children Accused of Crime" in Boezaart (ed) *Child Law in South Africa* (2009) 635-664.

390 *Loc cit*. Section 9 of the Child Justice Act 75 of 2008 stipulates a specific procedure in which to deal with children under the age of 10 who are accused of a criminal offence. See par 5.4.1.1.5 below.

than 10 but younger than 18;[391] and young people 18 years and older but under 21.[392]

Before the Child Justice Act 75 of 2008 came into force, the criminal capacity of minors was governed by the irrefutable common law principle stating that a child below the age of seven is *doli incapax,* children between the ages of seven and 14 are refutably presumed *doli incapax* and children older than 14 are presumed to have full criminal capacity.[393]

5.4.1.1 The Child Justice Act 75 of 2008

The Child Justice Act is a ground-breaking piece of legislation, as it encompasses not only the criminal capacity of minors, but it also aims to rectify injustice through restorative justice.[394] The Act explicitly refers to restorative justice by noting that the principles of restorative justice must be expanded and entrenched within child justice, while facilitating and guaranteeing a child offender's responsibility and accountability for his or her actions.[395]

Therefore it is evident that this piece of legislation does not aim to punish a child offender punitively, but rather seeks to rehabilitate such a child.[396] This has the implication that a shift in moral perspective is necessary within South African society. Corporal punishment as disciplinary method has been abolished by the Abolition of Corporal Punishment Act

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391 *Op cit* 650. Gallinetti also makes the point that the procedures set out in the Child Justice Act 75 of 2008 are intended to protect children while they are being handled by the criminal justice system.

392 *Loc cit*. The reason for the inclusion of this age group, is the fact that the legislature recognised that persons between the ages of 18 and 21 are still young and can thus derive some benefit from the procedures stipulated in this Act.

393 Gallinetti in Boezaart (ed) *Child Law in South Africa* (2009) 650.

394 See par 2.4.6 for a definition of restorative justice, which will be built upon in chapter 6.

395 Preamble to Act 75 of 2008.

396 Sloth-Nielsen and Gallinetti "'Just say sorry?' Ubuntu, Africanisation and the child justice system in the Child Justice Act 75 of 2008" 2011 *PER* 64 note that with the promulgation of the Child Justice Act, introduces a new era of alternative dispute resolution in terms of restorative justice and diversion as alternative to the formal criminal justice system.

33 of 1997.[397] However, it seems as though an ignorant notion reigns to the effect that corporal punishment is necessary to punish and discipline children.[398] It is argued that punitive punishment is not sustainable. Furthermore, in the context of bullying, what would a bully learn from such punishment, seeing that violence is an evil, recurring cycle?

5.4.1.1.1 *Section 2 – Objects of Act*

Section 2[399] of the Child Justice Act encapsulates the context within which this piece of legislation must be read.[400] First and foremost, the Child Justice Act seeks to regulate a legislative framework for children who come into conflict with the law.[401] One of the most important aims of the Child Justice Act is to uphold a child's constitutionally protected rights.[402] Furthermore, a balance is created between the rights of the accused child and the rights of the community.[403] Accountability and restorative justice are prominent features of the Child Justice Act.[404] However, reconciliation and restorative justice should by no means be

397 Section 1 of the Act states that any law that legalises corporal punishment is repealed. Therefore the inference can be made that this Act has general application in terms of not only private law, but also criminal law. See also par 5.3.2.1.3.

398 See par 3.7.1 regarding educator morale pertaining to corporal punishment and the lack of discipline in schools.

399 Section 2 of the Child Justice Act *inter alia* specifies that the aim of the Act is to protect the rights of children; promote *ubuntu* within child justice; fostering a child's human dignity; underwrite the importance of a child's respect for the fundamental rights of others through accountability; favour reconciliatory measures by means of the application of restorative justice processes; involve the parents, family and community in these procedures in order to assist with the reintegration of a child offender into society; prevent the detrimental effects of subjecting a child to the formal justice system, rather using appropriate alternative means by which to establish accountability and rehabilitation; and use diversion.

400 Gallinetti *Getting to know the Child Justice Act* (2009) 12. Sloth-Nielsen and Sloth-Nielsen and Gallinetti 2011 *PER* 68 note that section 2 is reminiscent of the preamble to the Act.

401 *Ibid*.

402 See par 5.2 and section 2(a) of the Child Justice Act, as well as section 28(1)(g) of the Constitution.

403 Gallinetti 12. Sloth-Nielsen and Gallinetti 2011 PER 71 also propose that through section 2(b)(ii) and (iv), the Act seeks to re-establish balance, seeing that it highlights the interest of not only victims but also society affected by the crime.

404 *Ibid*. Sloth-Nielsen and Gallinetti postulate that *ubuntu* as underlying principle to the Act, disregards the traditional punitive justice system, which includes revenge, banishment etc.

seen as merely apologising in order to get away with wrongdoing.[405] Parental, familial and societal involvement is also underlined through section 2.[406] The focus is placed on rehabilitation and support rather than ostracising a child offender.[407]

It has previously been stated that child law is holistic in nature.[408] It is thus submitted that, similar to the relationship between child law and other disciplines, child law and child justice are also linked. A combined effort is needed to fulfil the aims and objects as set out in the Child Justice Act. Government officials on all levels ought to work together in terms of procuring the future of all children, whether victim or offender.

5.4.1.1.2 *Section 3 – Guiding principles*

Section 3 is important because it gives direction in specific circumstances, suited to the needs of a specific child.[409] Upon dealing with a child offender, the aftermath should be proportionate to the offence committed as well as the circumstances of the child in question.[410] A child accused of committing a crime must be afforded the opportunity to participate in any proceedings affecting him or her.[411] A child offender should also be addressed in a manner which is in keeping with his or her age and development.[412] Undue delay must be avoided when working

405 Sloth Nielsen and Gallinetti 2011 *PER* 71.
406 *Loc cit*. See chapter 1 footnote 35 with specific reference to the proverb "[i]t takes a village to raise a child".
407 Gallinetti 12.
408 See par 3.2 regarding the relationship between child law and psychology. This is a symbiotic, multi-disciplinary relationship.
409 Gallinetti 13.
410 Section 3(b). Bullying encapsulates a myriad of recognised offences, ranging from minor to serious offences. Therefore, a "one size fits all" approach cannot be followed, as it may do more damage than good to the wellbeing of a bully and the ultimate aim is rehabilitation, not secondary victimisation.
411 Section 3(c). It is imperative always to hear the other side (*audi alteram partem*); the rules of natural justice also apply to child justice and especially in instances of bullying, both sides need to be taken into account in order to make a correct evaluation of the event.
412 Section 3(d). It goes without saying that bullying among foundation phase learners will be handled vastly differently from bullying in high school. By being sensitive towards a child's age and development, it is submitted that the

within the child justice system, as it may be detrimental to not only the offender's psyche, but also that of the victim.[413] The importance of family and the inclusion of family in the child justice process is underlined through section 3(g), which states that parents or guardians ought to be able to assist a child offender throughout the procedure, as well as participating in any decisions pertaining to the child.[414] It is also explicitly stated that the rights as stipulated in the CRC and ACRWC serve as guiding principles in terms of the Child Justice Act.[415]

5.4.1.1.3 *Section 4 – Application of Act*

The Child Justice Act applies to a child who comes into conflict with the law.[416] Section 4 stipulates the grounds of applicability with regard to the Child Justice Act. The Act applies to any person in South Africa, who at the time of committing an offence, was below the age of 10;[417] or older than 10 but under the age of 18.[418] In accordance with the Constitution, the moment a child turns 18, he or she is regarded as an adult.[419] However, in terms of justice, it would be fair to apply the Child Justice Act to individuals older than 18 as well (in certain circumstances).[420] Furthermore, a minimum age for criminal capacity is also prescribed.[421] This means that a child younger than the minimum age cannot be held criminally liable and can thus not be arrested or prosecuted.[422]

5.4.1.1.4 *Section 7 – Minimum age of criminal capacity*

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longevity of results from restorative justice processes will be greater than when a "one size fits all" approach is followed. See also footnote 406.

413 Section 3(f). Sloth-Nielsen and Gallinetti 2011 *PER* 73 note that this requirement is endemic to the African criminal justice system.

414 Section 3(g).

415 Section 3(i).

416 Preamble to the Child Justice Act. See also Gallinetti 15.

417 Section 4(1)(a).

418 Section 4(1)(b).

419 Section 28(3) of the Constitution.

420 Section 4(2)(b) of the Child Justice Act. See also Gallinetti 15.

421 Section 7 of the Child Justice Act.

422 Section 7(1) of the Child Justice Act. See also Gallinetti *Getting to know the Child Justice Act* (2009) 15.

A child who at the time of the offence committed is under 10 years of age cannot be prosecuted.[423] The Child Justice Act is a ground-breaking piece of legislation as it contains a minimum age of criminal capacity, whereas the CRC does not contain a similar provision.[424] In terms of section 7(2) of the Act, a child over 10 years of age but under the age of 14 is presumed to be *doli incapax*.[425] However, this assumption is rebuttable and if it were found beyond reasonable doubt that the child had the needed criminal capacity, he or she can be held criminally liable for his or her offence.[426] In essence, the *doli incapax* rule is still in force, but the minimum age has changed.[427] A child over the age of 14 has full criminal capacity.[428]

5.4.1.1.5 *Section 9 – Manner of dealing with children under the age of 10 years*

The Child Justice Act furthermore lays down specific procedures to be followed where a suspected child offender is under the age of 10 at the time of committing the offence.[429] It is thus stated that sections 9(3)(a)(ii)-(v) are very important within the milieu of bullying. Counselling[430] or therapy[431] is explicitly mentioned.[432] It is submitted

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423 Section 7(2) of the Child Justice Act. See also Gallinetti 15.

424 Wakefield "Is the Act working for children? The first year of implementation of the Child Justice Act" 2011 *SA Crime Quarterly No 38* 48.

425 *Ibid.*

426 Section 7(2) of the Child Justice Act. See also Gallinetti in Boezaart (ed) *Child Law in South Africa* (2009) 650.

427 Section 7(3) of the Child Justice Act.

428 *Ibid.*

429 Section 9(1) of the Child Justice Act *inter alia* holds that where a child is under the age of 10 but commits an offence, such a child may not be arrested, but must be handed over to his or her parents or guardian, or where no parent or guardian can be found, to a child and youth care centre. Upon taking these steps, a probation officer must be notified. See also Gallinetti *Getting to know the Child Justice Act* (2009) 15 and Gallinetti in Boezaart (ed) *Child Law in South Africa* (2009) 649.

430 The Canadian Psychological Association defines counselling psychology as: "a broad specialisation within professional psychology concerned with using psychological principles to enhance and promote the positive growth, wellbeing, and mental health of individuals, families, groups, and the broader community. Counselling psychologists bring a collaborative, developmental, multicultural, and wellness perspective to their research and practice". Definition for counselling psychology accessed from http://www.cpa.ca on 2012-07-12.

that in view of the young age of a suspected child offender (under 10 years of age), it would benefit such a child to be rehabilitated and thus correct a possibly skewed cognitive framework. This would create a sustainable solution, which can ultimately contribute to waning numbers of child offenders. Furthermore, mention is made of programmes designed to suit the specific needs of a particular child.[433] Every child is unique;[434] this refers to different cultural, socio-economic and social backgrounds.[435] Therefore, in order to ascertain where a child's problem lies, a "tailor-made" programme is necessary to focus on identifying the specific problem in order to ensure that it is sufficiently addressed in such a manner that it does not hinder a child any further.

Parents have a duty of care to their children.[436] Section 9(3)(a)(v) *inter alia* stipulates that a probation officer is entitled to arrange a meeting with the child and his or her parents and/or guardian.[437] The aim of such a meeting is to assist the probation officer in understanding the circumstances concerning the allegations against the child and following this, draft a plan suited to the child and relevant to the circumstances.[438]

5.4.1.1.6 *Section 10 – Decision to prosecute child who is 10 years or older but under the age of 14 years*

Section 7(2) of the Child Justice Act states that a child between the ages of 10 and 14 who commits an offence is presumed to lack criminal

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431 Therapy can be conceptualised as: "1. the treatment of disease or disorders, as by some remedial, rehabilitating, or curative process: speech therapy. 2. A curative power or quality. 3. Psychotherapy. 4. Any act, hobby, task, program etc. that relieves tension". Definition for therapy accessed from http://dictionary.reference.com on 2012-07-12.

432 Section 9(3)(a)(ii) of the Child Justice Act. See also chapter 3 for a psychological overview of bullying.

433 Section 9(3)(a)(iii) of the Child Justice Act.

434 Boezaart in Boezaart (ed) *Child Law in South Africa* (2009) 3 notes that children are an important societal group.

435 See par 3.5 for the causes of bullying.

436 Section 18(2)(a) of the Children's Act 38 of 2005. See also par 5.3.1.1.6 pertaining to parental rights and responsibilities, as well as footnote 244 for a definition of the term care.

437 See also sections 53(7) and 61 of the Child Justice Act in this regard.

438 Section 9(4) of the Child Justice Act.

capacity, unless the State can prove otherwise.[439] Section 10 contains various factors to be taken into consideration upon making a decision to prosecute a child offender between the ages of 10 and 14.[440] This serves as further protection in terms of young offenders.[441] When taking into account all the relevant factors as set out in section 10(1), it safeguards the child against an automatic prosecution process.[442] Taking these factors into consideration, a probation officer must decide whether criminal capacity is likely to be proven.[443] If it is likely that a child will have criminal capacity, the matter can be diverted.[444] If it is unlikely that criminal capacity will be proven, the child offender will be dealt with in terms of section 9.[445]

5.4.1.1.7 *Section 11 – Proof of criminal capacity*

Proof of criminal capacity vests upon section 11 of the Child Justice Act.[446] It is imperative to note that criminal capacity of a child offender must be proved beyond reasonable doubt.[447] In order to ascertain whether a child has criminal capacity, regard must be given to the probation officer's assessment report and any subsequent information provided.[448] The probation officer is also obliged to make a recommendation with regard to the child in question's criminal

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439 Sections 7(2) and 11 of the Child Justice Act.

440 These factors are encapsulated in section 10(1) and *inter alia* include the level of education of the child, cognitive capabilities, socio-economic circumstances, age, maturity, the nature and seriousness of the offence, the impact of the offence on the victim, the interests of the community, the report drafted by a probation officer, the likelihood of establishing criminal capacity, the favourability of diversion, and all other relevant factors.

441 Gallinetti *Getting to know the Child Justice Act* (2009) 18.

442 *Ibid*.

443 Section 10(2).

444 Section 10(2)(a)(i)

445 Section 10(2)(b).

446 Section 11 *inter alia* holds that the State must prove the criminal capacity of a child offender between the ages of 10 and 14 years' beyond reasonable doubt, which includes such a child's ability to differentiate between right and wrong. However, where such criminal capacity cannot be proven, the child can be referred to a probation officer to take the necessary steps in terms of section 9.

447 Section 11(1) of the Child Justice Act. See also Gallinetti *Getting to know the Child Justice Act* (2009) 19.

448 Sections 9 and 10 of the Child Justice Act. See also Gallinetti *Getting to know the Child Justice Act* (2009) 19.

capacity.[449] A child justice court or inquiry magistrate may also order an evaluation pertaining to the criminal capacity of the child.[450] Such an evaluation must be undertaken by a suitably qualified person[451] and must include an assessment of the child's cognitive, moral, emotional, psychological and social development.[452] If, however, a child's criminal capacity could not be proven beyond reasonable doubt, the inquiry magistrate or children's court may make an order to the effect that the child be referred back to the probation officer for further action in terms of section 9.[453]

Section 11 is not without criticism. Walker contends that the provisions of section 11(1) are concerning.[454] As section 11(1) currently stands, it amends common law.[455] The common law test for criminal capacity is two-fold. A court has to ascertain whether, at the time of committing the offence, the offender had the necessary mental faculties to know that his or her act was wrong and secondly, if the offender acted according to such a realisation.[456] It can be argued that, where a person satisfies the first part, satisfaction of the second part can be implied.[457] However, even though these two instances are compatible, they are not synonymous.[458] In terms of case law, it has been explicitly stated that it is doubtful that a child of 11 will have the necessary mental capacity to

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449 Section 40(1)(f) of the Child Justice Act.

450 Section 11(3) of the Child Justice Act. Such an evaluation may also be requested by the prosecutor or the child's legal counsel.

451 It is submitted that a child psychologist with experience in the field of developmental, abnormal and cognitive psychology would be suitable for such an undertaking.

452 Section 11(3) of the Child Justice Act. See also Gallinetti 19.

453 Sections 9 and 11(5) of the Child Justice Act. See also par 5.4.1.1.5.

454 Section 11(1) states: "The State must prove beyond reasonable doubt the capacity of a child who is 10 years or older but under the age of 14 years to appreciate the difference between right and wrong at the time of the commission of an alleged offence and to act in accordance with that appreciation." Walker "The requirements for criminal capacity in section 11(1) of the new Child Justice Act, 2008: a step in the wrong direction?" 2011 *SACJ* 34.

455 Walker 2011 *SACJ* 34.

456 Section 78(1) of the Criminal Procedure Act 51 of 1977; Burchell *Principles of Criminal Law* 358; Snyman *Criminal Law* 160.

457 Walker 2011 *SACJ* 35.

458 *Ibid*.

appreciate wrong doing.[459] Even though such a child may realise that his conduct is wrongful, it does not imply that he or she will foresee the consequences thereof or, fully realise the wrongfulness of the deed.[460] Furthermore, the example has been given of a 13 year-old child, who seemingly has all the necessary mental faculties to discern between right and wrong.[461] The court held that even though confessing to the deed may be sufficient to rebut the presumption of lack of criminal capacity, the issue should be regarded in a wider context.[462] An eight-year-old child may very well generally know that his conduct is wrong, but when he takes a piece of fruit from a neighbour's garden for example, he might not regard it as stealing.[463]

Thus, the correct manner in which to approach criminal capacity of minors depends upon the necessary insight pertaining to not only the child's unlawful act, but also his or her realisation of the consequences.[464] Walker argues that the current test, as encapsulated in section 11(1), is worded in abstract and general language, which lowers the standard of the test.[465] This amendment is detrimental to the rights of children accused of crime, which is in contrast with the best interest of the child.[466] Therefore it can be argued that it may render section 11(1) unconstitutional.[467]

5.4.1.1.8 – *Chapter 8: Diversion*

The National Institute for Crime Prevention and the Rehabilitation of Offenders pioneered the introduction of diversion programmes in South

459 *S v Dyk* 1969 (1) SA 601 (C) at par 603C-E.
460 *Ibid*.
461 *S v Pietersen* 1983 (4) SA 904 (E) at par 907A-C.
462 *Ibid*.
463 *Ibid*.
464 Walker 2011 *SACJ* 38.
465 *Ibid*.
466 Section 28(2) of the Constitution. Sections 7 and 9 of the Children's Act 38 of 2005. Walker 2011 *SACJ* 38.
467 Walker 2011 *SACJ* 39.

Africa.[468] Diversion has received judicial approval through case law such as *S v Z en Vier ander Sake*.[469] A prosecutor, in South African common law, is *dominus litis* and thus has discretion pertaining to prosecution.[470] Therefore the decision as to diversion of a child offender rather than prosecution, is vested in the prosecutor.[471]

In terms of diversion, criminal cases are diverted from a formal criminal court.[472] According to the Child Justice Act, diversion is achieved in three ways.[473] First and foremost, prosecutional diversion is based on a schedule one offence;[474] secondly diversion may be granted at the preliminary inquiry;[475] lastly a child may be diverted at the child justice court before finalisation of the case.[476]

Diversion aims[477] to deal with children outside the criminal justice system, underline the importance of accountability, meet the needs of the child in question, promote the reintegration of such a child into his or her community, provide a platform for the wronged party to express his or her feelings, promote reconciliation, prevent stigmatisation of the child offender, reduce re-offending potential, prevent a criminal record, promote human dignity.[478]

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468 Gallinetti in Boezaart (ed) *Child Law in South Africa* (2009) 656.

469 1999 (1) SACR 427 (E). The court held that in considering the case of a child offender, a court ought to refer such a child for diversion if the circumstances are appropriate.

470 Section 179(2) of the Constitution and section 20(1) of the National Prosecuting Authority Act 32 of 1998. See also Gallinetti in Boezaart (ed) *Child Law in South Africa* (2009) 657.

471 *Ibid*.

472 Gallinetti *Getting to know the Child Justice Act* (2009) 43.

473 Section 53 of the Child Justice Act.

474 Section 53(3) of the Child Justice Act. See also Galinetti in Boezaart (ed) *Child Law in South Africa* (2009) 658.

475 Section 53(4) of the Child Justice Act.

476 *Ibid.*

477 Section 51 of the Child Justice Act *inter alia* states that the aim of diversion is to deal with child offenders outside the formal criminal justice system; to encourage accountability, taking into account the needs of the specific child; facilitate reintegration within his or her family and society; give an opportunity for victim impact statements; consider compensation, reconciliation, prevention of stigmatisation and secondary victimisation; reduce the risk of re-offending; and promote the dignity and wellbeing of the child offender.

478 *Ibid*. See also Gallinetti *Getting to know the Child Justice Act (2009)* 43. Sloth-Nielsen and Gallinetti 2011 *PER* 75 further note that there are six

Diversion[479] applies to two levels, pertaining to the schedules containing the lists of offences (division based on seriousness of offence).[480] Schedule 1 contains minor offences, Schedule 2 more serious offences and 3 the most serious offences.[481] Level 1 links with Schedule 1 offences.[482] Level 2 applies to Schedule 2 offences.[483] There is also a vast array of options with regard to diversion, as it can range from informal orders and, admissions to formal programmes.[484] In the context of bullying, diversion serves as an excellent example of how to deal with a bully, after the incident. Instead of ostracising the child, he or she can be held accountable for his or her actions without punitive punishment and without being excluded from the community. In so doing, a bully will be able to learn from the experience and through counselling, therapy and family group conferencing, be equipped to deal with issues better. This in turn will assist the child in making better choices with regard to social behaviour.

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diversion orders that encompass elements of *ubuntu*. These include family time orders (which obligate a child to spend a certain amount of time with his or her family); a good behaviour order (which includes a standard of behaviour the child must adhere to); as well as a positive peer-on-peer association order (which orders the child to associate with people of his or her age in order to be influenced positively). It is submitted that all the above-mentioned orders can contribute positively to the rehabilitation and reintegration of a bully, as it is fundamental first to rectify any damage within the family, then work on behaviour and lastly, mend fences with his or her peers. In so doing, it is argued that the chances of reoffending (bullying again) will be slim to non-existent.

479 Section 53 of the Child Justice Act. Sloth-Nielsen and Gallinetti 2011 *PER* 75 state that section 53 is the longest substantive provision within the Act and includes a vast array of options in terms of diversion. These include an apology (written or oral), symbolic restitution (it is argued that this can range from a hand-crafted object, to something as simple as a hug) to either the victim or the community, community service etc.

480 Section 53(2)-(7) of the Child Justice Act. See also Gallinetti 44.

481 *Ibid*.

482 Section 53(2)-(7) of the Child Justice Act. Furthermore, it has been noted that there is a time limit to every level of diversion. On Level 1 the time period may not exceed 12 months in the case of offenders under the age of 14 and 24 months for children over the age of 14.

483 *Loc cit*. The timeframe for Level 2 diversion works on the basis that for offenders under the age of 14, diversion may not exceed 24 months and for offenders over the age of 14, the limit is 48 months.

484 Gallinetti *Getting to know the Child Justice Act* (2009) 44.

Level 2 diversion offers the same options as level 1; however, the intervention on level 2 is of a more intense nature.[485] The intervention may include anything from compulsory vocational, educational or therapeutic programmes to referral for intensive therapy.[486]

However, the Child Justice Act also lays down guidelines pertaining to the selection of a diversion option.[487] It must be reiterated that the Child Justice Act provides that all children are eligible in terms of consideration of diversion.[488] The guidelines must be followed in order to satisfy the common law principle of due process.[489]

It goes without saying that it is of crucial importance to monitor compliance[490] with a diversion order closely.[491] A probation officer must be designated to monitor the child's compliance with the diversion order.[492] Upon failure to comply with the diversion order, the probation officer must notify the inquiry magistrate or children's court in writing of non-compliance.[493] However; upon successful completion of diversion, a report must be submitted to the particular prosecutor handling the matter.[494] When a child fails to comply with the diversion order, a summons or warrant must be issued to obtain the presence of the child

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485 Gallinetti 44 notes that the reason for more intensive intervention is the fact that Level 2 diversion works with more serious offences (Schedule 2 and 3).

486 Section 53(4) of the Child Justice Act. See also Gallinetti 44.

487 Section 54 of the Child Justice Act *inter alia* encapsulates these factors as: diversion must be in keeping with section 53; the child's religious and social background must be taken into account; the child's level of education, cognitive capabilities and socio-economic circumstances play an important role in choosing a diversion option; proportionality must be applied, which means that the diversion option must be proportional to the infraction as well as harm caused; the nature of the offence and interests of the community must be taken into account, as well as the developmental needs of the child.

488 Gallinetti in Boezaart (ed) *Child Law in South Africa* (2009).

489 See par 5.2.8.

490 Section 57 of the Child Justice Act states that a suitable person whether a probation officer or not, must be appointed to monitor compliance with the diversion order. Where a child does not comply with the diversion order, such a compliance officer must report it to the court that made the order. Where, however, a child has successfully completed a diversion programme, the compliance officer must draft a report to be handed in to the court.

491 Gallinetti *Getting to know the Child Justice Act* (2009) 48.

492 *Ibid*. See footnote 488.

493 *Ibid*.

494 *Ibid.*

in court.[495] Upon appearance in court, it has to be ascertained why the child did not comply with the diversion order and it must be determined if it was the child's fault.[496] If it is found that non-compliance was not based upon fault ascribed to the child, the court may make an order to continue with the programme change the diversion order or make a suitable order with regard to assistance to both the child and his or her family to comply with the original diversion order.[497]

5.4.1.1.8.1 Family group conferencing and victim-offender mediation: A model to resolve issues in the bullying context?

The Child Justice Act describes a family group conference as –

> A family group conference is an informal procedure which is intended to bring a child who is alleged to have committed an offence and the victim together, supported by their families and other appropriate persons.

Family[498] is important.[499] It goes without saying that crime can have an adverse effect on familial bonds and therefore it is imperative to have procedures in place to combat the deterioration of family ties.[500] Bullying as such not only has an effect on the victim, but also on the bully.[501] Therefore, in order for parents to be able to assist such a child through a rehabilitation or therapy process, they need to be included in every step and therefore section 61 is of crucial importance.[502]

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495 Gallinetti 48.
496 Section 58 of the Child Justice Act.
497 *Ibid*. See also Gallinetti 49.
498 It is postulated that no single definition of family exists, in neither a legal or social context. Therefore, it is stated that family includes blood relatives such as parents, siblings, grandparents, aunts, uncles etc. However, family ought not to be limited to blood relation, as it may include people who have a close relationship with the child though they are not related.
499 See chapter 3 footnote 70.
500 Section 61 of the Child Justice Act. See also par 6.5.1.2.
501 See chapter 3.
502 See chapter 3 footnote 70.

Bullying has not been recognised as a crime in South African law and no mention of bullying has therefore been made in the schedules annexed to the Child Justice Act.[503] However; as previously stated,[504] many offences currently recognised in South African law satisfy the elements of bullying.[505] That being said, much can be learned from the Child Justice Act, with specific reference to section 61. In every social setting, communication is important. Whenever there is conflict, communication becomes strained. Thus, having a conference in which interested parties are involved might give rise to total reconciliation between not only a bully and a victim, but also their families. It is further submitted that an objective mediator ought to be present to direct the conference or mediation[506] in a constructive manner in order to come to a conclusion that benefits both victim and bully.

The Child Justice Act defines victim-offender mediation as –

> "Victim-offender mediation means an informal procedure which is intended to bring a child who is alleged to have committed an offence and the victim together at which a plan is developed on how the child will redress the effects of the offence."[507]

It is thus stated that implementing a similar structure[508] with regard to bullying can see this phenomenon wane into nonexistence. Whereas a

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503 The Protection from Harassment Act 17 of 2011 gives a wide definition of harassment in section 1, which could be applied to bullying. However, bullying is still not mentioned *eo nomine*. Bullying is a *sui generis* offence and therefore it is argued that it needs a specialised legal definition. See also chapter 6 footnote 81.

504 See par 5.4.1.

505 See par 2.4.1-2.4.3 and 5.4.1.

506 Nupen "Mediation" in Pretorius (ed) *Dispute Resolution* (2008) 39 defines mediation as a process whereby parties who are in conflict with one another voluntarily seek the help of a third party to help them reach a settlement. De Jong "Child focused mediation" in Boezaart (ed) *Child Law in South Africa* (2009) 113 encapsulates family mediation as a means by which a mediator, as an objective third party, facilitates negotiation between parties in conflict with the aim of re-establishing communication and also finding common ground on which to substantiate an agreement that recognises the rights and needs of all family members.

507 Section 62(1)(a) of the Child Justice Act.

508 Section 62 of the Child Justice Act. See also par 6.5.1.1.

probation officer, inquiry magistrate or child justice court presides over the victim-offender mediation as set out in the Child Justice Act,[509] it is submitted that any suitable person[510] could convene a victim-offender mediation in terms of a bullying incident. Such a structure can be annexed to a school's code of conduct or disciplinary procedures.[511] Therefore, a peaceful process can be used to ensure accountability and reconciliation between victim and bully.

5.4.2 Bullying, suicide and bullycide

It has already been established that many crimes can be linked to bullying behaviour, or even be an extension thereof.[512] These crimes are recognised offences in South African law and therefore, if found guilty, a person can be sentenced in accordance with his or her crime. However, important questions arise pertaining to bullying and it is disconcerting to note that currently, no concrete legislative measures protect children against bullying and the devastating effects[513] of bullying.[514]

5.4.2.1 Bullying

Currently no legal definition or legislation exists in South Africa pertaining to bullying. In the United States of America, Montana is now the only state without legislation against bullying in schools.[515] The Florida State "*Jeffrey Johnston Stand Up for All Students Act*" is regarded as the

509 See section 62(3) of the Child Justice Act.
510 In this instance it is hypothesised that a suitable person would be a qualified mediator with experience in child law, child justice and education law who is independent and objective to the issue at hand.
511 The annexure should include the structure or action plan, as well as a check list to facilitate the application of the structure. See par 5.3.2.1.1 and 5.3.3.2 with regard to a school's code of conduct.
512 See par 5.4.1.
513 See chapter 1 footnote 12 and chapter 3.
514 Important in this instance would be the South African Schools Act 84 of 1996, the Children's Act 38 of 2005 and the Child Justice Act 75 of 2008. It must be reiterated that these important pieces of legislation do not address bullying explicitly but rather encapsulates the constitutionally protected rights of children, which is imperative in terms of laying a foundation for possible anti-bullying legislation in South Africa.
515 Information accessed from http://www.bullypolice.org on 2012-07-12.

United States' best piece of legislation pertaining to bullying.[516] This Act defines bullying as –

> 3)For purposes of this section: (a)"Bullying" means systematically and chronically inflicting physical hurt or psychological distress on one or more students and may involve: 1.Teasing; 2.Social exclusion; 3.Threat; 4.Intimidation; 5.Stalking; 6.Physical violence; 7.Theft; 8.Sexual, religious, or racial harassment; 9.Public humiliation; or 10.Destruction of property.[517]

Upon examination of the interim definition offered previously, similarities are clear.[518] However, it is submitted that the definition of bullying as it stands in the "*Jeffrey Johnston Stand Up for All Students Act*" lacks substance. It makes no mention of the fact that bullying is a repeated, negative act, committed by either an individual or group of people. It does, however, include a rather comprehensive list of offences falling within the ambit of bullying.[519] A child cannot be held accountable for bullying in South African law, as the offence does not exist legally.[520]

5.4.2.2 Suicide

Suicide is a reality in modern South African society.[521] When a person commits suicide, he or she takes his or her own life,[522] thus, *prima facie*; there can be no criminal liability. However, if someone aids an individual in committing suicide;[523] or if a person can be proved to be the cause of an individual's suicide, the picture changes.[524] According to the United Kingdom's *Cap 212 Offences against the Person Ordinance 362 of 1997*

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516 *Ibid.*
517 Legal definition of bullying obtained from http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=1000-1099/1006/Sections/1006.147.html on 2012-07-12.
518 See par 2.4.2.
519 See par 5.4.1.
520 See footnote 503.
521 *Daily News* "Suicide stats 'alarming' constitutes third largest cause of unnatural deaths in SA" 6 September 2011; *The Big Issue South Africa* "SA's suicide rates 'alarming'" 6 September 2011; *Mail and Guardian* "SA 'too much' for its children" 14 October 2011.
522 See par 2.4.5.1.
523 It is thus stated that this constitutes culpable homicide within the confines of South African law. See par 2.4.5.3 for the conceptualisation of culpable homicide.
524 See chapter 2 footnote 7.

criminal liability exists for complicity to an individual's suicide.[525] To date, South Africa has no similar legislative measures pertaining to suicide.[526]

It is by no means farfetched to argue that bullying can lead to suicidal tendencies in not only the victim, but also the bully.[527] However, bullying is not the only reason for youth suicides, as many factors are involved.[528] It is thus submitted that bullying can be a major catalyst in terms of depression and ultimate suicidal ideation and completed suicides.[529] The argument is not to criminalise suicide. The deed leading to the suicide (bullying), ought to be criminalised[530] because once a life is lost, no monetary compensation, apology, corrective service or any means of reparation can bring back the deceased.

5.4.2.3 Bullycide

525 Section 33B of *Cap 212* reads as follows: "(1) A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be guilty of an offence triable upon indictment and shall be liable on conviction to imprisonment for 14 years. (Amended 50 of 1991 s. 4) (2) If on the trial of an indictment for murder or manslaughter it is proved that the accused aided, abetted, counselled or procured the suicide of the person in question, the jury may find him guilty of the offence so proved. (3) No proceedings shall be instituted for an offence under this section except with the consent of the Secretary for Justice."

526 Suicide should be distinguished from euthanasia in this instance. Grové *Framework for the Implementation of Euthanasia in South Africa* (LLM dissertation 2007 UP) 3 notes that even though the South African Law Commission made a legislation proposal in 1998, euthanasia is still considered illegal at present. Grové further defines euthanasia as "the killing or allowing to die of another person with mercy or compassion for that person as primary motive". Euthanasia can further be distilled down to active, passive, voluntary, involuntary, non-voluntary euthanasia and physician-assisted suicide. It must be borne in mind that euthanasia has been mentioned for the sake of completeness and that the intricate philosophical background and slippery slope arguments pertaining to euthanasia have no application with regard to bullying or bullycide. Euthanasia was included to illustrate the fact that in some instances, assisted suicides are deemed to be justifiable, whereas it is submitted that, with regard to bullying, there is no justification.

527 See par 3.6 and 3.6.1 pertaining to suicide and suicidal ideation.

528 See chapter 3 footnote 99.

529 See par 3.6.

530 See the "*Jeffrey Johnston Stand Up for All Students Act*" in par 5.4.2.1.

Bullycide can be defined as "the act or an instance of killing oneself intentionally as a result of bullying [C21: from bully + (sui)cide]".[531] This is a rather new concept and was first used by Neil Marr and Tim Field.[532] It is thus submitted that bullycide should not be limited to suicide due to bullying; but also refer to the killing of a victim by a bully and vice versa.[533] Holding someone criminally accountable for the suicide of another seems legally farfetched. However, families of children who commit suicide in response to bullying might feel that someone needs to be held accountable.[534] The counter-argument regarding such liability rests upon the common law rule of *novus actus interveniens.*[535]

5.4.2.3.1 *Novus actus interveniens*

Novus actus interveniens can briefly be described as a new intervening cause.[536] This means that even though initial damage or harm could have been caused by the act or omission of A, an intervening act disrupted causality and caused the final damage or worsened initial damage. For example, A seriously beats and injures B; B is rushed to hospital but owing to understaffing, B does not get the right treatment and subsequently dies.[537] This can give rise to a criminal defence of *novus actus interveniens* as A can argue that B died a result of medical negligence and not as a result of the assault.[538] Therefore, should a victim of bullying commit suicide *ex post facto*; a defence of *novus actus*

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531 Definition of bullycide accessed on 2011-09-20 from http://dictionary.reference.com/brows/bullycide

532 *Bullycide: Death at Playtime* (1 ed.) Subsequent to the death of Tim Field, the book is no longer in print.

533 Thus, the definition of bullycide shifts from "bully + (sui)cide", to bully + (homi)cide.

534 See the following videos with regard to bullycide and the effect thereof on the deceased's family: http://www.youtube.com/watch?v=-5wJxZEnRII; http://www.youtube.com/watch?v=2enaoFrEE9s&feature=related; http://www.youtube.com/watch?v=rv1KejSGYCE; http://www.youtube.com/watch?v=gD9OUas5pDs; http://www.youtube.com/watch?v=F7WIlPVA-A4&feature=relmfu.

535 See chapter 2 footnote 33.

536 The *Trilingual Legal Dictionary* 243.

537 Carstens "Medical negligence as a causative factor in South African criminal law: *novus actus interveniens* or mere misadventure?" 2007 *South African Journal of Criminal Justice* 192-211.

538 *Ibid*.

interveniens can be raised, as the bully did not physically murder the victim.[539] Nevertheless a counter-argument to a defence of novus actus interveniens exists, namely the principle of *conditio sine qua non.*

5.4.2.3.2 *Conditio sine qua non*

The common law principle of *conditio sine qua non* can be defined as – "a new cause intervening".[540] In other words, without the action setting events in motion, the ultimate outcome would not be the same. The test to be applied in respect of *conditio sine qua non* can be described as follows: first and foremost, the question must be asked what would have happened, had the conduct of A not taken place.[541] Would the result still have been the same?[542] If the answer is a positive there is no factual causation.[543] Snyman further notes that a *conditio sine qua non* exists where conduct cannot be "thought away" without the outcome disappearing as well.[544]

Furthermore, it is not sufficient to allege that a factual cause furnishes enough grounds for a court to find an individual guilty.[545] Conduct must be of both a factual and a legal nature.[546] Legal criteria are narrower and questions regarding factual causation ought to be answered based upon

539 See chapter 2 footnote 33.
540 See chapter 2, footnote 33.
541 Snyman *Criminal Law* 81.
542 *Ibid*.
543 *Ibid*.
544 *Ibid*. Burchell *Principles of Criminal Law* 212 states that, if the questioned conduct is a positive act, the question should be asked if the consequences would still have occurred had the positive act not transpired. If the answer is no, there is factual causation. Furthermore, it is noted that such an act can be seen as a consequence if it cannot be eliminated from the sequence without the ultimate result being different.
545 Snyman *Criminal Law* 83.
546 *Ibid*. Snyman further notes that such conduct must be forbidden not only on the grounds of natural science, but also in a legal context. An example of this is murder, as it not only goes against natural science, but is also a criminal offence.

normative value judgments and reasonableness.[547] Conduct can only have a legal cause if it also has a factual cause.[548]

If damage was incurred through an act rather than an omission, a court uses a hypothetical approach.[549] This means that by means of hypothesis, a court inserts the act which ought to have been performed into the factual setting.[550] If, upon hypothetical addition of the positive act the outcome changes, the omission can be seen as a factual cause of the consequence.[551]

It is thus submitted that in terms of an omission it is more applicable with regard to the liability of a school. If a school[552] knew[553] of a learner or learners subject to bullying at school and neglected to act, this failure to act would be a direct contravention of the duty of care placed upon the school.[554] This also satisfies the test for *conditio sine qua non*.[555]

Therefore, this counters the defence of *novus actus interveniens*.[556] It is submitted, however, that such liability ought to be monitored carefully. If

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547 *Ibid.*

548 *Ibid*. Burchell *Principles of Criminal Law* 211 notes that some authors see the *conditio sine qua non* test as the exclusive test pertaining to causation, whereas others, such as Milton, Van Oosten and Whiting, regard the test as a preliminary test in terms of factual causality. This preliminary examination will then be followed by an investigation in terms of legal causation.

549 Burchell *Principles of Criminal Law* 212.

550 *Ibid*.

551 *Ibid*.

552 School used as an umbrella term in this instance encompassing all staff, both teaching, non-teaching, the principal and school governing body.

553 In this regard, it must be stated that a learner ought to have brought bullying to the attention of staff, either directly or through his or her parents. Thus, the school had to have had knowledge of the incidents that were occurring.

554 Prinsloo "How safe are South African schools?" 2005 *South African Journal of Education* 2005 5-10 notes that educators standing *in loco parentis* towards their learners are obliged to take proactive steps to ensure that learners are protected from harm.

555 Where a learner complains to an educator, staff member or principal of a school about being bullied, such a person must investigate the matter, or, if it has not been reported directly to the principal, hand the matter over to the principal for investigation. Subsequent steps must then be taken to ensure learner safety, whether a learner meeting, a parent-educator meeting or a group conference to address the problem. If no such action is taken and a learner commits suicide, it can be argued that the negligence of the school was a contributory factor to the suicide.

556 See par 5.4.2.3.1.

a learner had a pre-existing condition of depression, it is most likely true that bullying could have worsened it, but evidence to that effect ought to be brought before the court by expert witnesses such as psychologists, social workers *et cetera*.[557] Furthermore, testimonies of people who knew the deceased for a time ought to be heard to establish his or her mental attitude before and after a bullying incident. This in turn could assist the court to ascertain whether the bullying or failure to act contributed to the suicide of the learner.

5.4.2.4 Bullycide and the principle of legality

Bullying is not an offence in South African law.[558] The principle of legality is important in this instance and is also enshrined in section 35(3)(*l*) of the Constitution.[559] Burchell encapsulates the principle of legality as follows-

> In its simplest form the principle of legality proclaims that punishment may only be inflicted for contraventions of a designated crime created by a law that was in force before the contravention.[560]

This would mean that, if brought before a court,[561] a bully cannot be held liable, as this would contravene a constitutionally enshrined principle of natural justice.[562] Therefore it is submitted that legislative reform is necessary, since the law is not a static entity. This means that in order to protect the citizens of South Africa properly, the legislature ought to keep up to date with changing times and address *lacunae* as they arise. Furthermore, bullycide ought to be accepted as a crime within the South

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557 See chapter 3 for a psychological overview of bullying.
558 See footnote 503.
559 See par 5.2.9 for an overview of section 35(3)(*l*).
560 Burchell *Principles of Criminal Law* 94.
561 See the discussion on the Child Justice Act in par 5.4.1.1 with specific reference to criminal capacity. Solutions to existing *lacunae* will be explored in the conclusive chapter. However, it is stated that in advocating for the criminalisation of bullying, the aim is not to punish a child, but rather to underline the importance of accountability and the effect of socially unacceptable behaviour upon others. Chapter 6 deals with restorative justice and will expand upon the instance of accountability.
562 Section 35(3)(*l*) of the Constitution. See also par 5.2.9.

African legal framework; this would show people that the rights of children are important.[563]

5.4.3 The law of delict

Bullying behaviour has the potential to cause the parties involved to be held both criminally[564] and delictually accountable[565] to the victim. The question arises who is to be held delictually responsible where minors are involved. Bullying entails a bully and a victim. Often both bully and victim are minors, but sometimes either the victim or the bully is an adult (educator).[566] Age is a very important factor in determining delictual accountability and thus also influences a child's status.[567] When referring to age, people are classified into three groups, namely *infantes,*[568] minors[569] and majors.[570]

An *infans* has no capacity to litigate and any legal action needs to be brought before a court by the parent/guardian on behalf of the *infans*. In civil matters a minor has limited capacity to litigate and thus he or she can institute proceedings or be summonsed with the assistance of his or her parents; or the parent/guardian can institute action on behalf of the minor.[571] Any rights and or obligations resulting from litigation befall the minor and not his or her parent/guardian, even though a minor must be assisted by his or her parent or guardian throughout litigation.[572]

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563 Bullycide does not exclude vertical bullying in the form of educator-on-learner or educator-targeted-bullying. However, in the context of this study, only learner-on-learner bullying is addressed. If adopted into legislation, such a definition of bullycide ought to be expanded to include not only learner-on-learner bullying, but also educator-on-learner and educator-targeted bullying.
564 See par 5.4.1 above – for a discussion of criminal law.
565 See footnote 384.
566 See par 2.2 for limitations of this study.
567 Boezaart in Boezaart (ed) *Child Law in South Africa* (2009) 3-37.
568 Children below the age of seven.
569 Young people below the age of 18, i.e. children.
570 From age 18 and older.
571 *Op cit* 34.
572 *Ibid*.

However, section 14 of the Children's Act 38 of 2005 must also be explored in this instance.[573] Even though the current issue pertains to law of delict, the Children's Act is still applicable, as the capacity to litigate is important in terms of child law as well.[574] An important question needs to be discussed – has section 14 amended the common law position pertaining to *infantes*,[575] as set out above? It is doubtful whether the position has been changed through section 14, as this would mean that an *infans* would be able to litigate in the same way a minor can (through the assistance of a parent or guardian).[576] This would imply that an *infans* would be able to litigate with parental assistance, but would for example be unable to enter into a basic contract, even with assistance.[577] The parents or guardian would have to enter into such a contract on behalf of the *infans*,[578] which then defies the entire purpose of the amendment. A child over the age of seven has a right in terms of section 14 to be assisted, or to use his or her limited litigation capacity, in conjunction with parental assistance.[579] Section 14 does not distinguish between children below the age of seven and children above the age of seven, which makes differentiation difficult.[580] However, there is a difference between participation and representation.[581] A child will not be deterred from gaining access to court, even though such a child does not have capacity to litigate.[582] Thus, it is argued that section 14 does not influence or change the position of an *infans* or a minor, but underwrites the importance of access to court.[583]

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573 See also par 5.3.1.1.4.
574 Boezaart and De Bruin "Section 14 of the Children's Act 38 of 2005 and the child's capacity to litigate" 2011 *De Jure* 419.
575 *Ibid*.
576 *Op cit* 419-420.
577 *Op cit* 420.
578 *Ibid*.
579 *Ibid*.
580 *Ibid*.
581 *Ibid*.
582 Section 14 of the Children's Act 38 of 2005. See also Boezaart and De Bruin 2011 *De Jure* 420.
583 An *infans* still has access to court, upon representation by a parent or guardian; whereas a minor still has limited capacity to litigate. This has not changed.

5.4.3.1 *Accountability*

Therefore, it can be said that a person is accountable (*culpae capax*) if he has the mental capacity to distinguish between wrong and right and acts in accordance with this realisation.[584] These mental faculties must be present at the time of the act in order for the law to regard him or her as accountable.[585] If, however it were found that at the time of the act or omission, the person did not have the mental capacity to distinguish between wrong and right, there can be no liability.[586]

An *infans* is regarded as *doli et culpae incapax* and thus cannot be held liable based on fault.[587] A rebuttable presumption exists regarding the accountability of a minor between age seven and 12 for girls and 14 for boys,[588] pertaining to unlawful acts.[589] It should, however, be borne in mind that every case should be judged upon its own merit.[590]

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584 Boezaart in Boezaart (ed) *Child Law in South Africa* (2009) 36.

585 Neethling and Potgieter *Visser Deliktereg* 119.

586 *Ibid*.

587 Boezaart "Child Law, the Child and South African Private Law" in Boezaart (ed) *Child Law in South Africa* (2009) 36.

588 Robinson "Children's rights in the South African Constitution" 2009 *Potchefstroom Electronic Law Journal* 5-25 makes the point that there is a differentiation in pubescent age for boys and girls because the sexes develop differently, physiologically. This differentiation might not be constitutional when regarding age in the light of private law accountability of minors (see Robinson footnote 25). It is thus stated that, for the purposes of private law, there should be one age for both sexes - 14. Lowering the age of puberty by two years for girls, is discriminatory and the margin for error is too big, since children develop differently and some children (irrespective of sex) develop more slowly than others. A consequential enforcement of one pubescent age would be beneficial in terms of eliminating confusion and other technicalities.

589 *Loc cit.* If the presumption is rebutted, a child above seven years of age can be held accountable on the grounds of intention or negligence. A child above 12 (girls) or 14 (boys) is regarded under South African law as accountable for his or her unlawful acts. Neethling and Potgieter *Visser Deliktereg* 119 also make the point that discharging the burden of proof pertaining to the rebuttable presumption rests with the plaintiff.

590 Neethling and Potgieter *Visser Deliktereg* 119 illustrated this point by using *dictum* from *Jones v Santam Bpk* 1965 2 SA (A) 554, which *inter alia* states that where a child under pubescent age has the emotional capacity to know the difference between right and wrong and to avoid danger, and where such a child has the mental faculties to control impulsive behaviour, neglecting to control himself or herself constitutes negligence and can be regarded as *culpae capax*.

The delictual liability of the State pertaining to injuries incurred at school is governed by section 60 of the South African Schools Act 84 of 1996. This section *inter alia* stipulates that where a learner was injured, or suffered damage while taking part in a school activity, the State (school) can be held liable for damages.[591] Therefore, it is argued that in view of the sensitive nature of bullying, a case must be brought to court against the State (school) and restorative mediation between the parties ought to be favoured. Where bullying resulted in serious damage, loss or injury, however, civil proceedings can be instituted against the bully (or his or her parent or guardian). Cases have to be judged on an *ad hoc* basis.

5.4.3.2 *Claiming for damages*

Following the discussion above, it is imperative to explain which actions are to be used when claiming for damages based on a delict caused by a bullying incident. In cases where *iniuria* also results in patrimonial loss, the *actio legis Aquiliae* and *actio iniuriarum* fall together.[592] This would typically happen where assault leads to hospitalisation. The plaintiff then needs to institute the *actio iniuriarum* for satisfaction and the *actio legis Aquiliae* for damages.[593] The *actio legis Aquiliae* and the claim for pain and suffering can be instituted concurrently where guilty impairment of physical and psychological integrity causes patrimonial loss.[594] This would be the case where physical injuries (due to, for example, a car accident) cause medical expenses.[595] Lastly, the *actio iniuriarum* and a claim for pain and suffering can also be instituted together. The *actio iniuriarum* has a satisfactory function, whereas a claim for pain and suffering has a compensatory function.[596]

In essence, the route to follow will depend on the damage incurred by the victim of a bullying incident. It is thus stated that all above-

591 See par 5.3.2.1.5.
592 Neethling and Potgieter *Visser Deliktereg* 250.
593 *Ibid*.
594 *Ibid.*
595 *Ibid.*
596 *Ibid*.

mentioned causes of action can be used to claim for physical and/or psychological injuries incurred through either an act or omission of one or more involved parties. This would mean that a bullying victim would be able to claim for any medical expenses incurred as a result of the bullying incident, but also claim for any patrimonial loss resulting from the incident. When taking into consideration the duty placed upon schools to act in the best interest of all learners entrusted to them,[597] it is argued that action ought to be instigated against the school, which then implies the State following section 60 of the South African Schools Act 84 of 1996.[598]

5.5 Case law

It is imperative to examine the application of legal rules in practice in order to scrutinise possible *lacunae*. The best way to do this is to look at case law. South Africa, however, does not yet have case law explicitly pertaining to bullying per se. There are cases involving infringement of learners' and educators' rights and these cases will be examined where applicable.

5.5.1 Liability of State

As previously stated[599] liability of the State is governed by section 60 of the Schools Act. However, it is important to focus on exactly what a duty of care in respect of an educator entails. Oosthuizen *et aliter* define it as encompassing care and supervision. Care includes concern and upholding the interests of another, whereas supervision means to guard a person.[600] Therefore, the inference can be made that educators have a duty to make the safety of learners their concern, which includes not only

597 This is due to the *in loco parentis* relationship which exists between a learner and his or her school (principal and educators).
598 See par 5.3.2.1.5.
599 *Ibid*.
600 Oosthuizen *et al* "The teacher's duty of care" in Oosthuizen (ed*) Introducton to Education Law* (2011) 91.

the physical wellbeing of learners but also spiritual and intellectual wellbeing.[601]

Because the educator has a duty to care in respect of the learner[602] and an educator is employed by a school that is an organ of state;[603] failure to carry out a duty of care gives rise to delictual liability.

5.5.1.1 *Knouwds v Administrateur, Kaap*[604]

The plaintiff in this matter instituted a claim for damages arising from an injury her eight-year-old daughter suffered while playing on a lawnmower with a fellow learner on the school grounds. The accident occurred just before the start of the school day. A race took place across a lawn where L, the operator of the lawnmower, was busy mowing the lawn.[605] While the learners were running, the fellow learner pushed the plaintiff's daughter, which resulted in the girl injuring her hand against the lawnmower.[606]

In a letter to the school board, the principal duly noted that learners were warned about the dangers of the lawnmower countless times.[607] The caretaker was not present at the time of the accident and it was noted that he should have been there to prevent children from coming near the lawnmower.[608] The defendant denied negligence on any count but countered that the plaintiff's daughter was contributorily negligent.[609]

The judge found that children often act irresponsibly and impulsively and then become oblivious of their immediate surroundings.[610] These

601 *Ibid*.
602 See footnote 133.
603 See sections 15 and 60 of SASA.
604 1981 (1) SA 544 (C).
605 P 545F
606 *Ibid.*
607 *Ibid*.
608 *Ibid*.
609 *Ibid*.
610 P 546C; Oosthuizen *et al* in Oosthuizen (ed*) Introducton to Education Law* (2011) 95.

characteristics should have been known by the principal, since he is in daily contact with children and therefore he should have foreseen injury to a young child.[611] Furthermore, the court held that the caretaker exercised no supervision and there was no valid reason for the operation of dangerous machinery during school hours.[612]

5.5.1.1.1 *Comments on the Knouwds case*

First and foremost, this is a prime example of state liability, even though this case was heard before the South African Schools Act 84 of 1996 came into force. The caretaker had a duty of care[613] and neglected to carry it out. However, the principal as manager of the school ought to have foreseen situations like these and therefore should have taken precautionary measures (in other words order that the lawns be mown after hours or ensure that proper supervision be exercised). Oosthuizen *et aliter* argue that in order to ascertain whether an educator ought to be held liable for the injuries suffered by a learner, the incident must be judged against the elements of a delict.[614] The plaintiff's daughter incurred damage due to negligence on the part of the school and the principal ought to have known that young children act rumbustiously. Therefore, liability in similar instances can definitely be proven with regard to bullying. Where a school knew of a problem but failed to act, the State ought to be held liable.

5.5.1.2 Dowling v Diocesan College and Others[615]

This case dealt with a school's liability for the actions of its prefects. A learner of Diocesan College was assaulted by two prefects of the

611 *Ibid*.
612 P 546C and D.
613 See par 5.5.1.
614 Oostuizen *et al* in Oosthuizen (ed) *Introduction to Education Law* (2011) 95 state that the elements of a delict are – an unlawful act which caused damage (patrimonial damage or non-patrimonial loss); there must be a nexus between the act and the damage incurred; fault must be on the part of the wrongdoer.
615 1999 (3) SA 847 (C).

school.[616] His parents instituted legal proceedings against the school board.[617] The finding was that schools are obliged to protect the inherent dignity of their learners.[618] The prefects assaulted the boy while carrying out a duly assigned duty (as prefects), thus they acted on behalf of the school. Therefore, the school was held liable for the actions of the prefects, based upon vicarious liability.

5.5.1.2.1 *Comments on the Dowling case*

This case is notable because it shows that learners (prefects) cannot clear themselves of guilt purely because they are minors.[619] Furthermore, it highlights the intricate relationship between a school and a learner in respect of prefects who are guilty of misconduct or abusing their power.[620] This case is also one of the few to bring to light actual evidence of bullying that transpired on school grounds:

a) The plaintiff was struck with a cricket bat on his bottom, on three different occasions, by the second defendant.
b) The plaintiff was forced against a wall, by the second defendant who held a cricket bat against his neck.
c) The plaintiff was slapped on his head and face by the second plaintiff.

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616 P 847H.
617 *Ibid*.
618 P 852G-I. One of the questions before the court was what the nature of the relationship between a prefect and the school is. Is it a master-servant or parent-child relationship? The court per Cleaver held that the submission made to the extent that the relationship between the first, second and third defendants resemble a parent-child relationship, which further means that a parent cannot be held liable for the delicts of his child, is wrong. Cleaver held that there is no absolute liability for a father pertaining to the delicts of his child; however, such liability can be brought forth by a service relationship, the child serving as an instrument for the intent of the parent, or negligence where the father could have intervened but failed to do so. Therefore, it is submitted that not only was there an *in loco parentis* relationship between the school and the prefects, but also a service relationship, as the prefects were carrying out school duties. Furthermore, the school could have prevented the harm caused to the plaintiff but failed to do so which constitutes negligence.
619 See age of criminality in par 5.4.1.1.4-5.4.1.1.7 above.
620 It must be borne in mind that this is also important with regard to initiation practices, as bullying and initiation practices share various commonalities. See footnote 613.

d) The plaintiff was furthermore struck on the hands with a thong.
e) The second defendant hit the plaintiff's head against a desk.
f) The second defendant pulled the plaintiff's hair.
g) The plaintiff was forced to ingest thick coffee paste by licking it off his hands.
h) The second defendant forced the plaintiff to go on all fours and lick spit off the ground.
i) The second defendant slapped the plaintiff in the face.
j) The plaintiff was struck on his bare back by the hand of the second defendant.
k) The second defendant forced the plaintiff to stand against a wall and proceeded to throw balls at him.
l) The third defendant kicked the plaintiff on his bottom.
m) The plaintiff was slapped on his hands by the third defendant.

Following the events listed above, the plaintiff incurred damage to his inherent dignity as well as feeling degraded, humiliated and insulted. Furthermore, the plaintiff suffered physically and endured substantial discomfort.

It is evident that the 'assault' mentioned above can be ascribed to bullying, as it happened over a prolonged period of time, caused injury to the child and humiliated him.[621] Holding the school liable for the actions of its prefects shows how serious "horseplay" really is. When one learner causes another learner harm, whether personally or to that learner's property or reputation, there ought to be accountability and personal liability. This does not mean that accountability is based upon a punitive point of view. However, in order to convince learners to abstain from socially unacceptable behaviour, the root of the problem must be addressed.[622]

621 See par 2.4.2 for a definition of bullying.
622 See chapter 3 for the psychology behind bullying as well as par 5.4.1.1.8 for a discussion on diversion.

5.5.2 Infringement upon human dignity

Human dignity is not only a constitutionally protected right, but also an entrenched value in the Constitution.[623] It has been noted that human dignity is 'pre-eminent' to fundamental rights.[624] In bullying, whether vertical or horizontal, respect for dignity is disregarded.[625] Moreover, when a bully infringes upon a victim's dignity, the victim can institute a delictual claim for non-patrimonial loss, as well as lay a criminal charge of *crimen iniuria*.

5.5.2.1 Le Roux v Dey

Three male learners from Waterkloof Hoërskool manipulated a picture to include the principal and deputy principal.[626] This picture showed a cartoon of two naked men sitting side by side (with the heads of the abovementioned individuals added into the picture), with their private areas covered by the school emblem.[627] This picture was pasted onto a school notice board for approximately 30 minutes before being removed, during which time it was seen by many school pupils.[628] Upon identification, the learners were disciplined by means of an internal disciplinary hearing.[629] The principal accepted the learners' apology; however, the deputy principal, Dey, did not.[630]

After being charged, the learners were placed in a diversion programme.[631] Even though they performed 56 hours of community service, they were also sued for damages as a result of defamation and

623 See par 5.2.2 and footnote 39.
624 See footnote 35.
625 See par 3.7.3.
626 2011 (3) SA 274 (CC) ; 2011 (6) BCLR 577 (CC) ; BCLR 446 (CC).
627 *Ibid*.
628 *Ibid*.
629 *Ibid*.
630 Par 20. Dey, upon instruction of his lawyers, charged the guilty learners with *crimen iniuria*.
631 Par 19. See also par 5.4.1.1.8.

iniuria to the amount of R600 000.[632] The North Gauteng High Court awarded R45 000 in damages and found that the learners acted wrongfully.[633] Leave to appeal was refused.[634]

The Constitutional Court heard the case in August of 2010. The learners argued that the picture was not defamatory in nature, as it was not realistic and furthermore that a reasonable viewer would not have viewed it as a real and true representation of the plaintiff.[635] Furthermore, even though Dey felt that his dignity had been infringed upon, it was not objectively justifiable.[636] The Constitutional Court reduced the quantum of the damages and found that the image was defamatory.[637]

Furthermore, the court underlined two valuable Roman Dutch law remedies, namely *amende honorable* (honourable amends) and *amende profitable* (profitable amends).[638] The former consists of a retraction and an apology; however, it has fallen into disuse.[639] The court did not reinstate this principal, but explained that dignity is central to the Constitution and society.[640] Respect breeds tolerance in the diverse South African society.[641] Without respect for the dignity of others, society cannot be reformed and uplifted.[642] Reconciliation between people is an imperative element of the aims and underlying values to the Constitution.[643] Imperative to the notion of reconciliation is apologising for wrongdoing in the past.[644] Reconciliation lies beyond the scope of legal enforcement, but should be encouraged and facilitated.[645] This

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632 Par 22. Dey felt that he was being portrayed as a publicly masturbating homosexual.
633 Par 4.
634 Par 7.
635 Par 23.
636 *Ibid*.
637 Par 25. Quantum was finally reduced to R25 000. The learners were further ordered to apologise unconditionally to Dey.
638 Par 199.
639 *Ibid*.
640 Par 202.
641 *Ibid*.
642 *Ibid*.
643 *Ibid*.
644 *Ibid*.
645 *Ibid*.

should also extend to the reparation of personal relationships and human dignity where it has been transgressed upon.[646]

Thus, although the learners were not absolved, their punishment was considerably lightened.

5.5.2.1.1 *Comments on the Dey case*

Human dignity is intrinsic to every individual. Because people are different, different things will affect them differently. Whereas person A might have laughed off the abovementioned incident as a joke, person B would have taken offence. Because of differing cognitive frames of reference, these instances ought to be judged case-sensitively.[647] It is evident that Dey felt defamed and that his dignity had been grossly infringed upon. This begs the question: to what lengths ought a person to be allowed to go in terms of vindication? Should vindication not be proportionate to the deed? Furthermore, in terms of the Child Justice Act, restorative justice is a founding principle in such cases.[648] It is argued that restorative justice could have solved the problem in this case, had it been properly applied at the beginning of the proceedings, however, the concept of *ubuntu* was totally disregarded.

Accountability for a wrongful act leads to a lesson well learned.[649] However; a punitive undertone must always be avoided. In the Dey case, the learners did community service in terms of a diversion programme; this in essence should have been punishment enough. To seek further monetary compensation to the value of R600 000 from

646 *Ibid*.
647 That being said, a reasonably objective test ought to be applied. In other words, what would an objective person, in the same situation, have done? Would such an individual have reacted in the same way or differently?
648 Section 2(b)(iii) of the Child Justice Act explicitly underlines the concept of *Ubuntu* by means of reconciliation through restorative justice.
649 It must be reiterated that only through accountability, can a child learn from his or her mistakes and in thus, refrain from repeating such a mistake. See also 5.4.1.1.8 for a discussion on diversion.

minors seems inordinate on the surface. However, upon closer inspection, a few questions come to the fore:

a) Why did Dey not stop at the apology offered by the learners?
b) What underlying issue gave rise to Dey pursuing vindication?
c) Was the apology sincere?
d) Did the learners realise the nature of their wrong deeds?
e) Did they really feel accountable?

It is hypothesised that since Dey is an educator and therefore knowledgeable with regard to children, he would not have pursued further legal action, had it been a minor infraction. If he felt that the apology was only a means by which to be cleared of guilt, he had the right to go ahead with his proceedings. Comments can not be made as to the sincerity of the apology or if indeed the learners felt accountable.

However, the right to have one's dignity protected should by no means be disregarded.[650] It is thus stated that other means should have been sought to solve the issue rather than to deepen and lengthen the conflict. If this had been done, not only the parties could have been reconciled, but communal healing could also have taken place.[651] As previously stated, though, where the learners do not realise their accountability, restorative justice could serve as a quick way out if they apologised just to get out of trouble. This is not in keeping with either the principle of *ubuntu* or restorative justice, as accountability is more important than an apology. Apologising should result from a feeling of accountability for one's actions, not *vice versa*.

650 The rights of educators, especially the right to human dignity, are by no means made secondary to those of learners. Learners have a duty to respect their elders and this also includes educators.
651 See chapter 1 footnote 4 for a definition of *Ubuntu*.

In the context of future defamation cases with specific reference to indirect bullying, much can be learned from the Dey case. It is submitted that the victim and his or her family have the right to acknowledge their feelings. In terms of sections 61 and 62 of the Child Justice Act, there are mechanisms in place for family group conferencing and victim-offender mediation.[652] Therefore, instead of instituting legal action, the plaintiff could first attempt to solve the issue by means of mediation or a conference attended by the victim, offender, relevant educator, principal and the families of the victim and offender. It is also submitted that an impartial referee or mediator should be present to direct the conference in a constructive manner in order to come to a conclusion befitting the situation. This solution is modelled upon sections 61 and 62 of the Child Justice Act with underlying principles of *Ubuntu* and restorative justice. It must be borne in mind, however, that in cases of serious infractions pertaining *to crimen iniuria* – for example defamatory content on social media damaging to a child's reputation not only in the present but also in future, the necessary steps must be taken to ensure that it does not happen again and that the content be taken down.[653]

5.6 Conclusion

It is evident that South African law comprises a vast network of elements. These elements work together in symbiosis to keep the South African community functioning optimally. However, from time to time a *lacuna* comes to light. In this particular instance, bullying is a *lacuna* in dire need of addressing. Much progress has been made with regard to legislation in South Africa.[654] In terms of bullying, a few constitutional rights are infringed upon.[655] It must be reiterated though that human

652 See par 5.4.1.1.8.1 for a discussion of sections 61 and 62 of the Child Justice Act.

653 In such an instance an interdict would suffice. It is also submitted that in such a case the plaintiff (with the assistance of either his or her parents of legal guardian) can claim for non-patrimonial loss.

654 See the respective discussions on the Children's Act 38 of 2005; SASA and the Child Justice Act 75 of 2008.

655 See par 5.2.

dignity is a binding factor among most if not all these rights.[656] Furthermore, the Constitution guarantees all citizens freedom from violence and torture, as well as cruel and inhumane punishment.[657] This implies that a bully, upon inflicting harm to his or her victim, disregards a crucial fundamental right as section 12 of the Constitution protects not only the physical, but also the psychological integrity of an individual.[658] The golden thread tying all of the rights that were examined together, ought to be the best interest of the child.[659] Education lays the foundation for the life of a child and if a learner is being bullied, this foundation cannot be considered solid.[660] In the event of a disciplinary hearing resulting from for example, misconduct, the school and school governing body must always adhere to the natural law rule of due process.[661]

Children have a myriad of rights, as is evident from *inter alia* the Children's Act 38 of 2005.[662] The best interest of the child can be seen as the most important right.[663] It is constitutionally protected, a right and a standard.[664] It is however, a factual in that the best interest of every child ought to be ascertained by judging every case upon its own merit.[665] In the milieu of bullying, the best interest of the child is cardinally important. It must be reiterated that this study examines learner-on-learner bullying and therefore both victim and bully are more often than not a child (depending on age).[666] This means that the best interest of both victim and bully are of paramount importance.[667]

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656 See par 5.2.2 and 5.2.2.1.
657 See par 5.2.3.2 and section 12 of the Constitution.
658 *Ibid*.
659 See par 5.2.6, 5.3.1.1.2, 5.3.1.1.3 and footnotes 123 and 220.
660 See chapter 1 footnote 12; par 3.7; par 5.2.7.1 and footnote 149.
661 Section 33 of the Constitution and section 8 of the South African Schools Act 84 of 1996. See par 5.2.8.1 and 5.3.2.1.1.
662 See par 5.3.1.
663 See footnote 659.
664 *Ibid.*
665 *Ibid*.
666 See footnote 618.
667 It becomes difficult in circumstances where there is an imbalance or disturbance of rights to uphold the best interest of both parties. However, it is thus submitted that through restorative justice and mechanisms such as the

The South African Schools Act 84 of 1996 builds upon the constitutional right to education.[668] SASA gives a framework and outline for basic education in South Africa. However, neither the Children's Act, nor the Schools Act, explicitly mention bullying. In terms of section 8 of the Schools Act, positive social conduct is motivated through a code of conduct for learners enforcing positive discipline rather than negative punitive measures.[669] The Schools Act furthermore prohibits corporal punishment[670] and initiation practices.[671] It has already been stated that both corporal punishment and initiation practices can be drawn parallel to bullying, as there are similarities, but bullying as such is not independently and explicitly mentioned.[672] Importantly, schools can be held liable for injuries suffered by learners on school grounds during school activities.[673] This means that, by acting negligently (disregarding a learner's plea for help), liability for damages is imminent.

It is thus submitted that, in order to emphasise the seriousness of the matter, bullying ought to be criminalised. However, by using the diversion model as set out in the Child Justice Act,[674] it can be ensured that such a child offender (bully) does not receive a criminal record but undergoes a tailor-made programme to help him or her acquire the necessary skills to deal adequately with tough issues rather than acting violently.[675]

Determining whether there can there be delictual liability as a result of a bullying incident would depend on the harm inflicted. If the bullying was verbal in nature, then a claim for non-patrimonial loss can be instituted.

Child Justice Act 75 of 2008 (see discussion in par 5.4.1.1) balance can be restored and reconciliation can be achieved.

668 See discussion in par 5.3.2.
669 See par 5.3.2.1.1 and 5.3.3.2.
670 See par 5.3.2.1.3.
671 See par 5.3.2.1.4.
672 See footnote 281.
673 See par 5.3.2.1.5 and 5.5.1.
674 See par 5.4.1.1.8.
675 See chapter 3 for an overview of the causes of bullying behaviour as well as chapter 6 with regard to restorative justice.

Where physical harm was caused and injury suffered, patrimonial loss can be claimed. Where dignity was affected, non-patrimonial loss can be claimed. Therefore, it will ultimately depend on the plaintiff whether or not civil proceedings are instituted or not.[676] It is thus submitted that proceedings instituted whether criminal, civil or both, ought to be proportionate to the damage suffered by the victim.

It is evident that bullying is ill addressed by South African law. In order to address the issue, attention must be paid to what exactly restorative justice entails. It could also be beneficial to compare the South African legal system with another system, well developed in the context of combatting bullying. Afterwards, a legal comparison will be made in order to make solid recommendations to possible legislative reform.

676 See par 5.5.2.1.1 for comments on the Dey case.

Chapter 6: Restorative justice in South African schools

6.1 Introduction

It is evident that even though South Africa has a formidable legal system,[1] bullying is a phenomenon that is still a big problem within a social and legal context.[2] It is submitted that it is not only necessary to examine the root of the problem;[3] it is also important how bullying is dealt with *ex post facto*. A society's general state of mind is reflected in the manner in which its children are treated.[4] Can restorative justice[5] be a solution to bullying?[6] Can restorative justice promote reconciliation between the parties involved? The aim of this chapter is to examine restorative justice in the context of South African schools whilst upholding the cardinally important constitutional value of *ubuntu*.[7]

6.2 Restorative justice in the education context

Every child has the right to education.[8] This right involves far more than merely going to school.[9] A growing child depends on others for security.[10] This need for security must always be kept in mind by an educator.[11] It is

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1 See chapter 5.
2 See chapter 1, footnote 12.
3 See chapter 3 for a psychological overview of bullying.
4 Paraphrasing of a quotation from former president Nelson Mandela: "There can be no keener revelation of a society's soul than the way in which it treats its children."
5 See par 2.4.6 for a definition of restorative justice.
6 Sherman and Strang "Crime and reconciliation: experimental criminology and the future of restorative justice" 2009 *Acta Criminologica* pose a question regarding restorative justice and criminology, namely, will the implementation of restorative justice processes reduce reoffending? If the answer is positive, successful implementation becomes important. The research as completed for the abovementioned article shows that victims benefit from restorative justice and welcome reconciliation and statistics further show that cases where restorative justice was applied, reoffending declined.
7 See chapter 1 footnote 4 for a definition of *ubuntu*.
8 See par 5.2.6 and 5.2.7.
9 See par 5.2 for a constitutional overview of relevant rights regarding bullying.
10 Oosthuizen "Security as a sine qua non for education" in Oosthuizen (ed) *Introduction to Education Law* 1.
11 *Op cit* 2. An educator must assist a learner in "unfolding reality" and furthermore guide the learner into "moral independence. Therefore, the learner (child), is under the guidance and supervision of the educator and this is an *in loco parentis* relationship." Oosthuizen further states that even though a child is a complete human being, adult guidance and supervision are of the utmost importance in order for the child to reach his or her full potential.

evident that safety and security underpins the right to education.[12] It is thus submitted that safety and security in education create balance and bullying disturbs this balance. It is further suggested that restorative justice can serve as a mechanism by which this balance can be restored.

6.2.1 Child justice in South African schools: reconciliation[13] versus punishment

Discipline in South African schools is positive, rather than punitive.[14] This means that sound moral values and positive social conduct are encouraged, rather than punishment. Discipline in schools is governed by section 8 of the South African Schools Act 84 of 1996, as well as Government Notice 776 of 1998.[15] However, there is a culture of violence amongst the youth of South Africa;[16] which gives rise to punitive or exclusionary measures of punishment.[17] It is thus submitted that the reinstatement of corporal punishment will not reverse the decline in violence in schools, as violence does not stop violence.[18]

How can a school enforce discipline with a positive undertone, maintaining good relations with its learners and attain good results? The answer to this is both hard and simple.[19] Even though corporal punishment has been abolished, it is preferred by many, as people deem it necessary to punish wrongdoing. However, punishment goes further than physically hitting a child and emotional scars are more dangerous than physical ones, as they

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12 See par 5.2.

13 Reconcile can be defined as "1. To re-establish a close friendship between. 2. To settle or resolve. 3. To bring (oneself) to accept. 4. To make compatible or consistent." Definition of reconcile accessed from http://www.thefreedictionary.com/reconcile on 2012-07-24.

14 Joubert "School discipline" in Boezaart (ed) *Child Law in South Africa* 502.

15 See par 5.2.7, 5.3.2.1.1 and 5.3.3.2.

16 Oosthuizen in Oosthuizen (ed) *Introduction to Education Law* 4; Reyneke "The Right to Dignity and Restorative Justice in Schools" 2011 *PER* 129; see also par 3.7.

17 Reyneke 2011 *PER* 129.

18 See par 5.3.2.1.3 and footnote 277, as well as chapter 3 footnote 17.

19 It is thus submitted that parents and educators ought to work together with regard to instilling sound moral values in their children. This is called balance. When one of the parties involved does not participate, the intricate balance (of which the child is central) is disturbed. See also chapter 1 footnote 35.

go unseen.[20] Punishment by means of beating and/or humiliation serves no constructive purpose, as it teaches a child no lesson he or she can carry into the future.[21] Social exclusion as a means of punishment is an indirect form of bullying[22] and where a bully is bullied, it does not solve the problem. It is submitted that this does not solve the problem, as the child only learns that his or her conduct (bullying) is right, as his or her perception of bullying others is solidified through the conduct of adults.[23] This in essence does not solve bullying but worsens it altogether. Retribution as a means of curbing bullying has failed and therefore it is submitted that even though restorative justice is a relatively new mechanism in the school context;[24] it ought to be given a trial run.

Restorative justice does not mean forgiveness.[25] Restorative justice as such is based on values such as respectful listening, equal respect for all stakeholders, accountability, respect for human rights, healing, restoration

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20 Reyneke 2011 *PER* 129; see also par 3.7.1, footnotes 134 and 142. It is argued that most adults and young adults today, were brought up in a culture of corporal punishment and therefore find it to be acceptable to "punish" a child, for, as the saying goes, by sparing the rod you spoil the child. However, it must be made clear that corporal punishment is wrong – it is also stated that there are other, better means of disciplining children with long-term results rather than hitting or emotionally bullying them.

21 Reyneke 2011 *PER* 134 further states that by punishing a child through retribution, dominance and control, punishment is used to bring about behavioural change in the child. The retributive approach focuses on a vertical relationship (in other words, an educator or principal is in a more powerful position than a learner and can use that position to assert dominance to punish wrongdoing). This vertical relationship can be used as deterrent when a learner's conduct is not in line with the school's code of conduct, as the educator or principal can make "an example" of the learner by punishing him or her through a hiding, exclusion, humiliation, etc. Reyneke notes that one social injury is replaced by another.

22 See par 2.4.2 for a definition of bullying.

23 When an adult in an authoritarian position, such as a principal or an educator, bullies a learner (this could be in any form, ranging from physical bullying, to indirect bullying such as sarcasm and social exclusion), a negative snowball effect is created, since the adult aims at punishing the learner for misconduct, but it solidifies the misbehaviour and gives it a stamp of approval, as it is mirrored in the conduct of the adult. See Reyneke 2011 *PER* 135.

24 Reyneke 2011 *PER* 156. Skelton and Batley "Restorative Justice: A Contemporary South African Review" 2008 *Acta Criminologica* 40 note however, that evidence shows that when restorative justice mechanisms are implemented, repeat offences drastically plummet in most (but not all) cases.

25 Skelton and Batley 2008 *Acta Criminologica* 38 explicitly state the following: "Restorative justice is not forgiveness, the theory does not require forgiveness, nor does a restorative justice process seek it."

and remorse about injustice, apologising, forgiveness and mercy.[26] It thus entails that the *status quo*, before bullying occurred ought to be restored, therefore the relationship should be as if the bullying never occurred.[27] If the learners were apathetic towards one another, by implementing restorative justice, friendships can be cemented and a safer and more harmonious school environment can thus be created.[28] Educators, principals, stakeholders and parents alike should always bear in mind that whatever means of discipline is used, it should have positive results in the long run with regard to the child's life; if not, such a child could ultimately become an adult offender.[29]

6.2.2 Restorative justice and dignity in the education system

As previously stated, dignity is not only a right, but also a founding value of the South African Constitution.[30] Dignity as such underpins a myriad of other constitutional rights.[31] Bullying more often than not takes place in and around schools.[32] When a child is bullied, his or her dignity is infringed upon, as it humiliates him or her, irrespective of whether the bullying is direct[33] or indirect.[34] Tying into dignity in this instance, with regard to

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26 Skelton and Batley 2008 *Acta Criminologica* 39 note that restoration ought to be promoted in a very basic form, such as the restoration of property or dignity as well as social and communal support. With regard to remorse, apology, forgiveness and mercy, Skelton and Batley state that the parties involved ought not to be actively encouraged but rather to let these elements develop naturally. It is also explicitly stated that forgiveness is neither an aim nor a key value of restorative justice. The mechanics of a bullying incident are *sui generis*, because these children, *ex post facto*, have to go to school together, see each other on an almost daily basis and most likely live in close proximity to one another. Therefore it is stated that forgiveness in the milieu of schools with specific reference to bullying, could be a step in the right direction. It would not be forced, as this would lead to secondary victimisation. However mending fences can ensure that repeat offences (repeated bullying) does not occur.

27 Hargovan "Evaluating restorative justice: working out 'what works'" 2011 *Acta Criminologica* 69 notes that South Africa has made considerable headway in terms of the application of reconciliatory principles in the criminal justice system, which could ultimately be the foundation for restorative justice as a preferred method of containing and preventing crime.

28 Hargovan 2011 *Acta Criminologica* 72 argues that restorative justice processes should become a prominent feature in the justice system both inside and out of formal procedures with regard to criminal law.

29 See chapter 3.

30 See par 3.7.3 and 5.2.2.

31 Reyneke 2011 *PER* 130. See also par 5.2.2.

32 See par 2.4.2 and 3.7.

33 See par 2.4.2 and 3.4.

34 *Ibid*.

bullying, is freedom and security of the person[35] and discrimination.[36] When a person is marginalised and discriminated against, the message conveyed to this person is that he or she is a lesser human being. In *Bhe v the President of the Republic of South Africa*,[37] the court held - "discrimination conveys to the person who is discriminated against that the person is not of equal worth".[38]

Bullying is inevitable; however, how it is dealt with *ex post facto* can curb repeat offences[39] as well as reconcile victim and offender and restore the dignity of the victim. Bullying can have a severely detrimental effect on not only the victim; but also on the bully.[40] Examples of the negative effects of bullying may range from ODD,[41] CD,[42] depression,[43] impaired intellectual and academic functioning,[44] cognitive disturbances,[45] negative self-esteem,[46] social and peer problems[47]and family problems[48] to suicide and suicidal ideation.[49]

All of these factors impair the dignity of the victim and they also have a negative impact on the bully.[50] It is therefore evident that by using retribution and punitive punishing methods, educators add to an already volatile situation instead of solving it.

6.2.3 Ubuntu*, restorative justice and education*

35 See par 5.2.3.
36 See par 5.2.1.
37 *Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; SA Human Rights Commission and Another v President of the RSA and Another* 2005 1 BCLR 1 (CC).
38 Par 187.
39 Hargovan 2011 *Acta Criminologica* 72 notes that Khulisa's Justice and Restoration Programme has become a key element in addressing social problems in certain areas of South Africa. These programmes can be a model for tailor-made anti-bullying initiatives. Bullying is not a legally recognised offence but it is an offence against the intrinsic dignity of the victim and as such it is encapsulated here as an offence.
40 Reyneke 2011 *PER*133; see also chapter 3.
41 See par 3.5.2.1.
42 See par 3.5.2.2.
43 Reyneke 2011 *PER* 133; see also par 3.6.1.
44 Reyneke 2011 *PER* 133; see also par 3.6.1.1.
45 See par 3.6.1.2.
46 Reyneke 2011 *PER* 133; see also par 3.6.1.3.
47 See par 3.6.1.4.
48 See par 3.6.1.5.
49 Reyneke 2011 *PER* 133; see also par 3.6.3.
50 See chapter 3.

Ubuntu is regarded as a crucially important value with regards to constitutional jurisprudence.[51] Tutu[52] describes *ubuntu* in the following words – [53]

> Ubuntu is very difficult to render into a Western language. It speaks of the very essence of being human. When we want to give high praise to someone we say 'yu, u nobuntu'; 'hey, he or she has Ubuntu.' This means they are generous, hospitable, friendly, caring and compassionate. They share what they have. It also means my humanity is caught up, is inextricably bound up, in theirs. We belong to a bundle of life. We say 'a person is a person through other people'.

Ubuntu can be described, as in the above quotation as "a person is a person through other people".[54] A school should function in symbiosis, as a cohesive unit. In a state of perfect symbiosis all the elements are in synchronisation with one another and in the context of education this means respect: Self-respect, mutual respect, as a value, not forced. It is submitted that this is how *ubuntu* can be applied in the school context. To assist with instilling this cardinal moral value, restorative justice practices can be applied as a structure not to punish offenders,[55] but to rehabilitate these learners and to assist with victim and communal healing.

Therefore, in the context of education, restorative justice can be applied once a bullying incident[56] has occurred, as restorative justice does not focus on the misbehaviour, but rather on its consequences.[57] The wrongdoing

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51 Skelton *The influence of the theory and practice of restorative justice in South Africa with special reference to child justice* (LLD thesis UP 2005) 374.

52 Archbishop Desmond Tutu, Nobel Peace Prize winner in 1984.

53 Tutu *No future without forgiveness* 34-35.

54 Skelton *The influence of the theory and practice of restorative justice in South Africa with special reference to child justice*385. Bennett "*Ubuntu*: an African equity" 2011 *PER* 30-61 translates *ubuntu* in terms such as humanity and personhood. However, these descriptions do not reflect the important cultural implications of the word.

55 Offenders in this regard ought to be seen as learners guilty of misconduct (broadly defined as disruptive conduct, bullying, harassment, etc).

56 It must be stated that restorative justice practices can be applied to not only bullying incidents but also to misconduct and disruptive behaviour in schools in general.

57 Reyneke 2011 *PER* 138. Hargovan 2011 *Acta Criminologica* 76 postulates the idea that restorative justice is a better choice than criminal justice since restorative justice produces better results. Where restorative justice is applied, recidivism

thus lies in the breakdown of interpersonal relationships rather than transgression of, for example, a code of conduct for learners.[58] In general, South Africa focuses mainly on punishing the transgressor for whatever rule he or she has broken, generally disregarding the pain of the victim.[59] This school of thought includes schools as well, since school governing bodies, principals and educators focus on the transgressor; with specific reference to disciplinary procedures.[60]

6.3 Application of restorative justice in schools in conjunction with existing mechanisms

Public schools in South Africa and their running are governed by the South African Schools Act 84 of 1996.[61] It must be reiterated that the Schools Act as such mentions neither bullying nor restorative justice (with regard to disciplinary measures). However, this does not mean that anti-bullying policies and restorative justice mechanisms cannot be used in conjunction with existing legislation.[62]

6.3.1 A code of conduct for learners

A code of conduct contains certain rules, regulations and moral standards which regulate the behaviour of learners.[63] A code of conduct, therefore, is a standard of behaviour.[64] It could be argued that a 'standard of behaviour' implies moral values such as *ubuntu*, human dignity, freedom, equality, non-racism, non-sexism, *et cetera*; as these are values underlying the

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plummets, reparation of harm done escalates and fewer vengeance crimes are perpetrated by victims.

58 *Ibid*.

59 *Op cit* 139.

60 *Op cit* 140; see also footnote 15.

61 See par 5.2.7 and 5.3.2.

62 See footnote 15.

63 Joubert in Boezaart (ed) *Child Law in South Africa* 507.Joubertstates that a code of conduct should be in line with both the Constitution and SASA but should be tailored to the individual needs of the school.

64 *Loc cit*. It is imperative to note that discipline ought not to be associated with punitive justice. A transgressor can find positive discipline tremendously helpful and it is argued that in the context of bullying, the focus should be split into transgressor-focused discipline (or intervention and rehabilitation) and victim focused-justice (which then includes therapy, reconciliation, etc.).

Constitution. In the education context, positive discipline is only an ideal, as disciplinary processes are mainly transgressor-focussed.[65]

With the abolition of corporal punishment, other means by which to discipline or punish learners had to be sought. Thus the Department of Education published "Alternatives to Corporal Punishment: A practical guide for educators" in 2000. This document contains guidelines in dealing with misconduct in class.[66] These measures *inter alia* include –

i) Level 1 misconduct: minor infractions such as truancy, failure to complete homework *et cetera*. Disciplinary consequences include warnings, community service, and detention.[67]
ii) Level 2 misconduct: breaking school rules such as those on smoking, abusive language, disrespect, vandalism, and dishonesty. Disciplinary consequences range from a talk with the learner and parents to written warnings and reports.[68]
iii) Level 3 misconduct: serious violation of school rules such as inflicting a minor injury on another, gambling, disrupting class, discrimination, possession of pornographic material or dangerous weapons, theft *et cetera*. Disciplinary consequences on this level ought to be taken by the disciplinary board of the school and a learner should receive a written warning and be suspended in addition to community service.[69]

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65 Reyneke 2011 *PER* 138.Reyneke argues that punishment serves no purpose other than to alienate the transgressor. Furthermore, it is submitted that punishment and accountability cannot be seen as synonymous terms. When a person is held accountable for his or her inactions, he or she shows accountability through a (not necessarily forced) action (or sanction). It must further be underlined that the aim of restorative justice in schools is not merely to say "sorry" and to move on, but rather for a transgressor to understand the gravity of his or her actions and/or inactions and thus, in future, to change his or her behaviour to prevent similar incidents. The aim of intervention programmes is not for the transgressor to apologise. The focus is on accountability and reconciliation. Where a transgressor feels accountable by truly seeing the consequences of his or her actions, it is argued that a heartfelt apology will be imminent. However, it is not required. See also par 3.7.

66 Joubert in Boezaart (ed) *Child Law in South Africa* 512.

67 *Ibid*.

68 *Op cit* 513.

69 *Ibid.* In this instance, it must be taken into account whether a child is a first-time offender, or a reoffender. Where a child keeps reoffending, more intensive procedures ought to be followed. However, this does not mean a child must be

iv) Level 4 misconduct: very serious transgression of school rules where disciplinary actions proved ineffective (i-iii), threatening anyone with a weapon, verbal threats, sexual abuse, drugs, possession of drugs or alcohol, being drunk, disrupting the school *et cetera*. Disciplinary consequences on this level should entail a formal disciplinary hearing.[70]

It is a pity that the alternatives as set out above fail to improve the conduct of misbehaving learners.[71] In order to make a sustainable impact, the transgressor must play an active part in restoring 'harmony' and the dignity of the victim.[72] This in turn would teach the transgressor a valuable lesson in terms of the impact his or her actions (or inactions)[73] on the victim.[74] In contrast to punitive punishment mechanisms or failing disciplinary measures of exclusion,[75] restorative justice does not seek to punish the transgressor but rather to assist such a child in growing and obtaining the necessary insight into the situation to know that his or her conduct always has consequences.[76]

6.3.2 Diversion

The entirety of chapter 8 of the Child Justice Act 75 of 2008 deals with diversion.[77] The Child Justice Act is a ground-breaking piece of legislation, as it disregards a punitive system of punishment and rather seeks to rehabilitate and to uphold the spirit of *ubuntu*.[78] In terms of criminal

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submitted to punitive justice, but rather that a more hands-on approach in terms of restorative justice is required.

70 *Ibid.*

71 See par 3.7.

72 Reyneke 2011 *PER* 140.

73 See chapter 4 for a discussion of bystander behaviour.

74 Reyneke 2011 *PER* 140.

75 See par 6.2.1.

76 Reyneke 2011 *PER* 141.

77 See par 5.4.1.1.8.

78 Section 2 of the Child Justice Act 75 of 2008 states the aims of the Act, which are *inter alia* the promotion of *ubuntu* throughout child justice, nurturing a child's dignity and feeling of self-worth, underlining respect for human rights and freedoms through accountability for actions, supporting reconciliation through restorative justice processes and involving parents, families, victims and the community within the child justice process to facilitate reintegration. It is submitted that the aims as listed in section 2 describe what any anti-bullying legislation or policy ought to regard as important. See also par 6.2.3.

proceedings, a prosecutor is *dominis litis* and thus has a discretion in terms of which he or she can decide whether to prosecute or divert a child.[79]

However, it is submitted that diversion in this instance ought to be used as a model upon which similar structures should be built, to create diversion programmes in school context with specific reference to restorative justice and bullying. As stated above, the gravity of the bully's actions (or the inactions of a bystander) must be underlined through a restorative justice model. Through this, the child learns valuable lessons which are in line with the principles underlying the Constitution.[80] Therefore, it is submitted that the emphasis should not be on the criminal aspect of bullying,[81] but on its aftermath thereof and how it can be successfully addressed in such a way that it does not happen again and that the victim's dignity[82] is fully restored.

It must be borne in mind that the entire purpose of diversion is the encouragement of accountability in the transgressor.[83] Accountability is also one of the important values underlying restorative justice.[84] Furthermore, diversion aims to reintegrate such a child into his or her community.[85] It is submitted that reintegration into the milieu of education with specific reference to bullying is crucially important.[86] A sound support

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79 Gallinetti "Child Justice in South Africa: The Realisation of the Rights of Children Accused of Crime" in Boezaart (ed) *Child Law in South Africa* 657.

80 Section 1 of the Constitution contains the founding principles. See also par 6.2.3.

81 This does not disregard the devastation bullying causes to a victim, neither does this statement aim to exclude the pain of the victim. However, it is submitted that bullying is a criminal act *sui generis* though not *eo nomine* because it encompasses both a physical and psychological element and is characterised by occurring over a prolonged period of time. It is also never explicitly described as "bullying", even though all the necessary elements of bullying are there – it more often than not falls within the ambit of assault, *crimen iniuria*, etc. Furthermore it is hypothesised that bullies are often the victims of violence at home, as they absorb what they see at home and act it out at school. Therefore, in dealing with bullying and the aftermath of such an incident, it ought to be regarded as a balancing of rights. On the one hand there is the victim; on the other hand there is the bully (who could also be a victim). It is submitted that, through an individually tailored diversion or restorative justice mechanism, balance can be maintained and restored and the rights of the parties involved can be upheld. The victim's dignity can be restored and the bully can learn a valuable lesson with regard to accountability. See also footnote 26; chapter 3 footnote 17 and Reyneke2011 *PER* 134.

82 See par 5.2.2 and 6.2.2.

83 Section 51(b) of the Child Justice Act 75 of 2008.

84 Skelton and Batley" 2008 *Acta Criminologica* 39; Reyneke 2011 *PER* 141.

85 Section 51(d) of the Child Justice Act 75 of 2008.

86 "It takes a village to raise a child", see chapter 1 footnote 32.

structure can prevent a child from falling victim to peer pressure and substance abuse.[87] Reconciliation between transgressor and victim and transgressor and community must be promoted.[88] It is cardinally important to ensure that secondary victimisation does not occur.[89]

A restorative justice or diversion programme is rendered void if re-offending keeps occurring.[90] Such a programme should equip both victim and bully with the necessary emotional tools to develop insight into what happened, why it happened and how it can be resolved in a sustainable manner.[91] The healing of the victim, community as well as the bully ought to be emphasised rather than punishment and further bullying and secondary victimisation.[92]

6.3.3 Rehabilitation

Restorative justice aims to heal rather than punish.[93] Because bullying and violence are often associated terms, a forceless, violence-free initiative ought to be implemented in order to help not only the victim but also the bully in terms of rehabilitation and overall healing. Rehabilitation[94] should

87 Pretorius *et al* "Psychosocial Predictors of Substance Abuse among Adolescents" 2003 *Acta Criminologica* 2 note that the need to be accepted plays an integral role in an adolescent's social structure. Van Biljon ,Strydom and Vermeulen "The influence of a diversion programme on the psycho-social functioning of youth in conflict with the law in the North West province" 2011 *Acta Criminologica* 75 postulate the importance of familial and peer involvement in order to encourage reintegration of the child offender into his or her community. The ideal would be to be proactive rather than reactive. See also par 3.7.

88 Section 51(g) of the Child Justice Act 75 of 2008.

89 Section 51(h) of the Child Justice Act 75 of 2008. Secondary victimisation could occur in terms of either the victim or the bully. The bully could be ostracised for being a bully and become a victim of bullying, or the victim of bullying can become a victim yet again for reporting being bullied. This must be avoided at all costs. It is submitted that a peaceful mechanism must be instated that makes a bully realises and accepts accountability for his or her actions. Confronting such a child could potentially give rise to escalation of an already volatile situation, whereas the ultimate aim is to eradicate it altogether.

90 Section 51(i) of the Child Justice Act 75 of 2008.

91 Reyneke 2011 *PER* 143. The emphasis should be on the fact that re-offending should not re-occur. Criticism of restorative justice in schools is *inter alia* that it is time-consuming and that the impact cannot be seen immediately (see Reyneke 161-162). In order to obtain positive results, one must start somewhere and it is evident that the status quo is not satisfactory. See also par 3.7.

92 Reyneke 2011 *PER* 143.

93 Skelton and Batley 2008 *Acta Criminologica* 39; Reyneke 2011 *PER* 143.

94 Rehabilitation can be conceptualised as "a treatment or treatments designed to facilitate the process of recovery from injury, illness, or disease to as normal a

be seen as a means by which to heal a bully rather than to punish him or her.[95] As previously stated, the root of the problem must be identified to ensure that bullying does not recur.[96] The Child Justice Act mentions a few viable options;[97] however, it has already been noted that bullying should be regarded as a criminal act *sui generis* and should be treated accordingly.[98]

Bullying is a psychologically motivated act with legal consequences.[99] Therefore, when considering the definition of rehabilitation, it is evident that the solution ought to be psychological in nature, governed by legislation.[100] Family group conferencing and victim-offender mediation ought to fall within the ambit of such rehabilitation as these measures underwrite accountability and reconciliation.[101] In serious cases of bullying, mediation and conferencing might not be enough and "intensive therapy" should be included.[102] Such a programme ought to balance rights in such a way that it satisfies the interests and general opinion of the community; restores and reconciles the victim and the bully, restores the dignity of the victim and keeps the dignity of the bully intact.

It is submitted that by contributing to programmes such as community service, a bully not only learns a personal, positive life lesson, but also contributes to society. These programmes may include the maintenance of school grounds, charity work and physical therapy. Physical activities can

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condition as possible." Definition of rehabilitation accessed from http://medical-dictionary.thefreedictionary.com/rehabilitation on 2012-07-25.

95 See chapter 3 for a psychological overview on bullying.

96 See par 3.4.

97 Chapter 8 of the Child Justice Act 75 of 2008; see also par 5.4.1.1.8.

98 See footnote 81.

99 See par 3.4.

100 See footnote 98 as well as http://www.nicro.org.za/interventions/programmes/ last accessed on 2012-09-26. Because bullying encompasses many fields of study, touching (and devastating) many lives, legislation is needed to regulate the matter. Such legislation should contain a definition of bullying, compulsory guidelines for schools in terms of policies in addition to a code of conduct in terms of bullying and the implementation of restorative justice models to eradicate bullying. Therefore, anti-bullying legislation should be regarded as a general framework on which policies and guidelines revolve.

101 See par 5.4.1.1.8.1.

102 Section 53(4)(c) of the Child Justice Act 75 of 2008 stipulates –"referral to intensive therapy to treat or manage problems that have been identified as a cause of the child coming into conflict with the law, which may include a period or periods of temporary residence."

contribute to emotional wellbeing.[103] Therefore, such activities ought to include, but should not be limited to, painting, gardening, artwork and applying creativity. Where a child is guilty of serious bullying, it may be necessary to apply a more rigorous plan, so that, through harder labour, he or she may learn what the consequences of hurting others are.[104]

6.4 Restorative justice: can it solve bullying?

Internationally, restorative justice programmes have been implemented in schools and the criminal justice system.[105] Even though the legal milieu differs internationally, the basic principle of restorative justice remains the same.[106] South African schools have become the setting for violence, bullying and substance abuse.[107] This proves that the current system fails the learners in South African schools and therefore alternative solutions must be sought.

Ubuntu should underwrite an intervention programme with regard to bullying in schools.[108] This forms a solid moral basis for diversion and intervention to take place in the context of bullying, as *ubuntu* underlines the importance of mutual respect.

The importance of accountability must be reiterated. Only when a bully realises how his or her conduct has affected the victim, can there be progress. It is submitted that restorative justice in terms of intervention is the perfect mechanism for this, mainly because victim impact statements are cardinally important and there is room for the victim to voice his or her opinion on how the transgressor affected him or her as victim.[109] Not only is it advantageous for the victim, but it also affords the transgressor the

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103 Schomer and Drake "Physical activity and mental health" 2001 *IntSportMed* J 1.
104 It must be reiterated that the aim of such a programme is not to engage a child in child labour, or infringe upon his or her dignity. The focus is rather on fostering sound moral values with an appreciation for his or her peers, as well as teaching such a child responsibility through positive discipline rather than punitive justice through which a bully is punished and disregarded without learning anything from the incident other than the fact that violence, whether physical or verbal, is correct.
105 Skelton and Batley 2008 *Acta Criminologica* 40.
106 Reyneke 2011 *PER* 146.
107 See par 3.7.
108 Reyneke 2011 *PER* 147; see also par 1.1 and 6.2.3.
109 Child Justice Act 75 of 2008, section 70.

opportunity to acknowledge guilt and to show remorse openly.[110] This can restore relationships[111] and can be conducive to a harmonious learning environment.

There is a difference between diversion and intervention. When using diversion programmes, it means that a child has already been placed within the child justice system. Intervention programmes can be used far earlier and it would to be better to use early intervention instead of being reactive. A model for restorative justice in schools should be based on the diversion chapter in the Child Justice Act 75 of 2008,which is a comprehensive guideline in terms of rehabilitation, reintegration and reconciliation of child offenders with their families, the victims and society.

6.5 Intervention programs

It is critically important to draft and facilitate intervention programmes that improve rather than further impair volatile situations such as bullying. These programmes must aim to have a positive long-term effect on not only the bully, but also the victim, the school and the families of both victim and bully. It is submitted that there are various options available with regard to intervention programmes, but the merit of each case has to be judged determine which option would be best suited to the parties involved.

6.5.1 *Restorative mediation*

Restorative mediation practices have various elements and use different methods. These include victim-offender mediation, victim-offender conciliation, family group conferencing, sentencing circles, victim-offender panels and alternative dispute resolution.[112] In the milieu of bullying, it is

110 Reyneke 2011 *PER* 149.Reyneke further notes that such a process could contribute to increased self-worth in the transgressor. It must be reiterated at this point that merely apologising does not absolve the bully from liability; however, it is a step in the right direction. See also footnote 24.

111 In *S v Makwanyane* 1995 2 SACR 1 (CC) par 328, the court held: "even the vilest criminal remains a human being possessed of common human dignity".

112 Naude, Prinsloo *et al* “Restorative mediation practices” 2003 *Acta Criminologica* 10.

submitted that victim-offender mediation and family group conferencing are best suited to resolve underlying issues.[113]

6.5.1.1 *Victim-offender mediation*

Victim-offender mediation is regarded as a formal restorative mediation process, instigated by the criminal justice system.[114] The authors submit that bullying in schools ought to fall within the gist of informal restorative mediation which is settlement driven.[115] However, in view of the *sui generis* nature of bullying, it is submitted that a specific form of victim-offender mediation ought to be introduced in schools, aimed at healing, restoration and accountability.

The mediation process should not be centred on guilt or innocence,[116] but rather focus on the reason for the deed as well as the restoration of balance.[117] It ought to be facilitated so that the victim and bully agree to communicate *vis à vis* with the assistance of a professional mediator.[118] The aim of victim-offender mediation is a discussion of what happened between the parties[119] and the creation of opportunity for restitution whether direct (to the victim) or indirect (to the community).[120]

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113 Naude, Prinsloo *et al* 2003 *Acta Criminologica* 10 are, however, of the opinion that the term restorative mediation ought to be used in all instances where mediation practices are used in the restorative justice context. Such an approach is too wide and therefore, specifically in the milieu of bullying where the procedure followed is determined *ad hoc*, there must be a clear distinction between processes, whether similar or not.

114 *Ibid*.

115 *Ibid*.

116 Naude, Prinsloo *et al* 2003 *Acta Criminologica* 11.

117 Where victim-offender mediation is used between a bullying victim and a bully, it is argued that the bully should first be assisted in addressing underlying feelings and reasons for victimising his or her fellow learner. Such a child will then understand accountability better and it is further submitted that, even though the aim of such a process is not an apology, one may very well follow.

118 Naude, Prinsloo *et al* 2003 *Acta Criminologica* 11.Educational psychologists often affiliate themselves with a particular school. These individuals do not work pro bono in most instances and many families cannot afford their rates. Therefore, it is argued that a qualified mediator should be appointed on a contract basis, by mandate of the Department of Basic Education, to facilitate school-based mediation. This would also ensure objectivity and a swift result.

119 It is also imperative to work separately with the bully, to establish why he or she was moved to bully. See chapter 3.

120 Naude, Prinsloo *et al* 2003 *Acta Criminologica* 11.

Criticism of victim-offender mediation is based on the fact that it may not always be successful because the sometimes vengeful attitude of some victims.[121] However, failure to reach a settlement should be regarded as a contravention pertaining to one of the aims of restorative justice, as a mutually agreeable outcome is important.[122] Research shows that the success rate of restoration is higher among victims and offenders commencing with victim-offender mediation, than among parties not using restorative mediation.[123] Furthermore, it is argued that victim-offender mediation lacks the procedural safeguards of formal litigation.[124] Bullying is a *sui generis* phenomenon more often than not transpiring between minors and therefore, a programme suited to the needs of children ought to be used. It is hypothesised that because children are involved and bullying is a sensitive issue, a more informal approach would be best suited to addressing the problem. However, in serious bullying cases where, for example, the bullying has lasted for more than a few weeks, or, where the bully inflicted serious bodily or emotional harm upon the victim, the mediation process can be structured more formally, in the form of arbitration. This does not mean that a system of punitive justice is to be used; it indicates that a victim-centred approach is being followed. Also, offenders may feel obligated to participate for fear of harsher punishment if they do not oblige.[125] In terms of bullying, it is argued that the realisation of accountability, not only towards the victim, but also the families and community, is sufficiently serious to disregard any form of punitive justice.

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121 *Op cit* 13. Skelton "Face to face: Sachs on restorative justice" 2010 *SAPL* 100 notes that victims often seek vindication through the justice process, which is based upon instinct. This can be misconstrued as a need for vengeance, but where restorative justice processes are successfully applied, victims may feel vindicated and find validation of their trauma. Skelton further states that, the victim's healing commences through this process and that a need for vindication originates from the need to have his or her dignity restored.

122 Naude, Prinsloo *et al* 2003 *Acta Criminologica* 13.

123 *Loc cit*. The findings include four programmes in Canada. It was found that 90% of victims and 83% of offenders participated voluntarily. Furthermore, 91% of victims and 93% of offenders said that they would engage in such a programme again. Successful mediations, where agreements were reached, amounted to 92%. More than 90% of mediations in the United States of America result in agreements. In England, 84% of victims and 100% of offenders indicated that mediation was satisfactory; whereas 74% of victims and 79% of offenders felt satisfied with the outcome.

124 Naude, Prinsloo *et al* 2003 *Acta Criminologica* 17.

125 *Ibid*.

When a child realises the gravity of his or her actions, it is submitted that it would prey on his or her conscience and through victim-offender mediation the bully can be assisted to deal with these emotions, which ultimately contribute to the healing of the victim.

6.5.1.2 *Family group conferencing*

Section 1 of the Child Justice Act 75 of 2008 defines family group conferencing as a meeting orchestrated by a probation officer as part of diversion or sentencing to fulfil the underlying aim of restorative justice.[126] The Act further postulates that family group conferencing is intended to facilitate reconciliation between the victim and offender as supported by the respective families.[127] Furthermore, a family group conference is only permissible and advisable upon consent of both parties.[128] Parties allowed to attend such a conference include the offender accompanied by his or her parents or guardian, the victim and his or her parents or guardian, the family group conference facilitator, a community member of the area in which the offender resides as appointed by the facilitator and any authorised person nominated by the facilitator.[129] It is submitted that the aim of such a conference is to draw up a plan in respect of the child offender to set out objectives, services, assistance, programmes, responsibilities of the offender and his or her parents, as well as mechanisms for monitoring and time management.[130] It is imperative, specifically with regard to bullying, that parents, caregivers and the community take collective responsibility[131] and that the parents contribute to restitution of damages.[132]

6.5.1.3 *Community service*

126 See sections 1 and 2 of the Child Justice Act 75 of 2008.
127 Section 61(1)(a). See also par 5.4.1.1.8.1.
128 Section 61(1)(b).
129 Section 61(3)(b).
130 Section 61(6)(b).
131 A child of sound mind does not bully. It is evident that certain factors influence a child's development and ultimately his or her conduct and character. It is hypothesised that many bullies are subjected to some or other form of violence and/or abuse at home. Therefore, it is critical to involve parents in the process of rehabilitation, as they themselves may need proper guidance. See also par 3.5.
132 Naude, Prinsloo *et al* 2003 *Acta Criminologica* 12.

Community service can be defined as the instance where a child offender works for a community organisation without remuneration.[133] More often than not, it is not only the offender and the victim who are affected by crime, but also the community.[134] Therefore, healing ought to be looked at more widely than restitution of damages or harm done to the victim alone. It is submitted that, through community service, restitution towards society is facilitated and the child offender may therefore learn valuable lessons, contributing positively to his or her development. Suggested means of community service pertaining to bullying are maintenance and beautification of school grounds,[135] taking part in advocacy work regarding bullying[136] and mandatory attendance of various therapeutic programmes.[137]

6.5.1.4 Therapy

Therapy is intended to address and manage the underlying problems causing the child's unacceptable and often violent behaviour.[138] The recurrence of criminal acts by children ought to be prevented and it is submitted that in order to satisfy the principle of restorative justice, the "why"[139] must be investigated in order to provide a sustainable, long-term solution.[140] Therapy is a recurring diversion option throughout the Child

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133 Section 1 of the Child Justice Act 75 of 2008.

134 Section 2(b)(ii) states that the interests of *inter alia* the community ought to be protected.

135 This has no labour implication as a bully will not take over the role of the groundkeeper, but play an assisting role, to facilitate accountability as well as to derive positive results from a negative incident. It further underlines the fact that a community, in the case of bullying, refers to the school community. Such a programme should be strictly supervised in order to ensure that the child satisfies the requirements of the programme, as well as to protect the child against possible labour malpractice.

136 It is argued that a bully ought to be part of educating and advocating on issues concerning bullying: training, creating and putting up posters, peer conversations on bullying, etc.

137 Therapy will be discussed below.

138 Section 53(4)(c) of the Child Justice Act 75 of 2008. Therapy should be facilitated by the school, making use of educational psychologists or qualified therapists. Where families are not able to afford such therapy, it is submitted that funding may be provided by obtaining sponsorships from large companies.

139 The reason for a child's bullying behaviour must be investigated and addressed. One cannot hope to heal a raw wound by merely covering it with a bandage; the right treatment is needed, often starting from within. Therefore, it is evident that a system of punitive justice through which a bully is punished will not solve bullying but may act as a catalyst to more serious bullying.

140 See chapter 3.

Justice Act 75 of 2008.[141] The ultimate aim, through restorative justice, is to minimise the risk of re-offending while upholding constitutional values such as, the human dignity of both the victim and offender.[142] Rehabilitation and reintegration of child offenders are critically important within child justice.[143] It is submitted that therapy programmes tailored to the needs of every specific bully/victim/bystander will facilitate proper rehabilitation and reintegration. As noted before, a holistic approach to combating bullying is to be favoured, as this phenomenon does not function in a vacuum – bullying is basically a psychologically motivated act with legal consequences.[144] Therapy could also include parent training, to assist parents in successfully facilitating the complete rehabilitation of their children.[145] Where these programmes are implemented and used properly, aggression levels will plummet and this could curb bullying.[146]

6.6 Conclusion

Every child has the right to feel safe and secure at school.[147] Bullying wreaks havoc on the education system and restorative justice can serve as a proper mechanism of intervention to curb the effects of bullying at first and finally to eradicate it altogether.[148]

Discipline in schools is enforced by means of a code of conduct.[149]A code of conduct can be regarded as a standard of behaviour for learners.[150] However, when considering the *status quo* in schools, it is evident that these measures are not given proper regard.[151] Because violence continues to occur in schools and corporal punishment in schools has been abolished, educators resort to other methods of "punishment "including

141 See *inter alia* sections 9(3)(a)(ii), 53(3)(j), 53(4)(c).
142 Sloth-Nielsen and Gallinetti "'Just say sorry?' *Ubuntu*, Africanisation and the child justice system in the Child Justice Act 75 of 2008" 2011 *PER* 65.
143 *Ibid*.
144 See chapter 3.
145 See par 3.5.2.4 for possible solutions and suggestions in terms of the inclusion of parents and family with regard to therapy and training.
146 See chapter 3 footnote 74.
147 See par 6.2 and footnotes 7,8 and 9.
148 See par 6.2.
149 See par 6.2 and footnote 15.
150 See par 6.3.1 and footnotes 63 and 64.
151 See par 3.7 and 6.3.1.

sarcasm, social exclusion, detention and extra homework.[152] By further bullying a bully, such a child's already warped perception of life is mirrored in the conduct of an authority figure, which is what should be avoided at all costs. As adults in an authoritarian position, educators, principals and stakeholders should always set an example to learners.

Restorative justice does not equal forgiveness.[153] However, *ubuntu*[154] should be seen as a key element with regard to mutual respect. Closely tying into the concept of *ubuntu* is human dignity. When a child is bullied, his or her dignity is infringed upon.[155]

The Child Justice Act 75 of 2008 revolutionised the child justice system with regard to child offenders.[156] Not only does it break down punitive means of punishment, but it also infuses the criminal justice system with *ubuntu*.[157]

It is submitted that bullying is a criminal act *sui generis* since it is applicable to minors, encompasses both a physical and psychological element (but these elements are not interdependent or mutually exclusive), and takes place over a period of time.[158] It is stated that even though bullying should be a statutory crime, a child guilty of bullying should not have a criminal record. However, such a child must be submitted to mandatory programmes, which *inter alia* include victim-offender mediation, family group conferencing, community service and written or verbal apology to the victim. The focus ought not to be on the deed, but rather on the harm it caused and how the harm can be repaired. Diversion should have a psychologically based undertone,[159] as bullying is a psychologically motivated act.[160]

152 See par 6.2.1 and footnote 16.
153 See footnote 24.
154 See par 6.2.3.
155 See par 6.2.2 and footnote 34.
156 See par 6.3.2 and footnote 77.
157 See par 6.3.2 and 78.
158 See par 2.4.2 as well as footnotes 26 and 81.
159 See footnote 102.
160 See par 6.3.3 and footnote 99.

Chapter 7: International instruments

7.1 Introduction

It is important to examine national legislation as well as persisting *lacunae* in the South African legal milieu closely. However, South Africa must also be placed in context internationally, since the country party to international treaties and conventions governing human and children's rights and these international instruments play an integral part in the drafting of national legislation. The aim of this chapter is to examine international instruments governing human and children's rights to which South Africa is party. It must be ascertained whether any of these instruments explicitly mentions bullying.

7.2 South Africa in the international sphere

First and foremost, international law can be defined as "a body of rules and principles which are binding upon states in their relations with one another".[1] Furthermore, international law can be broken down into general and specific rules.[2] For the purposes of this chapter, the emphasis will be on specific rules, as specific rules are created by treaties, which establish a relationship between the states party to the treaty only.[3]

International law is recognised through both international and municipal courts (including South African courts).[4] There are a myriad reasons for state compliance with international law, which may range from interest (either altruistic or selfish), maintenance of peace and order, acceptance of international rules and orders, the reputation of the State both locally and internationally and realisation of the need for co-existence to fear of sanction.[5]

7.2.1 *Historical context*

1 Dugard *International Law* 1.
2 *Ibid*.
3 *Ibid*.
4 *Op cit* 9.
5 *Op cit* 10.

South Africa played an integral role in the establishment of the United Nations in 1945.[6] The prime minister at the time, General Smuts, was greatly responsible for the drafting of the United Nations Charter's preamble.[7] However, because of South Africa's strict racial policies, the United Nations excluded it from the international arena for well over 30 years.[8] In 1994 South Africa's international position changed after the democratic election.[9] South Africa resumed its seat in the United Nations' General Assembly, as well as restoration of membership to agencies of the United Nations such as the WHO.[10] More recently, South Africa hosted United Nations conferences pertaining to racism[11] and sustainable development.[12] Recognition of international law has been enshrined in the Constitution.[13]

7.3 International child law instruments

In terms of sections 39 and 233 of the Constitution, international law must be considered when interpreting the Bill of Rights or any legislation.[14] Child law has developed tremendously, not only internationally, but locally as well.[15] In terms of section 28 of the Constitution, children are afforded additional protection.[16] The Children's

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6 *Op cit* 20.
7 *Loc cit*; the preamble *inter alia* mentions "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."
8 *Loc cit*. South Africa was barred from participating in the United Nation's General Assembly in 1974.
9 *Op cit* 22.
10 *Ibid*.
11 *Loc cit*; Durban, September 2001.
12 *Loc cit*; Johannesburg, September 2003.
13 Sections 39 and 233 of the Constitution. *Op cit* 26; see also par 5.2.10.
14 Oosthuizen "International law, legislation and common law as sources of education law" in Oosthuizen (ed) *Introduction to Education Law* 43; see also par 5.2.10. Dugard 47 notes that there are two schools of thought with regard to the relationship between international and municipal law. Firstly, there are the monists who believe that these two phenomena are not essentially different and that courts therefore ought to apply international rules without any act of adoption or transformation. The dualist movement, however, see international and municipal law as two vastly different entities and thus international law may only be applied within national law if transformed or adopted into municipal legislation. South Africa follows a dualistic approach in terms of international law.
15 Oosthuizen in Oosthuizen (ed) *Introduction to Education Law* 43.
16 *Loc cit*. See also par 5.2.6.

Act 38 of 2005, as well as the Child Justice Act 75 of 2008,[17] governing child law related matters[18] are in accordance with the Constitution. However, there are many international instruments protecting children's rights as well, predating the Constitution.[19] The most important instruments will be discussed below, although many others exist, such as the *United Nations Convention against Discrimination in Education 1960* and the *Universal Declaration on Human Rights*.[20]

7.3.1 *The United Nations Convention on the Rights of the Child 1989*

The CRC is the most ratified treaty in the history of human rights treaties.[21] One of its biggest achievements is its impact upon state behaviour with regard to children.[22] The CRC address the socio-economic, civil and political rights of children in one document.[23]

For the purposes of the CRC, a child[24] is defined as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".[25] If a country party to the CRC has a lower majority age than mentioned in the CRC, a child who is a citizen of that country cannot benefit from the CRC, as he or she would not be regarded as a child for the purposes of the convention.[26] In terms of the

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17 The Child Justice Act was modelled on the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*, which came into force on 29th November 1985 and contains various principles pertaining to child justice, inter alia provisions highlighting the importance of family, as well as the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, adopted on 14th December 1990 which explicitly states that child offenders' rights must be upheld and their overall wellbeing maintained.

18 *Loc cit*. See also par 5.3.1 and 5.4.1.1.

19 *Ibid*

20 See also par 5.2.3.1 for other relevant international documents on human rights.

21 Mahery "The United Nations Convention on the Rights of the Child: Maintaining its Value in International and South African Child Law" in Boezaart (ed) *Child Law in South Africa* 309.

22 *Op cit* 310.

23 *Op cit* 311.

24 See par 2.4.7.

25 Article 1 of the CRC. See also Hodgkin and Newell *Implementation Handbook* 1.

26 Mahery in Boezaart (ed) *Child Law in South Africa* 311. However, this does not absolve the State of any obligation toward young people under the age of 18. Such a person cannot, however, fall under the ambit of the CRC but can claim the rights of an adult as set out in the national law of the country in question.

Constitution[27] and the Children's Act 38 of 2005,[28] it is evident that South Africa has broadly aligned itself with the CRC with regard to the definition of a child.[29]

As previously stated, the best interest of the child principle runs like a golden thread through the discipline of child law.[30] Article 3 of the CRC echoes and underlines the crucial importance of the best interest of the child principle and yet again it is evident that South Africa is in line with the CRC.[31]

Furthermore, the CRC recognises the importance of the parental role with regard to responsibilities, rights and duties.[32] The importance of the parent is underlined in no less than 19 articles of the CRC.[33] Furthermore, the preamble to the CRC *inter alia* says the following with regard to family –

Hodgkin and Newell *Implementation Handbook* 3 note that the age of majority ought not to be structured unreasonably low. See also par 2.4.7.

27 See footnote 22 above.

28 *Ibid*.

29 Mahery in Boezaart (ed) *Child Law in South Africa* 312. It must be noted, however, that alignment with the CRC on the part of South Africa is provisional in nature.

30 Hodgkin and Newell *Implementation Handbook* 35-36 state that the best interest standard also influences other articles of the CRC, such as separation from parents (articles 9(1) and (3)), parental responsibilities (article 18(1)), deprivation of family environment (article 20), adoption (article 21), restriction of liberty (article 37(c)) and penal matters involving a child offender (40(2)(b)(iii)). See also chapter 5 par 5.3.1.1.2 and 5.3.1.1.3.

31 See chapter 5 footnote 204. It is underlined that the wording in South African child law pertaining to the best interest of the child is stronger than that of the CRC, since it is described as of "paramount importance". See section 28(2) of the Constitution as well as sections 7 and 9 of the Children's Act 38 of 2005.

32 Article 5 of the CRC stipulates the following: "States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention." In this context, direction and guidance are critically important with respect to bullying. Even though it has been argued that bullying ought to be a crime, the focus should not be on punitive justice, but rather on guiding the child to rehabilitation and reintegration, thus safeguarding a bully against secondary victimisation. In this instance, the role of a parent or guardian is of paramount importance. See also Hodgkin and Newell *Implementation Handbook* 232.

33 Mahery in Boezaart (ed) *Child Law in South Africa* 312 states that these articles *inter alia* encompass 3(2), 5, 7(1), 8(1), 9, 10, 14(2), 18 and 21(a).

> Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community, recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.[34]

It goes without saying that the right to life of every child is of utter importance and that every state should take the necessary measures to protect the lives of its children.[35] Furthermore, the CRC recognises the right of children to have freedom of expression and to form their own opinions and have a right to be heard.[36]

With regard to bullying, article 16 of the CRC specifically is critically important; it states –

> No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation. 2. The child has the right to the protection of the law against such interference or attacks.[37]

It is hypothesised, based upon article 16 of the CRC, the definition of bullying[38] and section 7(2) of the Constitution, that the State must take legislative and other[39] related measures to ensure the safety of all South African learners in all South African schools. The CRC also guarantees

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34 Extract of the preamble to the CRC.

35 Article 6 of the CRC states: "States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child." According to Hodgkin and Newell *Implementation Handbook* 83, the right to life is a general principle accepted by the CRC; it is a basic, fundamental right.

36 A child has the right to be heard and to form his or her own opinion. In the bullying context, especially restorative mediation practices, both sides have a right to express views in order to adhere to the principles of natural justice. See article 12 of the CRC. See also par 5.3.1.1.4 and footnote 225; as well as par 6.5.1.

37 Article 16 of the CRC.

38 See par 2.4.2.

39 It is thus submitted that even though it would be ideal for South Africa to draft legislation and policy documents to eradicate bullying, advocacy work to effect a nationwide movement on mutual respect and *ubuntu* can lay the groundwork to stop bullying in schools.

safety from all forms of violence, abuse and neglect.[40] The Constitution is in keeping with the CRC; however, it guarantees freedom from cruel and degrading punishment to all citizens.[41] The CRC furthermore recognises the vital importance of optimum developmental conditions for a child.[42] It has been stated that children absorb their surroundings (bullies in particular); it is therefore imperative that all children be afforded the best possible chances in life to develop into well-rounded young adults.[43]

One of the most important rights and opportunities any young child has is the right to education, which is enshrined in articles 28 and 29 of the CRC.[44] A solid education lays the foundation for the life of a young person and bullying can severely damage such a foundation.[45] The right to education is not only constitutionally protected, but also internationally through the CRC. The CRC further protects children against exploitation, which is detrimental to the welfare of the child.[46]

The Child Justice Act 75 of 2008 brought about changes in the child justice system in South Africa.[47] However, the rights of children accused

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40 Article 19 encapsulates this right as follows: "1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child." It has been stated that a well-balanced child does not bully. Furthermore, it is argued that, even though state interference with regard to the parent-child relationship ought to be kept to a minimum, the origins of bullying behaviour should feature prominently. When the conduct of one child causes harm to others, whether verbally or physically, the State has a duty to protect the victims, but also the bully, such a child could be a victim of abuse at home. See also article 37 of the CRC.

41 See par 5.2.3.

42 Article 27 of the CRC.

43 See chapter 3, specifically footnote 17.

44 Article 28(2) *inter alia* stipulates that states parties are obliged to see to it that school discipline is administered consistent with the child's human dignity. Hodgkin and Newell *Implementation Handbook* hold that article 28 sets a bare minimum standard with regard to the right to education. See also article 29 of the CRC and par 5.2.7.

45 See par 1.1.

46 Article 36 of the CRC. This is specifically important with regard to cyber bullying. See also the discussion on the *Le Roux v Dey* case in par 5.5.2.1 and 5.5.2.1.1.

47 See par 5.4.1.1.

of crime are predated by article 40 of the CRC.[48] It must be reiterated that a child offender's dignity and human rights must be respected throughout legal proceedings.[49]

7.3.2 *The African Charter on the Rights and Welfare of the Child 1999*

The ACRWC has only been in force for little over a decade.[50] African children, more so than adults, are inclined to be the victims of human rights infringements.[51] Comparatively, African children suffer even more than children on other continents.[52] The ACRWC is founded upon three principles, namely the best interest of the child; non-discrimination and the primacy of the abolition of harmful customs and cultural practices.[53]

For the purposes of the ACRWC, a child is defined as "every human being below the age of 18 years".[54] The Charter further upholds the best interest of the child principle.[55] The best interest of the child principle

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48 This article *inter alia* states that where a child has been accused of a crime, such a child must be treated in such a way that it upholds the child's dignity and self-worth, thus underlining the importance of respecting the fundamental rights of others. Furthermore, a child may not be accused of a criminal offence that has not been recognised by law (see par 5.2.9). A child may not be forced to testify, or confess his or her guilt. A child offender has the right to have his or her privacy respected (see par 5.2.4). It is also explicitly stated that states parties are obliged to promulgate laws and policies and to create institutions etc, to assist with the child justice process. Mention is also made of restorative justice, although not directly, through which the CRC argues that it is desirable to deal with child offenders outside of the formal criminal justice system, incorporating programmes such as counselling, education and vocational training. This is deemed necessary to respect and promote the wellbeing of such a child (see par 6.5.1). Hodgkin and Newell *Implementation Handbook* 602 note that article 40 deals with a child offender from the period of investigation right through to sentencing. Hodgkin and Newell further point out that article 40 includes a list of minimum guarantees with regard to the rights of a child offender.

49 It must be borne in mind that bullying ought to be seen as an offence and therefore a bully will be seen as an offender. Article 40(1) of the CRC; see chapter 6 footnotes 25, 77 and 106; see also footnote 46 above.

50 Viljoen "The African Charter on the Rights and Welfare of the Child" in Boezaart (ed) *Child Law in South Africa* 331. The ACRWC is a regional document with regard to child law.

51 *Op cit* 332.

52 *Ibid*.

53 *Op cit* 336.

54 Article 2 of the ACRWC; see also par 2.4.7 as well footnotes 22 and 23 of this chapter.

55 Article 4 of the ACRWC has stronger wording than that of the CRC, as it inter alia states that "the best interests of the child shall be the primary consideration." See also article 3 of the CRC as well as footnotes 28 and 29 above.

serves as a yardstick against which a state party must measure all law and policy pertaining to children.[56] Every child has a guaranteed right to life under the ACRWC.[57] These rights can also be postulated as survival rights.[58]

Under the Charter, every child has the right to privacy.[59] The cardinal importance of education is yet again underlined in the ACRWC through article 11.[60] At a basic level, the right to education is unqualified.[61] In terms of education on secondary level, state parties must take progressive steps to make it free and accessible to all.[62]

Furthermore, The ACRWC protects children against all forms of degrading, inhumane treatment and or punishment, abuse or neglect.[63] Not only does the CRC predate the Child Justice Act 75 of 2008 with regard to the protection of child offenders, it also details the regulation of processes pertaining to the administration of child justice.[64] Even though these international instruments provide for instances where children commit criminal offences, the Child Justice Act 75 of 2008 is a unique

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56 Viljoen in Boezaart (ed) *Child Law in South Africa* 336.

57 Article 5 of the ACRWC *inter alia* declares that a child has a right to life, which must be protected by the State, guaranteeing the survival, development and protection of the child. See also footnote 34 above.

58 Viljoen in Boezaart (ed) *Child Law in South Africa* 336.

59 Article 10 of the ACRWC; see also footnote 36 and par 5.2.4.

60 Article 11 of the ACRWC *inter alia* specifies that education should be directed at the fostering of a child's personality, mental and physical capabilities to its full potential, promoting respect for fundamental rights and values such as human dignity, underlining the importance of strong moral values and preparing the child for his or her life as a socially responsible, well-adjusted adult. Furthermore, it is explicitly stated that states parties are obliged to respect the rights and responsibilities of parents. It is also important to note that the ACRWC mentions that school discipline and its administering should be consistent with fundamental values such as human dignity (footnote 42). See also footnote 43.

61 Viljoen in Boezaart (ed) *Child Law in South Africa* 339.

62 *Ibid*.

63 Article 16 determines that states parties must take any necessary steps (including educational measures) to protect children from harm. It is submitted that a myriad possibilities exist within educational measures, such as training activities, advocacy work, drafting of national policies and guidelines etc. See also footnotes 38 and 39.

64 Article 17 of the ACRWC stipulates that children accused of crime have a right to be treated with dignity, which then underwrites respect for human rights and fundamental values of other people. The aim of child justice is to rehabilitate and reintegrate child offenders. See also footnotes 45, 46 and 47.

piece of legislation, upholding the provisions in the ACRWC pertaining to child offenders.[65]

Parents[66] have the primary responsibility with regard to the upbringing of their children.[67] With regard to the development and raising of a child, the best interest of that child should be a parent's primary concern.[68] It is interesting to note that the ACRWC allows for corporal punishment administered by a parent; however; it is explicitly stated in article 20(1)(c) that such punishment must take into account the dignity of the child.[69] This underlines the fact that state interference is limited with regard to the parent-child relationship. However, it is stated that, where such a relationship becomes abusive, the State becomes obliged to interfere.

The ACRWC also protects children against harmful cultural and social practices.[70] Initiation practices can be seen as harmful cultural and/or social practises.[71] A parallel has already been drawn between initiation practices and bullying.[72] Therefore the inference can be made that article 21 of the ACRWC could also protect children against bullying.

The belief that children have rights but no responsibilities is unfounded.[73] In terms of the Charter, children not only have rights, but also responsibilities.[74] Children have responsibilities to their parents, family

65 See par 5.4.1.1 and chapter 6.
66 Article 20 of the ACRWC encapsulates the rights and responsibilities of parents and *inter alia* determines that parents or guardians have the primary responsibility for the upbringing of a child, ensuring that the best interest of the child is the basic concern at all times. Furthermore, domestic discipline (in the CRC it is postulated as direction and guidance; see footnote 30) ought to be administered in keeping with the dignity of the child. States parties have the responsibility to support parents with in *inter alia* educational matters.
67 Viljoen in Boezaart (ed) *Child Law in South Africa* 340.
68 *Ibid*.
69 See also chapter 5 footnote 275.
70 Article 21 of the ACRWC.
71 See par 5.3.2.1.4.
72 *Ibid*.
73 See chapter 3 footnotes 158 and 160.
74 The responsibilities of children are described in article 31 of the ACRWC which states that children have a responsibility to their family and society. Furthermore, children are obliged to respect and promote the cohesion of family, respecting not only their parents, but also their elders.

and the local and international community.[75] One of the most important duties children have is respect for their elders.[76]

7.3.3 *Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples 1965*

In the preamble to the declaration,[77] it is stated that young people wish to have "an assured future".[78] Furthermore, it is postulated that young people have suffered most in turbulent times.[79] Young people want a future underpinned by peace, freedom and justice.[80] This can be conceptualised as a universal ideal among all people.

It is evident from principle I that a parallel can be drawn between the aims of the Peace Declaration and South African constitutional values.[81] The ideal of mutual respect is cardinally important, as through the fostering of mutual respect, bullying can be eradicated without using punitive measures.

The Peace Declaration also underlines the importance of quality education.[82] This means that any form of education or instruction, by an educator or parent, ought to foster peace, humanity, individualism, solidarity and ultimately bring people closer together.[83] It is submitted that this can be drawn parallel to the spirit of *ubuntu*.[84]

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75 Viljoen in Boezaart (ed) *Child Law in South Africa* 339.
76 Article 31(a) of the ACRWC; Viljoen in Boezaart (ed) *Child Law in South Africa* 339. "Elders" also include educators.
77 Referred to hereafter as the Peace Declaration.
78 Extract from the preamble to the *Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples 1965*.
79 *Ibid*.
80 *Ibid*.
81 Principle I states the following: "Young people shall be brought up in the spirit of peace, justice, freedom, mutual respect and understanding in order to promote equal rights for all human beings and all nations, economic and social progress, disarmament and the maintenance of international peace and security." See also par 6.3.1.
82 Principle II of the Peace Declaration.
83 *Ibid*.
84 See par 6.2.3.

Dignity and equality are important elements to achieve peace and unity.[85] Treating people with dignity in a non-discriminatory way is critical to establish a culture of mutual respect and *ubuntu* in schools.[86] This in turn ties into restorative justice an intervention mechanism with regard to bullying.[87]

7.4 The relevance of international instruments to bullying in South African schools

Currently, there are no treaties or conventions specifically pertaining to bullying in schools. However; the jurisprudence underlying the international instruments are important with regard to bullying and methods to solve this problem. One of the most important elements relevant in this instance is the best interest of the child principle. It is enshrined in not only the Constitution[88] and national legislation,[89] but also in international instruments.[90] Furthermore, the right to be protected against all forms of violence, torture, abuse and neglect is echoed in the Constitution,[91] as well as both the CRC and ACRWC.[92] These two principles alone are critically important in the milieu of bullying, as it is important to act in the best interest of both victim and bully; and all children have the right to be free from violence.[93] The right to basic education is a cardinal, basic human right featuring prominently in not only the CRC but also the ACRWC.[94]

7.5 Conclusion

85 Principle III of the Peace Declaration states the following: "Young people shall be brought up in the knowledge of the dignity and equality of all men, without distinction as to race, colour, ethnic origins or beliefs, and in respect for fundamental human rights and for the rights of peoples to self-determination."
86 See par 5.2.1, 5.2.2 and 6.2.3.
87 See par 5.4.1.1 and chapter 6.
88 See par 5.2.6.
89 See par 5.3.1.1 and 5.4.1.1.
90 See par 7.3.1 and 7.3.2.
91 See par 5.2.3.
92 See par 7.3.1 and 7.3.2 respectively.
93 See par 2.4.1, 2.4.2 and 2.4.3.
94 See footnotes 42-44 and 58-60 above.

There are many national legislative measures protecting children and governing their rights.[95] However, there are a myriad international instruments protecting the rights of children as well and since South Africa is part of the international community, an international overview is necessary. The protection of the rights of children falls under the ambit of specific international rules.[96]In view of section 39 of the Constitution, attention may be paid to international law.[97] The CRC is an all-encompassing international document pertaining to children.[98] The four pillars upon which the CRC rests are general principles of critical importance and include the child's right against non-discrimination the best interest of the child, the right to life and the right to express his or her views.[99] The ACRWC protects African children because they are more susceptible to human rights transgressions.[100] When states ratify both these instruments, a legal duty is imposed upon them to facilitate a comprehensive review of municipal legislation in order to comply with the obligations as set out in both the CRC and ACRWC.[101] Generally speaking, a child can be seen as a person under the age of 18.[102] The best interest of the child is a prominent feature in international law.[103] Furthermore, the importance of family, specifically parental involvement, is highlighted.[104] A child needs to grow up in a stable, loving, family

95 Examples are the South African Schools Act 84 of 1996; the Children's Act 38 of 2005 and the Child Justice Act 75 of 2008.
96 See footnote 2.
97 See footnote 14.
98 Memzur "The African Children's Charter versus the UN Convention on the Rights of the Child: A zero-sum game?" 2008 *SAPR/PL* 1 notes that the adoption of the CRC can be seen as a paradigm shift in how a child is regarded, as well as the treatment of children. See also par 7.3.1.
99 Memzur 2008 *SAPR/PL* 3-4.
100 *Op cit* 5-6; the adoption of the ACRWC is in keeping with the United Nations' regional recognition of human rights. Furthermore, Memzur notes that the aim of the ACRWC is to apply the CRC in the African context. See footnote 49.
101 Memzur 2008 *SAPR/PL* 14-15 also states that the ACRWC imposes a higher normative standard of conduct upon state parties than the CRC.
102 *Op cit* 16; there are no limitations in the ACRWC with regard to the definition of a child, as contained in the CRC. The reason for the lack of limitation in the ACRWC is that the ACRWC is designed to apply to as many children as possible. See also footnotes 23-27 and 52.
103 *Op cit* 18; owing to the fact that the wording of the best interest of the child principle is stronger in the ACRWC than the CRC, it is clear that there has been some advancement in children's rights. See also footnotes 28, 29 and 54.
104 Memzur 2008 *SAPR/PL* 24. See also footnotes 30-32, 64-67 and 71-74.

environment.[105] It goes without saying that survival rights ought to be guaranteed automatically.[106] A child has the right to privacy and to have his or her reputation kept intact.[107] Bullying is almost always associated with some kind of violence, whether verbal or physical. Both the CRC and the ACRWC protect children against all forms of violence.[108] Education gives a child the opportunity to develop into a successful adult. Without an education, it is thus submitted that a child has a disadvantage in life. The right to education is therefore critically important.[109] It is important to reiterate that children are not only the bearers of rights, but also responsibilities. These responsibilities are as important as the rights that every child has.[110]

It is thus submitted that the Peace Declaration has an underlying value of *Ubuntu*, as it promotes peace, justice, dignity and mutual respect.[111] It is stated in the preamble to the Peace Declaration that young people want a future secured by peace, freedom and justice.[112] This can also be seen as a constitutional ideal upon closer inspection of the constitutional values underlying the South African Constitution.[113] It is further submitted that the ideals as set out in the Peace Declaration are important elements of harmony in South African schools, as mutual respect could bring about a peaceful resolution to bullying.[114] Education must be of such quality and content that learners learn moral values, to the extent that they are equipped with the necessary tools to foster respect, individualism, peace and humanity within themselves as well as in their fellow learners.[115]

Even though there are no treaties or conventions specifically addressing bullying, it is evident that existing international instruments do in fact

105 See footnote 41.
106 The right to life is a survival right. See also footnotes 33, 55 and 56.
107 See footnotes 35-37 and 57.
108 See footnotes 38, 39 and 61.
109 See footnotes 42, 43 and 58-60.
110 Memzur 2008 *SAPR/PL* 24. See also footnotes 71-74.
111 See par 7.3.3.1.
112 See par 7.3.3.
113 Section 1 of the Constitution.
114 See par 7.3.3.1.
115 See footnote 81.

protect the inherent rights of children to such an extent that these international norms can be applied to instances of bullying. An example of this is article 21 of the ACRWC, which protects children against harmful social and cultural practices.[116] Even though bullying is not mentioned, it can be inferred or read into the document. Bullying is a gargantuan problem in need of addressing;[117] thus a legal comparative study will be done in chapter 8 to assist in addressing persisting *lacunae* in the South African legal framework pertaining to bullying in schools.

116 See footnotes 68-70.
117 See chapter 1 par 1.2.1 and footnote 12.

Chapter 8: Australian law

8.1 Introduction

In order to ensure concise research, a wider scope must be used to provide proper results. This means that a legal comparative research method ought to be used to compare persisting *lacunae* in the South African legal context to those in another country in order to offer possible solutions. For the purposes of this study, the *status quo* of South Africa will be compared to that of Australia. The legal comparative study is made possible by section 39 of the Constitution, which states in subsection 1 –

> When interpreting the bill of rights, a court, tribunal or forum – (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.[1]

International law pertains to conventions, treaties and declarations.[2] Therefore, whenever a legal comparative study is done, such an investigation falls within the ambit of section 39(1)(c) of the Constitution, which regulates the use of foreign law.[3]

Australia is a Commonwealth nation[4] with common law jurisdiction.[5] Australia furthermore has Federal;[6] State[7] and Territories laws.[8]

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1 Section 39 of the Constitution; see also par 5.2.10.
2 See chapter 7.
3 See par 5.2.10.
4 This means that Australia is a federation within the confines of the British Commonwealth. The Commonwealth of Australia came into being in 1901 when six independent British colonies joined, creating states within a new nation. Information accessed from http://australia.gov.au/about-australia/our-government on 2012-08-06.
5 Srivastava *et al Introduction to Australian Law* 11. See also Leeming "Common Law within three federations" 2007 submitted at the International Association of Constitutional Law Conference June 2007 Athens (unpublished conference paper) who notes that Australian law as it stands was developed from English common law.
6 Srivastava *et al Introduction to Australian Law* 11 state that Australian Federal laws have national application.
7 Pengelley and Milne *Researching Australian Law*1 note that every state has its own government, legislature and judiciary; however, there are instances of overlapping with Federal law. Section 109 of the Australian Constitution

Australia's legal system is underwritten by doctrines such as the separation of powers,[9] the rule of law[10] and judicial precedent.[11] The nine[12] legal systems in Australia are each equipped with a legislature and principle law-making body, as well as an executive arm of government to share law-making functions.[13] However, Australia currently has no Bill of Rights. Federal legislation concerning basic human rights *inter alia* includes the *Charter of Human Rights and Responsibilities Act 2006,*[14] the *Human Rights and Equal Opportunity Commission Act 1986*[15] and the *Sex Discrimination Act 1984.*[16]

8.2 Australian law pertaining to children

Australia is a party state to international children's rights instruments such as the CRC,[17] the *Declaration on the Rights of the Child* 1959, as well as the *Universal Declaration of Human Rights* 1948. Various legislative measures have been taken to fulfil the duties as set out in these instruments to realise the rights of children.[18] Because of the

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stipulates that, where state and Federal law are in conflict, Federal law will prevail to the extent that it exists. Information accessed from http://llrx.com/features/researchingaustralianlaw.htm on 2012-08-06.

8 *Loc cit*. There are three self-governing Australian territories but in the case of conflict with Federal law, such territories' laws may be disallowed by the Federal Parliament.

9 The *trias politica* doctrine is enshrined in the South African Constitution in section 165.

10 The rule of law has been incorporated into the South African Constitution in section 1.

11 Srivastava *et al Introduction to Australian Law* 115.

12 These legal systems are the Australian Capital Territory, Northern Territory and Norfolk Island as territories. The states are New South Wales, Queensland, Southern Australia, Victoria, Tasmania and Western Australia. Information accessed from http://australia.gov.au on 2012-08-06.

13 Srivastava *et al Introduction to Australian Law* 29.

14 This Act establishes human rights and is similar to the Bill of Rights found in Chapter 2 of the Constitution of the Republic of South Africa.

15 This Act puts a commission in place to oversee that human rights are enforced equally.

16 This Act deals with discrimination based on sex, marital status, pregnancy, potential pregnancy, family responsibilities or sexual harassment.

17 See par 7.3.1.

18 Legislative measures pertaining to children *inter alia* entail the *Children and Young People Act 2008* (Australian Capital Territory); *Children and Young Persons (Care and Protection) Act 1998* (New South Wales); *Care and Protection of Children Act 2007* (Northern Territory); *Child Protection Act 1999* (Queensland); *Children's Protection Act 1993* (South Australia); *Children, Young Persons and their Families Act 1997* (Tasmania); *Children, Youth and*

vastness of Australian law, only an overview of the most relevant and important legislative measures will be given.

8.2.1 *Australian Capital Territory: Children and Young People Act 2008*

The long title of the Act reads "An Act about the welfare of children and young people, and for other purposes".[19] The *Children and Young People Act 2008 inter alia* aims[20] to promote the wellbeing, care and protection of children and young people[21] in such a manner that their right to a safe and stable environment is realised[22] as well as taking into consideration the responsibilities of parents, family, society and the government.[23] Furthermore, the Act aims to ensure that children are free from abuse[24] and neglect.[25] The services provided by government pertaining to children ought to cater to the needs of children;[26] promote health, education, development, spirituality and dignity in children[27] and respect the uniqueness[28] of every child.[29] Young offenders[30] must receive support in terms of rehabilitation and reintegration into society[31] and share responsibility in terms of rehabilitation with their parents, family, society and government.[32]

Families Act 2005 (Victoria) and *Children and Community Services Act 2004* (Western Australia).

19 *Children and Young People Act* 2008.

20 The aims of the Children's Act 38 of 2005 (South Africa) are encapsulated in section 2 of the Act.

21 Section 7(a).

22 Section 7(a)(i).

23 Section 7(a)(ii).

24 Section 342 argues that abuse can be physical, sexual, emotional, psychological and can be deemed as such when conduct causes significant harm to the wellbeing of a child.

25 Section 7(c).

26 Section 7(e)(i).

27 Section 7(e)(iii).

28 Through section 7(e)(iv) this can be defined as "individual race, ethnicity, religion, disability, sexuality and culture". Section 343 defines neglect as failure to provide a child or young person with life necessities (food, shelter, clothing and health care); if such a failure was severely detrimental to the wellbeing or development of a child or young person. In terms of section 344 the risk of neglect or abuse is determined based upon a balance or probabilities.

29 *Loc cit*.

30 The Child Justice Act 75 of 2008 governs all matters pertaining to child offenders in South Africa. See also par 5.4.1.1.

31 Section 7(f)(i).

32 Section 7(f)(ii).

The best interest of the child principle[33] is encapsulated in section 8[34] of the *Children and Young People Act* 2008 and holds that the best interest of the child in question is of paramount importance.[35] The Act builds upon the best interest principle by stating that decision-makers ought to make decisions with regard to children to take into account the best interest of children and young people in general.[36] In terms of elements to consider when making decisions pertaining to children and young people, section 9[37] encompasses basic principles to be used as a yardstick of measurement.[38]

In terms of the *Child and Young People Act 2008*, a definite distinction is drawn between children and young people. A child[39] is defined as a person under the age of 12;[40] whereas a young person is defined as a person older than 12 but not yet an adult.[41]

Parental responsibility in terms of the Act can be defined as all the duties and responsibilities pertaining to daily and long-term care of children.[42] A child or young person is in need of care and protection if he or she is or has been abused or neglected or at risk of being abused or neglected;[43]

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33 The best interest of the child principle is contained in sections 7 and 9 of the Children's Act 38 of 2005. See also par 5.3.1.1.2 and 5.3.1.1.3.

34 In instances where a child or young person is in need of care or protection, section 349 encompasses further principles in terms of the best interest of the child.

35 Section 8(1).

36 Section 8(2).

37 The best interest of the child standard is contained in section 7 of the Children's Act 38 of 2005 (South Africa) and enumerates roughly 23 principles to take into consideration when making a decision pertaining to a child. See also par 5.3.1.1.2.

38 These principles *inter alia* entail the child's cultural identity (section 9(1)(a)); encouragement of education (section 9(1)(b)); and the child's maturity and developmental capacity (section 9(1)(c)). Furthermore, undue delay must be prevented with regard to important decisions pertaining to children, as it may be prejudicial to a child's overall wellbeing (section 9(1)(d)).

39 See par 2.4.7 for a definition of "child".

40 Section 11.

41 Section 12. The *Legislation Act 2001* defines adult as being an individual at least 18 years of age.

42 Sections 15 and 16.

43 Section 345(1)(a).

or where a person with parental responsibilities is unwilling to act in terms of protection of the child or young person.[44]

8.2.2 *An overview of various legislative matters in other parts of Australia pertaining to children*

Throughout the other Australian jurisdictions, various other legislative measures pertaining to child law exist.[45] For the sake of completeness, it is necessary to give a brief overview of the most important legislation regarding children in Australia.

Australian child law legislation aims to provide care and protection for children and young persons[46] in terms of their safety, welfare and wellbeing.[47] Principles to be taken into account are worded differently in each act.[48] Some of the Acts regard the best interest standard as of "paramount consideration"[49] whereas others phrase it as of "paramount importance".[50] It must be noted that "paramount importance" is stronger

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44 Section 345(1)(b).

45 See footnote 19.

46 The New South Wales *Children and Young Persons (care and protection) Act* 1998 distinguishes between children (under the age of 16) and young persons (16 and above) in section 3. The Victoria *Children, Youth and Families Act* 2005 distinguishes between various instances when defining a child for example child offenders, family violence and employment. In general this Act defines a child as a person under the age of 17. The Northern Territory *Care and Protection of Children Act* 2007, section 13; Queensland *Child Protection Act* 1999, section 8; Southern Australia *Children's Protection Act* 1993, section 6; Tasmania *Children, Young Persons and their Families Act* 1997, section 3 and Western Australia *Children and Community Services Act* 2004, section 3 describe a child as a person under the age of 18.

47 Section 8 of the New South Wales *Children and Young Persons (care and protection Act* 1998; section 4 of the Northern Territory *Care and Protection of Children Act* 2007; section 4 of the Queensland *Child Protection Act* 1999; section 3 of the Southern Australia *Children's Protection Act* 1993; section 1 of the Victoria *Children, Youth and Families Act* 2005; section 7 of the Tasmania *Children, Young Persons and their Families Act* 1997 and section 6 of the Western Australia *Children and Community Services Act* 2004. It must be noted that the wording differs slightly in every Act. However, every act aims to protect children and young persons.

48 The best interest of the child principle, *inter alia*.

49 Southern Australia's *Children's Protection Act* 1993, section 4; Tasmania's *Children, Youth and Families Act* 2005, section 8.

50 The New South Wales *Children and Young Persons (care and protection) Act* 1998, section 9, as well as the Northern Territory *Care and Protection of Children Act* 2007, section 10 describes it as of "paramount concern". The Queensland *Child Protection Act* 1999 section 5A, as well as the Victoria

wording than "paramount consideration" and the stronger wording is echoed in both the South African Constitution and the Children's Act 38 of 2005.[51]

In all matters concerning a child, that child has a right to participate in the decision-making process if such decisions have a considerable impact on his or her life.[52] A very important concept (something which is foreign to South African child law), is legislative measures pertaining to the resolving of serious conflict in the parent-child relationship without legal repercussions, as well as the provision of services when a breakdown in relationships has occurred.[53] Section 111 of the *Children and Young Persons (care and protection) Act* 1998[54] states that such a crisis situation applies to instances of serious conflict within the parent-child relationship, which can ultimately be detrimental to the health and wellbeing of a child or young person. This section is significant in the milieu of bullying, especially in the context of the relationship between a bully and his or her parents, as it addresses malfunctioning families. The relationship may often be strained and if the family is assisted in strengthening family bonds, healing can start from within. This would mean that rather than meting out punishment, the importance of family is upheld.[55]

The Northern Territory *Care and Protection of Children Act* 2007 *inter alia* stipulates that its government is responsible for promoting and

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Children, Youth and Families Act 2005 section 10, states that the best interests of a child is paramount.

51 See par 5.2.6 and 5.3.1.1.3.

52 New South Wales *Children and Young Persons (care and protection) Act* 1998, section 10; Northern Territory *Care and Protection of Children Act* 2007, section 11; Western Australia *Children and Community Services Act* 2004, section 10; Queensland *Child Protection Act* 1999 section 51ZC. The Southern Australia *Children's Protection Act* 1993 and Tasmania *Children, Young Persons and their Families Act* 1997 make no mention of child participation.

53 New South Wales *Children and Young Persons (care and protection) Act* 1998, section 110. This is seen as a crisis situation. The New South Wales Act is the only piece of Australian legislation containing such a provision.

54 New South Wales.

55 Section 114 of the New South Wales *Children and Young Persons (care and protection) Act* 1998 determines that where serious family conflict occurs; alternative dispute resolution methods (such as mediation) may be used to resolve these differences. See also par 5.4.1.1.8, 5.4.1.1.8.1 and 6.3.2.

safeguarding the wellbeing of children.[56] Also important in this Act, is the fact that the role of family is highlighted, but if a family cannot take proper responsibility for a child's wellbeing, the child can be removed.[57] Furthermore, a child has the right to be treated with respect and dignity.[58]

Harm to a child can be described as any act or omission that results in detriment to the physical, emotional, mental or psychological wellbeing of the child.[59] Harm can be caused by physical, psychological or emotional neglect or abuse, not excluding sexual abuse or exploitation.[60] A person who has a duty of care[61] for a child may not act or neglect to act in such a manner that the child suffers significant harm due to physical injury or psychological harm to the extent that it damages the child's emotional or intellectual development.[62] In terms of the Tasmania *Children, Young Persons and their Families Act* 1997 a person could still be guilty of the abovementioned offence even if the specific child was protected from harm[63] through the actions of another person.[64]

It is evident that there are many similarities and parallels to be drawn between South African and Australian child law. However, there are differences and the solution to eradicating bullying in schools could lie in

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56 Section 7. See also sections 7 and 28 of the Constitution of the Republic of South Africa, 1996.

57 Section 8. This is relevant to bullying because as previously hypothesised, bullies are often the victims of abuse at home. If the abuse at home can be stopped, it is stated that there will be a decline in the bullying behaviour of that specific child.

58 Section 9. This applies to victims of bullying, bullies and bystanders. All children have the basic right to dignity. See also par 5.2.2.

59 New South Wales *Children and Young Persons (care and protection) Act* 1998, section 23; Northern Territory *Care and Protection of Children Act* 2007, section 15; Queensland *Child Protection Act* 1999 section 9; Southern Australia *Children's Protection Act* 1993, section 6; Tasmania *Children, Young Persons and their Families Act* 1997, section 3; Western Australia *Children and Community Services Act* 2004, section 3.

60 *Ibid*.

61 In South African law, parents and people who are *in loco parentis* have a duty *to* care.(Own emphasis added.)

62 Tasmania *Children, Young Persons and their Families Act* 1997, section 91; Western Australia *Children and Community Services Act* 2004, section 101.

63 In terms of section 10 of Queensland's *Child Protection Act* 1999, a child who has suffered significant harm or is at risk of harm can be regarded as a child in need of protection.

64 Section 91(3) of the Tasmania *Children, Young Persons and their Families Act* 1997.

these differences. Child law is not the only legal field relevant to bullying. The fields of education law and criminal law (child justice) are equally important and will be briefly discussed below.

8.3 Australian education law

As previously stated, education is fundamental to the proper development of children.[65] Within the eight jurisdictions of Australia are various legislative measures pertaining to education[66] are applied. Because of the vastness of the framework regarding education in Australia, a brief overview of the most important aspects will suffice for the purpose of this study.

Every piece of legislation pertaining to education includes the extremely important right of every child to receive a high-quality education, which *inter alia* aims to develop the child to his or her full potential, as well as promoting tolerance and respect for others.[67] Section 17A of the Australian Capital Territory *Education Act* 2004 determines that, where the parent or parents of a child fails to comply or respond to an information notice issued by the school, such a parent is guilty of an offence.[68] Furthermore trespassing and causing disturbances on school

65 See par 1.1, 5.2.7 and 5.3.2.

66 Australian Capital Territory *Education Act* 2004; New South Wales *Education Act* 8 of 1990; Northern Territory *Education Act* 2007; Queensland *Education (General Provisions) Act* 2006; Southern Australia *Education Act* 1972; Victoria *Education and Training Reform Act* 2006; Tasmania *Education Act* 1994 and Western Australia *School Education Act* 1999.

67 Australian Capital Territory *Education Act* 2004, section 7; New South Wales *Education Act* 8 of 1990, section 4; Queensland *Education (General Provisions) Act* 2006, sections 5 and 7; Victoria *Education and Training Reform Act* 2006, section 1.2.1; Western Australia *School Education Act* 1999, section 3.

68 Australian Capital *Territory Education Act* 2004, section 17A; Queensland *Education (General Provisions) Act* 2006, sections 333 and 334. This is important in the context of bullying. It is submitted that parents of either the bully or the victim do not always respond favourably to communication from the school and by including a similar principle in South African child and education law, parents will be forced to respond and comply. For example, where parents have been given notice that their child exhibits bullying behaviour and they ought to make an appointment with the principal, they are obliged to respond and comply, it would be within the best interest of their child to find a solution to his or her problem, in conjunction with the school.

grounds are strictly forbidden.[69] In the milieu of bullying, it is submitted that the procedure for dealing with a bullying incident,[70] repercussions and process *ex post facto* ought to be kept as simple as possible. When parents or persons claiming to be interested parties[71] enter school premises to address a bully directly without a prior appointment with the principal and without proper supervision, this constitutes a disturbance and should generally not happen. It goes without saying that liability in the case of damage or loss is vitally important, specifically pertaining to bullying.[72] In terms of section 25B of the Northern Territory *Education Act* 2007, a person is absolved from civil or criminal liability for an act or omission carried out in good faith within such a person's functioning as authorised officer.[73]

The relationship between the school and a child is very important. As previously stated, this is an *in loco parentis* relationship.[74] Queensland draws an explicit distinction between a parent and an educator by stating that a person temporarily assuming the place of a parent (such as an educator) is not the parent of the child.[75]

8.3.1 *Discipline*[76] *in Australian schools*

In view of the importance of discipline in schools, specifically with regard to bullying, discipline will be discussed separately. It has already been established that discipline ought to be seen as a positive enforcement of moral values and not a means of punitive punishment.[77] Australian

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69 Australian Capital Territory *Education Act* 2004, section 147.
70 This act does not refer to bullying *eo nomine*. However, in section 36(1)(iv), mention is made of behaviour that is "disruptive to the student's learning or that of other students".
71 Such a person or persons could be a family member, a friend, etc.
72 See par 2.4.1-2.4.3.
73 Northern Territory *Education Act* 2007.
74 See chapter 5 footnote 234.
75 Queensland *Education (General Provisions) Act* 2006, section 10. In terms of section 5 of the Southern *Australia Education Act* 1972, however, a parent can be either the biological parent or a person in an *in loco parentis* relationship with the child.
76 With regard to this section, discipline is used as an umbrella term for learner conduct and prohibition of corporal punishment as well as search and seizure of contraband or harmful items.
77 See par 5.3.2.1.1.

schools *inter alia* have the power to "punish", suspend or expel learners upon the breach of school rules and regulations.[78] Unlike in South Africa, there is no single standard for a code of conduct for learners contained in a single[79] piece of legislation.[80] An innovative division in the Queensland *Education (General Provisions) Act* 2006 details behavioural improvement conditions.[81] In terms of this division, students who are liable to be suspended can be eligible for a behavioural improvement condition.[82] The Tasmania *Education Act* 1994 defines unacceptable behaviour as conduct through which a learner refuses to participate in educational activities, is disobedient or impedes the quality of education of other learners. Such conduct is detrimental to the overall health and wellbeing of other learners causes damage; and brings the school into disrepute.[83] Furthermore, the Act explicitly states that a learner who is guilty of the abovementioned conduct, may be punished by means of suspension or detention.[84]

The Victoria *Education and Training Reform Act* 2006 includes a division pertaining to harmful items.[85] Furthermore, a principal and/or assistant principal may carry out searches to determine whether harmful items are

78 Verma "Disciplinary procedures" accessed from http://www.lawhandbook.org.au/handbook/ch06s03s04.php on 2012-08-21.

79 Federal legislation governs all the respective jurisdictions, therefore in this instance reference is made to federal measures in terms of guidelines pertaining to discipline in schools.

80 *Inter alia* the New South Wales Education Act 8 of 1990, section 35; Northern Territory Education Act 2007, sections 21 and 21A; Queensland Education (General Provisions) Act 2006, sections 283, 284, 285, 288A, 288B and 288F. See also par 5.3.2.1.1.

81 Sections 323-327. Section 323 defines a behavioural improvement condition as: "behaviour improvement condition, for the challenging behaviour of a State school student, means a condition requiring the student to undertake a behaviour management program, arranged by the school's principal, reasonably appropriate to the challenging behaviour".

82 Section 324. It is submitted that the concept of a behavioural improvement structure for bullies ties into the principles of restorative justice. See chapter 6 and footnote 81 above.

83 Section 36. In terms of section 89 of the Western Australia *School Education Act* 1999, a breach of school discipline is any act or omission infringing upon order and management of a school. Therefore, bullying is synonymous with unacceptable behaviour in this instance.

84 Section 37. Western *Australia School Education Act* 1999, section 90. See also par 5.3.2.1.2.

85 Sections 5.8A.1-5.8A.7. Section 5.8A.1 describes harmful items as a prohibited item, including a firearm, controlled weapon or a prohibited weapon.

present on school grounds.[86] Upon finding such an object, the principal or assistant principal may seize the item.[87] After seizure, the principal may inform a police officer of the seizure, upon which removal of the weapon to the police force will be orchestrated.[88] However, if the item does not pose an immediate threat, it can be returned to the parents or the owner of the weapon.[89]

It has already been noted that corporal punishment is a demeaning form of punishment and has been abolished in the South African educational context.[90] Physical punishment administered by a parent or carer in the Australian legal milieu is regulated legally.[91] Throughout most of the jurisdictions within Australia, corporal punishment by a parent or carer is lawful if carried out for the purpose of corrective discipline and if it is reasonable.[92] When punishment results in bruising or any other injury that lasts longer than 24 hours it can be deemed unreasonable and therefore classified as physical abuse.[93] With regard to corporal punishment in schools, however, most of the jurisdictions either explicitly ban[94] this form of chastisement or have removed provisions in education that provides a defence for administering corporal punishment.[95]

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86 Section 5.8A.3 further specifies that the school premises, premises occupied by students, a vehicle in use for learner activity or any bag or storage facility used by a learner may be searched. However, such searches may only be carried out where the authorised person has a reasonable belief that harmful items are present on the school premises. In terms of section 5.8A.6, a principal or assistant principal may authorise an educator to carry out searches or to seize harmful items.

87 Section 5.8A.4.

88 Section 5.8A.5.

89 *Ibid*.

90 See par 5.3.2.1.3.

91 Holzer and Lamont "Corporal punishment: key issues" 2010 *National Child Protection Clearinghouse resource sheet* accessed from http://www.aifs.gov.au/nch/pubs/sheets/rs19/rs19.pdf on 2012-08-21.

92 *Ibid*. Holzer and Lamont further note that the following aspects should be taken into account upon the administering of corporal punishment: the age of the child, punishment method, the child's ability to understand correction and harm caused to the child.

93 *Loc cit*.

94 Australian Capital Territory *Education Act* 2004 prohibits corporal punishment under section 7(4); New South Wales *Education Act* 8 of 1990 prohibits corporal punishment under sections 35 and 47(h); Northern Territory *Education Act* 2007 does not have any provisions explicitly prohibiting corporal punishment, but the *Criminal Code Act*, section 11 does make it lawful for

8.4 Child justice in Australia

Australia refers to the system governing the process followed with regard to youth offenders as "Juvenile justice". However, in South African child law and child justice, the term juvenile is explicitly not used because it stigmatises a child and this must be avoided.[96] Therefore, "juvenile justice" will not be used in this study, but rather "child justice". Child justice is governed by legislation throughout the various jurisdictions of Australia.

8.4.1 *Overview of the most relevant child justice provisions in Australia*

A child offender in the Australian context means a person who has been charged or found guilty of an offence before a court; who was under the age of 18 when the crime was committed and has been sentenced accordingly.[97] Very important with regard to child justice, is the age of criminal capacity.[98] In terms of the Southern Australia *Young Offenders Act* 1993, for example, a child under the age of 10 cannot commit a

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educators to administer corporal punishment on condition that the parents have signed a consent form; Queensland *Education General Provisions Regulation Act* 2006 repealed all provisions legalising corporal punishment in state schools; Southern Australia *Education (Amendment) Act* 1991 repealed provisions allowing corporal punishment in schools; Tasmania *Education Amendment Act* 1999 banned all forms of corporal punishment in both government and non-government schools and explicitly states that principals have a duty to ensure that learners are not subjected to corporal punishment; Victoria *Education and Training Reform Act* 2006 prohibits corporal punishment through sections 1.4.60 and 4.3.1(6)(a); Western *Australia School Education Act* 1999 prohibits corporal punishment, furthermore *School Education Regulation* 2000 specifies that a learner enrolled at a government school may not be disciplined by means of corporal punishment.

95 *Ibid*.

96 The same can be said of the concept "delinquent" denoting a child offender.

97 Australian Capital Territory *Children and Young People Act* 2008, section 114; Northern Territory *Youth Justice Act* 2005, section 6. The New South Wales *Young Offenders Act* 1997, on the other hand, defines a child offender in section 7A as a person who is or was a child at the time of commission of the offence or is under the age of 21 while being dealt with under the provision of the Act. The Southern Australia *Young Offenders Act* 1993 describes a youth as a person above the age of 10, but under 18 and in terms of a person in detention or training, such an individual has to be under 18 at the time of the commission of the offence. Tasmania *Youth Justice Act* 1997, section 3. Western Australia *Young Offenders Act* 1994, section 3; section 4 states that where a young person committed the crime while under the age of 18 but turns 18 during proceedings, the Act still applies to such an individual.

98 See par 5.4.1.1.4.

crime.[99] Throughout all the Australian jurisdictions, a child under the age of 10 is *doli incapax.*[100] A rebuttable presumption exists in terms of a child between the ages of 10 and 14, where such a child is presumed to be *doli incapax* unless the prosecution can refute the presumption.[101] From the ages of 14 to 17 or 18 (depending on the jurisdiction), a child has full criminal responsibility in terms of criminal offences.[102]

A child offender must receive positive support and encouragement in respect of rehabilitation and reintegration into the community.[103] The responsibility of assistance with rehabilitation and reintegration must be shared with the child's parents, family and community.[104] A child offender furthermore has the right to have his or her human rights respected, to be treated humanely, to be free from torture or violence, not to be subjected to any further punishment other than his or her sentence; to be assisted in terms of reintegration into society, and to receive assistance with regard to rehabilitation.[105] In any decision pertaining to a child offender, the best interest of the child principle must always be applied.[106] Furthermore, young detainees may also be granted bail.[107]

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99 Section 5.

100 Urbas "The age of criminal responsibility" 2000 *Australian Institute of Criminology trends and issues in crime and criminal justice* 1.

101 *Ibid*.

102 *Ibid*.

103 Australian Capital Territory *Children and Young People Act* 2008, section 7.

104 *Ibid*.

105 Australian Capital Territory *Children and Young People Act* 2008, section 138; Northern Territory *Youth Justice Act* 2004, sections 3 and 4; Queensland *Juvenile Justice Act* 1992, section 2; schedule 1 to the Act contains a *Charter of Juvenile Justice Principles* which explicitly states that the community should be protected from crime, but also that a child offender must be treated with dignity and respect; Southern Australia *Young Offenders Act* 1993, section 3; Tasmania *Youth Justice Act* 1997, sections 4 and 5; Western Australia *Young Offenders Act* 1994, sections 6 and 7.

106 Australian Capital Territory *Children and Young People Act* 2008, sections 94 and 955.

107 Australian Capital Territory *Bail Act* 1992, section 23 sets out the criteria for granting bail to children; section 26 stipulates the conditions on which bail may be granted to children. The New South Wales Children (Detention Centres) Act 1987 regulates the detention of children and other young persons who have been found guilty of a criminal offence. Queensland *Juvenile Justice Act* 1992, sections 47, 48, 51 and 52. Chapter 4 of the Child Justice Act 75 of 2008 regulates the detention of child offenders in South Africa.

Diversion is a very important concept in the milieu of child justice.[108] The Northern Territory *Youth Justice Act* 2005 provides for diversion options in terms of child offenders.[109] However, these provisions are not as comprehensive as chapter 8 of the Child Justice Act 75 of 2008, which regulates diversion in the South African context.[110] In terms of the *Youth Justice Act* 2005, viable options in terms of diversion may include a verbal or written warning, convening a youth justice conference or referring the child for diversion.[111] A child offender may only be diverted if a responsible adult consents to the diversion; if a police officer cannot find a responsible adult to obtain consent, he or she may, at his or her own discretion, give the child offender with a written or verbal warning.[112] Where consent is not given to diversion, and where the police officer reasonably suspects that the child may be guilty, such a child offender may be prosecuted for the offence.[113] Upon satisfactory completion of the diversion programme, no criminal proceedings can be instituted against the child.[114] The decision to divert a child cannot be appealed, nor be reviewed in any court or tribunal.[115] The Southern Australia *Family and Community Services Act* 1972 *inter alia* determines that training centres must be established for the care, correction, detention, training and rehabilitation of child offenders.[116]

In terms of bullying, specifically, it is important for the bully to know how his or her conduct harmed the victim. In this process a victim-centred approach is followed, as provided for in the *Service Charter for victims of crime in South Africa*. In terms of the Northern Territory *Youth Justice Act* 2005, victim impact statements feature prominently in the administering of child justice. A victim impact statement is defined as –

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108 See par 5.4.1.1.8.
109 Part 3 of the Act – Diversion of youth. Tasmania *Youth Justice Act* 1997, part 2 – Diverting youths from court system. Western Australia *Young Offenders Act* 1994, Part 5, Division 1 – Cautioning.
110 See par 5.4.1.1.8.
111 Northern Territory *Youth Justice Act* 2005, section 39.
112 Section 40.
113 *Ibid*.
114 Section 41.
115 Section 44.
116 Section 36.

> an oral or written statement prepared for the purposes of this Division and containing details of the harm suffered by a victim of an offence arising from the offence.[117]

Before sentencing an offender, the court must allow time for the victim impact statement to be read in court.[118] Furthermore, the court is obliged to consider every victim impact statement in terms of sentencing.[119] A court must stay objective and may not favour either an offender or a victim if a victim impact statement was not heard in court.[120] The child offender must receive a written and signed copy of the victim impact statement.[121] Such a statement may *inter alia* contain details of the harm caused by the offender for which he has already been sentenced or will be sentenced by the court; which has already been taken into account by the court, or will be taken into account with regard to sentencing procedures. The victim may also express his or her wishes in terms of sentencing of the offender.[122]

8.5 Anti-bullying policies in Australian schools

Australia regards bullying in schools as a very serious issue and has drafted a framework to the effect that it aims to ensure learner safety at school.[123] The *National Safe Schools Framework* aims to provide a framework to help foster a safe and supportive school community, which in turn contributes to learner wellbeing and good relationships in

117 Northern Territory *Youth Justice Act* 2005, section 76; Child Justice Act 75 of 2008, section 70(1).
118 Northern Territory Youth Justice Act 2005, section 77; Queensland *Victims of Crime Assistance Act* 2009, section 15.
119 Northern Territory *Youth Justice Act* 2005, section 77.
120 *Ibid*.
121 *Ibid*.
122 Northern Territory *Youth Justice Act* 2005, section 80; Child Justice Act 75 of 2008, section 70(2).
123 Information accessed from http://www.deewr.gov.au/Schooling/NationalSafeSchools/Pages/nationalsafeschoolsframework.aspx on 2012-08-21.

general.[124] The National Safe Schools Framework is based on nine guiding principles, namely:

(i) The commitment of leaders towards safe schools;
(ii) a supportive school structure;
(iii) adequate policies and procedures;
(iv) positive behavioural management;
(v) skills development and a curriculum incorporating the principle of safe schools;
(vi) student wellbeing-focused education;
(vii) early intervention; and
(viii) partnerships with families and communities.[125]

In conjunction with these principles, educators are also encouraged to take a proactive role in facilitating safer schools rather than being reactive in such instances.[126] However, upon being confronted with bullying or any maltreatment of a learner, educators ought to be appropriately reactive by responding effectively to such situations.[127]

8.5.1 State and Territories anti-bullying policies

Every jurisdiction in Australia has a specific policy or strategic plan to combat bullying in schools, which is consistent with the *National Safe Schools Framework* as set out above. Where the enforcement of these policies is mandatory, it shows parents, learners and stakeholders that bullying (and the wellbeing of learners) is regarded as a serious matter.

The *Countering Bullying, Harassment and Violence in ACT Public Schools Policy*[128] states that schools are obliged to develop and implement strategies to combat bullying, harassment and violence in

124 *National Safe Schools Framework* 2. This framework was accepted on 18 March 2011, concurrently with the National day of Action against Violence and Bullying. South Africa does not have similar initiatives and it would be worthwhile to experiment with similar forms of advocacy work.
125 *Op cit* 4.
126 *Ibid*. Bullying is mentioned *eo nomine* throughout the framework.
127 *Ibid*.
128 Australian Capital Territory.

schools.[129] Instances of bullying, harassment and violence must be reported within 24 hours of the incident.[130] The intervention plans developed by schools must contain strategies for reporting incidents of bullying, harassment and violence; intervention; access to assistance in these matters and training for educating and non-educating staff.[131] Bullying is defined as –

> A product of social dynamics which can be defined as the repeated negative actions by individuals or groups against a target individual or group, which involves an imbalance of power. Bullying can take different forms – verbal, physical, social, cyber or psychological. Actions can be observable or hidden.[132]

From this definition it is clear that there are certain universal elements in a definition of bullying, namely a power imbalance, individuals or groups being targeted or acting as a bully, as well as the various forms of bullying.[133] Violence is defined as –

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129 The New South Wales *Bullying: Preventing and Responding to Student Bullying in Schools Policy* 2011 explicitly states in its policy statement that bullying in all forms is to be rejected and that no learner or educator should have to be subjected to bullying. The Northern Territory *Bullying, Harassment and Violence Policy* 2009 prescribes that schools must aim to prevent instances of bullying, harassment and violence; however, where these incidents occur, they will be dealt with promptly and regarded as extremely serious.

130 *Countering Bullying, Harassment and Violence in ACT Public Schools Policy* 2007, 1.

131 *Ibid*.

132 *Ibid*. See also par 2.4.2. The New South Wales *Bullying: Preventing and Responding to Student Bullying in Schools Policy* adds to this definition by expanding upon the forms of bullying as well as the incidents excluded from bullying. According to this policy, bullying may also include humiliation, victimisation, domination and discrimination; however, fights or conflict between individuals does not fall within the ambit of bullying for the purposes of the policy. The Northern Territory *Bullying, Harassment and Violence Policy* also mentions that occasional differences of opinion and "nonaggressive conflict" do not qualify as bullying. In terms of the Victorian *Building Respectful and Safe Schools: A resource for School Communities* 2010document, bullying can be motivated by jealousy, distrust, fear and ignorance. Furthermore, bullying is divided into four types, namely direct physical bullying (hitting, kicking etc), direct verbal bullying (name-calling etc), indirect bullying (spreading rumours, lying, etc), and cyber bullying (bullying via any media platform). It is also noted that bullying does not entail mutual conflict, social exclusion (where it is not deliberate) and single episodes of conflict.

133 *Countering Bullying, Harassment and Violence in ACT Public Schools Policy* 2.

> Incidents where a person is intimidated, abused, threatened, physically assaulted or where property is deliberately damaged by another person. It is an extreme use of force often resulting in injury or destruction. Violence does not necessarily involve an imbalance of power.[134]

As previously stated, bullying and violence are not the same phenomena; but are usually related terms.[135] The procedures to be followed by schools with regard to bullying, harassment and violence ought to include measures by which to identify recurring behaviour patterns and encourage the proactive involvement of learners, parents and educators; as well as constant two-way communication between the school and parents or care-givers.[136]

In terms of the Northern Territory *Bullying, Harassment and Violence Policy*, the procedure to be followed in all instances of violence should include preventative measures to identify possible risks and reduce the severity of incidents; proper preparation, so that stakeholders are duly prepared to handle any incidents which may occur adequately; response to incidents of violence, to minimise damage and recovery, to ensure that the *status quo* can be restored swiftly.[137]

The Queensland *Safe, Supportive and Disciplined School Environment Policy* 2012 includes a discipline measure called "time out". This strategy

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134 *Ibid.* See also par 2.4.1.
135 *Ibid*. See also par 2.4.1-2.4.3.
136 *Loc cit*. In terms of the New South Wales *Bullying: Preventing and Responding to Student Bullying in Schools Policy*, different obligations are assigned to the various role players in any possible bullying incident. For example, principals must ensure that a collaborative anti-bullying strategy is implemented by the school. Educators must respect and support learners. Learners must respect others and behave appropriately. Parents and care-givers must see to it that their children oblige with the anti-bullying policies. The school community must promote good relationships between learners as well as educators and learners, etc. The Northern Territory *Bullying, Harassment and Violence Policy* 2009notes that principals must ensure that all stakeholders are aware of the school's zero tolerance policy on all forms of violence directed at learners and educators. Educators are obliged to conduct themselves in a manner that is above reproach and to maintain the values encapsulated in the policy. The Western Australia Behaviour Management in Schools Policy holds school principals responsible for the drafting and maintenance of anti-bullying policies.
137 Northern Territory *Bullying, Harassment and Violence Policy*.

allows learners to manage their own behaviour, in order to calm down.[138] The aim of time out is to reduce the frequency of unacceptable behaviour.[139] Principals and educating staff must ensure learner safety during time out, as well as constant supervision of the learner.[140] However, where a learner is regularly subjected to time out, other more comprehensive and intensive strategies must be applied in order to improve the learner's behaviour.[141]

Southern Australia provides guidelines in terms of school audits and personalised anti-bullying policies.[142] Furthermore, these guidelines specify elements that must be included within every anti-bullying policy.[143] Important aspects are inter alia a proper policy statement to the effect that bullying in all forms will not be tolerated; definitions of bullying, harassment, violence *et cetera*; procedures in terms of reporting and responding to incidents of bullying, harassment and violence; the responsibilities of all stakeholders; recognition[144] of a bullying victim;[145] follow-up consultations with parents *ex post facto*[146] and intervention strategies; as well as training and education regarding bullying.[147]

Building Respectful and Safe Schools: A resource for School Communities is a resource tool for the Victoria public with regard to

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138 Queensland *Safe, Supportive and Disciplined School Environment Policy*2012. Bullying is mentioned *eo nomine* in this policy.
139 Queensland *Safe, Supportive and Disciplined School Environment Policy*2012.
140 *Ibid*.
141 *Ibid*.
142 Information accessed from http://www.decd.sa.gov.au/speced2/files/links/Draft_for_web_Anti_bullyin.pdf on 2012-08-29.
143 *Ibid*.
144 These signs *inter alia* include unexplainable cuts, bruises or injuries, damaged clothing, aches and pains, fear of going to school, asking for extra food or money, anxiety and insomnia, hiding his or her phone or profiles on social media platforms.
145 This is very important, since signs often go unnoticed. If a victim can be identified in the early stages of bullying, it is submitted that the effects can be limited if addressed immediately.
146 It is very important to establish a strong relationship with parents. If this is done,, children affected by bullying will feel safe and cooperation may be guaranteed as children follow the example of authority figures.
147 Information accessed from http://www.decd.sa.gov.au/speced2/files/links/Draft_for_web_Anti_bullyin.pdf on 2012-08-29.

school safety. This document argues that schools ought to be a safe place for everyone.[148] Furthermore, parents and care-givers have a primary role regarding the moulding of proper behaviour in children.[149] Learners have a right to feel safe at school.[150] The school environment includes all learners, irrespective of diversity or cultural differences.[151] A whole-school approach with initiatives and strategies to promote positive relationships is of the utmost importance to ensure learner safety.[152] An effective school model is built upon aspects of professional leadership, education focused school environment, shared goals and vision, purposeful education, high expectations, learning communities, accountability and a stimulating learning environment.[153] This document also acknowledges the importance of bystanders in the milieu of bullying by suggesting bystander training.[154] This training encompasses the building of emotional strength to challenge the actions of the bully (or bullies).[155] Furthermore, it is imperative that all learners must know that they should act responsibly at all times.[156] Schools are encouraged to make use of restorative justice, to move away from punitive means of punishment and to focus on behavioural management.[157]

Western Australia also has a *Duty of Care for Students Policy*, which describes the duty of educating and non-educating staff to care for the safety and wellbeing of all learners within their care.[158] This duty implies that reasonable measures to ensure learner safety must be taken when

148 *Building Respectful and Safe Schools: A resource for School Communities*2010.
149 *Ibid*.
150 *Ibid*.
151 *Ibid*.
152 *Ibid*.
153 *Ibid*.
154 *Ibid*. See also chapter 4.
155 *Loc cit*.
156 *Ibid*.
157 *Ibid*. See also chapter 6.
158 *Duty of Care for Students Policy* accessed from http://www.det.wa.edu.au/policies/detcms/policy-planning-and-accountability/policies-framework/policies/duty-of-care-for-students.en?oid=au.edu.wa.det.cms.contenttypes.Policy-id-3783072#PolicyStatement on 2012-08-29.

necessary.[159] Educators must ensure the maintenance of equilibrium between caring for and protecting learners and allowing them to be independent.[160]

8.6 Case law

It has already been noted that bullying is a *sui generis* offence.[161] In the context of South African law, cases of bullying (where it is explicitly mentioned as bullying) between learners do not reach a court. However, it is imperative to examine the application of legislation and policy with regard to bullying, within the context of a judicial system. A few examples of bullying in Australian schools that reached the courts will be discussed.

8.6.1 "H" v State of New South Wales [2009] NSWDC 193

The plaintiff in this case sustained injuries upon being attacked and stabbed by various students.[162] At the time of the incident, the plaintiff was 16 years of age and a learner at Birrong Boys' High School.[163] The incident followed an earlier death threat to the plaintiff by a fellow learner in front of an educator.[164] Because the damage caused by the attack, the plaintiff held school authorities liable for damages based on a breach of duty of care owed to the plaintiff as learner at the school.[165]

8.6.1.1 Questions before the court

The court had to consider the following issues –

i) The scope and content of the duty of care owed to the plaintiff;[166]

159 *Ibid*. Furthermore, learners must be protected from harm and educators are obligated to foresee threats where these arises and act accordingly.
160 *Loc cit*.
161 See par 5.4.2.
162 [2009] NSWDC 193 par 1.
163 *Ibid*.
164 *Ibid*.
165 *Ibid*.
166 Par 5.

ii) Whether there was a reasonable breach of the abovementioned duty of care;[167]

iii) If a breach of the duty of care could be proved, how it caused or contributed to injuries suffered by the plaintiff;[168]

iv) Defence, if any, available to the defendant.[169]

8.6.1.2 Decision

The court held that the school was indeed in breach of its duty of care since two educators failed to protect the plaintiff from serious physical and psychological harm.[170] The court further held that this breach of duty resulted in the plaintiff's physical and psychological injuries, including chronic post-traumatic stress disorder.[171] Furthermore, the court held that the requirements for liability and causality had been met and therefore awarded the plaintiff an amount of $627 468.[172]

8.6.2 Oyston v St Patrick's College [2011] NSWSC 269

This case is particularly important in view of the fact that bullying as such is explicitly mentioned as a cause of the plaintiff's injuries. The plaintiff instituted a claim based on negligence on the part of the school.[173] Furthermore, the plaintiff stated that her injuries were due to constant exposure to bullying behaviour and harassment by fellow learners.[174]

8.6.2.1 Questions before the court

In terms of the plaintiff, the issues pertained to liability[175] and damages.[176] With respect to the defendant, the issues were *inter alia* the

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167 *Ibid.*
168 *Ibid*.
169 *Ibid*.
170 Par 7.
171 *Ibid*.
172 *Ibid*.
173 [2011] NSWSC 269 par 1.
174 *Ibid*.
175 Par 8. *Inter alia*, the adequacy of the school's anti-bullying policy was brought into question, as was its effective application with regard to the complaints of the plaintiff and negligent acts on the part of the defendant.

nature of a duty of care to the plaintiff; whether there was indeed a breach of the abovementioned duty of care; establishing whether the defendant was guilty of contributory negligence; the scope of the plaintiff's injuries; liability with regard to the plaintiff's injuries and the nature of the plaintiff's pre-existing psychological problems.[177]

8.6.2.2 Decision

The court *inter alia* found that a reasonable person (in the place of the school) would take reasonable measures to protect learners (such as the plaintiff) against bullying.[178] The court further found that, even though the school had anti-bullying policies in place, the response to the plaintiff's complaint was not as determined by these policies.[179] Therefore, with respect to the plaintiff, implementation of the said policies was inadequate.[180] The court also noted that the school was aware of the distress of the plaintiff, yet did nothing to safeguard her against on-going bullying.[181] The court found that the plaintiff's injuries were a direct result of the school's failure to take the steps as set out in their anti-bullying policies.[182]

8.7 Australian *status quo* with regard to bullying

Research shows that one in five to one in seven Australian learners are bullied several times a week.[183] The research can further be refined –

i) One in five to one in seven learners report being bullied once a week or more.[184]

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176 Damages reflect the nature and extent of the plaintiff's injuries, the nexus between the bullying incidents and the plaintiff's ultimate injuries, the plaintiff's need for assistance and the likelihood of further problems due to the bullying.
177 *Loc cit*.
178 Par 15.
179 Par 16-37.
180 Par 51 and 61.
181 Par 311.
182 Par 320.
183 Slee and Ford "Bullying is a serious issue – it is a crime!" 1999 *Australia & New Zealand Journal of Law & Education* 25.
184 *Op cit* 26.

ii) Bullying occurs more frequently in primary schools than high schools.[185]

iii) In primary schools, bullying occurs more frequently between younger children.[186]

iv) In high schools, bullying behaviour spikes around grade 10 and 11.[187]

v) Boys report being bullied more regularly than girls.[188]

vi) Research further shows that male and female learners are bullied differently (direct and indirectly).[189]

Furthermore, it has been assessed that bullying generally lasts for a week or two.[190] Taking this into account, it can be inferred that the cumulative negative effect of such bullying might last longer than mere short- or midterm effects.[191] It is worrying to note that some students feel so unsafe in Australian schools that they have resorted to carrying weapons for protection.[192] In terms of the effects of bullying on both the bully and the victim, research shows that it is both physically and psychologically harmful, socially isolating many Australian children.[193] Depression, illness and suicidal thoughts have also been linked to bullying.[194]

185 *Ibid*.
186 *Ibid*.
187 *Ibid*.
188 *Ibid*.
189 *Ibid*. As previously stated, male learners are more susceptible to direct bullying whether physical or verbal; whereas female learners will more often than not be bullied verbally and indirectly, in the form of social exclusion, spreading of rumours etc.
190 *Ibid*.
191 *Ibid*. See also chapter 3.
192 Slee and Ford 1999 *Australia & New Zealand Journal of Law & Education* 27.
193 *Op cit* 28. See also chapter 3.
194 *Ibid*.

Because of the seriousness of bullying, various Australian schools have started to implement intervention programmes.[195] These programmes *inter alia* include –

i) gathering data on bullying by means of questionnaires, involving both learners and educators,[196]

ii) development of policies specifically to address bullying,[197]

iii) classroom discussions on how bullying can be countered,[198]

iv) implementation of strategies to resolve conflict in schools,[199] and

v) staff training with regard to counselling to assist bullies and victims.[200]

Australia has widened the scope of examining the inner workings of bullying, by examining not only the bully, inclusive of behaviour, emotional state and familial circumstances, but also involving welfare, parent organisations, the police and the community.[201] The fact that bullying can be attributed to a general failure to nurture and protect children is thus underlined.[202] Schools must not become complacent, but be the advocates of change in the lives of all children, not only bullies, but victims and bystanders as well.

Australian schools have a duty of care in respect of their learners.[203] This duty is present where there is an educator-learner relationship.[204] A

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195 Slee and Ford 1999 *Australia & New Zealand Journal of Law & Education* 30.
196 *Ibid*. See also par 5.3.3.1.
197 *Ibid*. As stated above in par 8.5.1 there are many anti-bullying policies in Australia. Therefore, this goal should be read as developing existing anti-bullying policies in keeping with an ever-changing society.
198 *Ibid*.
199 *Ibid*. By using victim-offender mediation and/or family group conferencing, this aim can be achieved. See also par 5.4.1.1.8 and chapter 6.
200 Slee and Ford 1999 *Australia & New Zealand Journal of Law & Education* 30.
201 *Ibid*. As previously stated, a holistic approach is of critical importance if bullying is to be successfully dealt with. See also chapter 3 pars 3.1-3.4.
202 *Ibid*. It is submitted that a child is not born a bully. However, external factors play a big role in the ultimate development of a child and therefore, society as a whole must get more involved in the lives of children, taking responsibility for the youth, globally as well as locally. See also chapter 3.
203 Slee and Ford 1999 *Australia & New Zealand Journal of Law & Education* 33.

school can be held liable for the injury of a learner based on negligence on the part of an educator.[205] The school can also be held liable where it is established that injury was due to the negligence of the school administration or the education system.[206] Such a duty of care is breached where it can be established that a reasonable person would have acted in a manner consistent with eliminating risk or injury to the learner, contrary to the negligence of the school.[207] If the injury or harm was reasonably foreseeable, the duty of care is thus breached.[208] In terms of injury, actual damage must have been suffered.[209] However, does psychological damage fall within the ambit of actual damage? In *Jaensch v Coffey*[210] the court ruled that "Compensation is awarded for the disability from which the plaintiff suffers, not for its conformity with a label of dubious medical acceptability". Therefore, psychological damage is an actual injury. It is evident that Australia implements a vast array of protective measures in respect of learners and learner safety.

8.8 Comparison

In order to make an objective assessment of the South African *status quo* pertaining to bullying in schools, it is imperative to have a broader view of the issue. However, because bullying occurs globally, Australia's position has been selected for the purposes of a legal comparative study since there are many mandatory policy measures to combat bullying in schools.

8.8.1 *Child law*

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204 *Ibid*. See also 8.5.1 and footnote 157.
205 *Ibid*. This is known as vicarious liability.
206 Slee and Ford 1999 *Australia & New Zealand Journal of Law & Education* 33. *The Commonwealth of Australia v Introvigne* (1981) 150 CLR 258 at 269 per Mason held the following: "A school authority owes to its pupils a duty to ensure that reasonable care is taken of them whilst they are on school premises during hours when the school is open for attendance."
207 Slee and Ford 1999 *Australia & New Zealand Journal of Law & Education* 30.
208 *Ibid.*
209 *Op cit* 36.
210 (1984) 155 CLR 549 on p 560 per Brennan.

Parents, family, society and the government are held responsible for the wellbeing of children.[211] In view of the holistic nature of this study, this is a critical element, because it takes a village to raise a child.[212] The best interest of the child principle is a prominent feature in child law, internationally as well as nationally.[213] Moreover, general consensus on the best interest of the child principle holds that it is encapsulated as of paramount importance.[214] However, there are Acts wording it as of "paramount consideration" as opposed to "paramount importance".[215] As previously stated, paramount importance gives more weight to the principle than paramount consideration.[216]

The *Child and Young People Act 2008*[217]draws a definite distinction between the definition of a child and a young person. A child is a youth under the age of 12, whereas a young person is an individual older than 12 but younger than 18.[218]

It goes without saying that the relationship between a parent and child is very important and therefore also protected by law.[219] In keeping with the importance of family life, the Children and Young Persons (care and protection Act 1998[220] includes a provision that in instances of serious parent-child conflict, these issues can be resolved by means of services rendered by government.[221] It is thus stated that mediation can play an integral role in such cases and in the South African context, can save time and money, as well as comply with the principles of *ubuntu* and restorative justice.[222] In order to eradicate bullying, it is submitted that healing has to start from within, therefore reconstructing strained familial relationships by means of mediation can contribute to the dwindling of

211 See footnote 24. See also sections 7 and 28 of the Constitution.
212 See chapter 1 footnote 35.
213 See par 5.2.6, 5.3.1.1.2, 5.3.1.1.3 and chapter 7.
214 See footnotes 34-36.
215 See footnotes 50 and 51.
216 See footnote 52.
217 Australian Capital Territory.
218 See footnotes 40-42 and 47.
219 See section 28(1) of the Constitution.
220 New South Wales.
221 South Africa does not have similar legislative provisions to this effect.
222 See chapter 6.

bullying figures altogether. Thus, by focusing on strengthening family ties, punitive punishment is no longer called for in the context of bullying and remedying the situation.[223]

\in the context of Australian child law, it is explicitly stated that children have the right to be treated with respect and dignity.[224] Respecting an individual's inherent human dignity is a central value of the Constitution and is not only a value but also a right.[225] Harm to a child impairs his or her dignity. In terms of Australian legislation, harm to a child can be defined as any act or omission that is detrimental to the physical, emotional, mental or psychological wellbeing of a child.[226] Where an individual has a duty of care for a child, he or she may not act, or neglect to act in a manner that causes harm or suffering to the child.[227] A person can be held liable for causing harm to a child even where the child was protected from harm through the actions of another person.[228] In terms of bullying, such a legislative provision can contribute to stakeholders being more alert with respect to learner safety.

8.8.2 *Education law*

Education is essential to the development of healthy, happy children.[229] In the Australian context, the right of every child to a high-quality education is underlined throughout legislation pertaining to education.[230] Parents are obliged to comply with information notices issued by the school.[231] Where a parent fails to comply with such a notice, he or she is guilty of an offence.[232] Two-way communication between parents and the school is imperative to ensure the wellbeing of a child, because problems can be identified early and addressed properly. Specifically in

223 See footnote 56.
224 See footnote 59.
225 See par 5.2.2.
226 See footnotes 60-63.
227 *Ibid*.
228 See footnote 65.
229 See footnote 66.
230 See footnote 68.
231 See footnote 69.
232 *Ibid*.

the milieu of bullying, parents must communicate with the school. If a child exhibits bullying behaviour, parents must work with the school to remedy the problem in order for the child to develop properly. When parents work with the school, it is submitted that this may give the child a feeling of safety, as there is teamwork and proper control.

A person can be absolved from civil and or criminal liability for an act or omission where it is established that the individual acted *bona fide* within his or her functioning as authorised officer.[233] In terms of section 60 of the South African Schools Act 84 of 1996, however, the State can be held liable for damage incurred by a learner during school activities.[234] Therefore, it is argued that even though a person acted in good faith, he or she can be held accountable if the ultimate outcome (harm or injuries) was foreseeable. With respect to bullying, it is unacceptable to claim that the educator was unaware of bullying incidents. Since there must be proper supervision and an educator is an expert in his or her field, signs of bullying ought to be identified and acted upon.

Discipline in schools is important because it fosters sound moral values in a child, to be used during every stage of the individual's life. In the Australian context, the word "punishment" still features prominently in terms of discipline in schools. As previously stated, discipline should be positive instead of punitive.[235] South Africa has a well-formulated standard of discipline in schools detailed in section 8 of the South African Schools Act 84 of 1996, whereas there is no similar provision in Australian education law.[236]

However, valuable lessons can be learnt from certain legislative provisions. The *Education (General Provisions) Act* 2006 includes provisions pertaining to behavioural improvement conditions.[237] This means that where a learner is liable to be suspended, he or she can

233 See footnote 73.
234 See par 5.3.2.1.5.
235 See footnote 77.
236 See footnotes 79 and 80.
237 See footnote 81.

qualify for a behavioural improvement programme that assists in addressing the unacceptable behaviour of the learner.[238]

Corporal punishment has explicitly been abolished in South African schools.[239] Corporal punishment is a degrading form of punishment in direct contravention of an individual's right to human dignity. However, in Australia physical punishment by a parent is regulated by law.[240] There is a definite distinction between corporal punishment administered by a parent and that administered by an educator. In terms of punishment by a parent, it is lawful if done reasonably for the purposes of corrective discipline.[241] Bruising due to corporal punishment, however, is unreasonable and can be regarded as assault.[242] Most of the jurisdictions in Australia have explicitly banned corporal punishment in schools, but some have merely repealed provisions legalising corporal punishment.[243] This can lead to legal uncertainty, because there is no uniform application of the abolishment of corporal punishment, which may lead to corporal punishment still being administered in Australian schools.

8.8.3 *Child justice*

Australia refers to child justice as "juvenile" or "youth justice". In the South African context, the term juvenile has purposefully and explicitly been disregarded because it stigmatises and marginalises a child offender. Criminal capacity in Australian child justice is similar to that of South Africa, where a child under the age of 10 is irrefutably *doli incapax*.[244] Furthermore, a rebuttable presumption exists with regard to children between the ages of 10 and 14 to the effect that such a child is presumed *doli incapax* until proven otherwise.[245] From 14 to 17 or 18

238 See footnotes 81 and 82.
239 See par 5.3.2.1.3.
240 See footnote 91.
241 See footnotes 91 and 92.
242 See footnote 93.
243 See footnote 94.
244 See par 5.4.1.1.4. See also footnote 99.
245 *Ibid*. See also footnote 100.

(dependent upon jurisdiction), a child has full criminal capacity to act.[246] In the South African child justice context, a child above the age of 14 has full criminal capacity.[247]

There is also a strong focus on support for a child offender in terms of rehabilitation and reintegration into society.[248] This is in line with the values underpinning the Child Justice Act 75 of 2008, namely *ubuntu* and restorative justice.[249] Furthermore, Australian legislation determines that parents, family and the community must share the obligation to rehabilitate a child offender.[250] The Child Justice Act 75 of 2008 highlights a very important aspect in this regard, namely that parents, families, victims and the community (where affected by the crime) ought to be involved in procedures in order to help facilitate the reintegration of the child offender.[251] This is important with regard to bullying owing to the fact that such children are often ostracised and stigmatised, which must be avoided at all costs.

Decisions made with regard to child offenders must always apply the best interest of the child principle.[252] Throughout the Child Justice Act 75 of 2008, mention is made of upholding the best interest of the child.[253] It must be reiterated that all children involved[254] ought to be taken into consideration. However, a victim-centred approach is critical to the proper administration of justice.

Diversion in terms of child offenders is not as comprehensively outlined in Australian child justice legislation as it is in South Africa.[255] Limited diversion options are incorporated into legislation;[256] whereas in the

246 *Ibid*. See also footnote 101.
247 See par 5.4.1.1.4.
248 See footnotes 102 and 103.
249 See chapter 1 footnote 4, par 5.4.1.1, as well as chapter 6.
250 See footnote 103.
251 Section 2(b)(iv) of the Child Justice Act 75 of 2008.
252 See footnote 105.
253 Preamble; sections 1, 9(1)(b), 24(3)(a), 30(3)(a), 35(i), 38(2)(b), 39(5), 41(3), 44(2), 44(4)(a), 47(5)(a), 47(8)(a), 63(4), 65(2) and 80(1)(d).
254 See chapter 4.
255 See footnotes 107-109.
256 See footnote 110.

South African context, an entire chapter of the Child Justice Act 75 of 2008 is devoted to diversion, including detailed diversion options.[257] Australian legislation deterrmines that care centres must be established to facilitate diversion.[258] As previously mentioned, victim impact statements ought to feature prominently in the milieu of bullying.[259] However, the Child Justice Act is not as detailed as legislation in Australia with regard to victim impact statements.[260] Such a statement can form part of a restorative justice process in schools, specifically pertaining to bullying.[261]

8.8.4 *Anti-bullying policies*

Australia has a vast resource of anti-bullying policies and safe school strategies.[262] Most importantly, the overall aim of these policies and strategies is to contribute positively to the wellbeing of all learners.[263] This is consistent with the rights and values as envisaged by the South African Constitution.[264] People in authoritarian positions are encouraged to take the lead with regard to school safety.[265] Schools ought to be supportive,[266] *adequate*[267]policies must be in place,[268] skills development[269] must receive attention, early intervention[270] must take place and partnerships with parents and communities must be

257 See par 5.4.1.1.8.
258 See footnote 115.
259 See footnotes 116-121.
260 *Ibid*.
261 See also chapter 6.
262 See par 8.5 and footnote 122.
263 See footnote 123.
264 Constitution of the Republic of South Africa, 108 of 1996. See also par 5.2.
265 See footnote 124.
266 *Ibid*. It is thus submitted that an all-inclusive support structure with regard to parents, learners, educators and stakeholders will suffice in this instance.
267 Own emphasis added.
268 *Loc cit*. It is argued that one of the main reasons for the high prevalence of violence and bullying in schools, globally, can be ascribed to improper enforcement of policies and strategies and furthermore, policies that are ill-drafted or the complete absence of policies.
269 *Loc cit*.
270 *Ibid*. It is also stated that addressing a bullying incident promptly will not only safeguard learners against further harm or marginalisation, but can assist with the speedy reconciliation of the parties involved.

established.[271] When an anti-bullying policy and its proper enforcement becomes mandatory, it shows that bullying is regarded as serious, that the safety and wellbeing of learners are important and that the South African legal system does care about the youth of the country.[272] Currently, however, there is no legislative provision obliging schools to draft anti-bullying policies.[273] The closest to this is section 8 of the South African Schools Act 84 of 1996.[274]

8.9 Conclusion

It is evident that doing legal comparative research can be valuable with regard to national legal innovation. In terms of the *status quo* of Australia versus that of South Africa, both countries can learn from each other. One of the most important factors that South Africa can use is mandatory anti-bullying policies in schools. Australia has few federal law provisions regarding child law, education law and child justice, which may lead to legal uncertainty. However, when comparing the various pieces of legislation, it is evident that both jurisdictions can learn from each other. Bullying is never explicitly mentioned in South African case law.[275] In terms of policies and strategies, it is evident that bullying is regarded more seriously in Australia than in South Africa. In order to adhere to the obligations as set out in the Constitution, change must be effected.[276]

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271 *Loc cit*. In order to facilitate rehabilitation, it is imperative to maintain healthy relationships with not only parents, but also the community. See also par 8.8.3 and footnote 248.

272 See par 8.5.1.

273 There have been talks among local government officials to implement provincial anti-bullying policies; however, nothing has come to light thus far. Furthermore, there are a few private schools that have their own anti-bullying policies but there is no nationally applicable anti-bullying policy in South Africa. See also *Volksblad* 4 September 2012 "Hoofde neem boelies onder oë" as well as http://www.stjohnscollege.co.za/prepBoysPolicyBully.php and http://www.stmaryschool.co.za/admitAntiBullying.php accessed on 2012-10-08 as examples of anti-bullying policies in South African private schools.

274 See par 5.3.2.1.1., 5.3.3.1 and 5.3.3.2.

275 See par 5.5 and 8.6.2.

276 See section 7 of the Constitution.

Chapter 9: Conclusion and recommendations

9.1 Introduction

Bullying is an escalating[1] phenomenon that intrudes beyond the seemingly safe confines of family life, impairing a harmonious environment that is crucial to learning.[2] It is elusive, as the psychological damage brought on by bullying can not be seen, but is severely detrimental to the child and can ultimately lead to attempted and completed suicide.[3] South Africa not only has a constitutional and legislative obligation to protect its youth, but is also obliged to do this in terms of international law.[4] Children are regarded as a vulnerable group and therefore need additional protection against harm, violence *et cetera*.[5] A proper solution is necessary, one that is not only academically valid, but also practicable.

9.2 Bullying defined

It has been noted that bullying is hard to define owing to the vastness of the concept, as well as the fact that fields of study other than law are relevant to bullying. However, in order to address the issue legally, a definition ought to be drafted as point of departure. The definition suggested for bullying is –

Bullying is a wrongful, intentional act; whether a physical act, gesture, verbal, written or electronic communication, taking place repeatedly; performed by either a single individual or more than one person. Bullying can be characterised as frightening, intimidating treatment to

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1 See par 1.2.1 for statistics on bullying in schools.
2 See chapter 1 footnote 12 for media coverage on bullying, as well as par 1.1 with regard to school phobia. Schools are no longer safe havens for learners as is the general ideal, but rather hostile and violent. Violence, alcohol and substance abuse, assault, theft etc have become the order of the day in many South African schools. See par 3.7.
3 See chapter 3 for a psychological perspective on bullying.
4 See chapters 5 and 7 with specific reference to the Constitution, South African Schools Act 84 of 1996, Children's Act 38 of 2005, Child Justice Act 75 of 2008; as well as the CRC and the ACRWC.
5 See sections 7 and 28 of the Constitution.

which a learner is repeatedly subjected by another learner/learners or an educator resulting in:

i) Harm to the learner or his or her property;

ii) emotionally harassment of the learner;

iii) making the learner fear for his or her own safety or the safety of his or her property;

iv) substantial disruption of the orderly functioning of school activities; and

v) the ultimate creation of a hostile environment that is counterproductive to learning.[6]

Currently, no definition of bullying exists in the South African legal milieu.[7] In order to prevent vagueness and legal uncertainty, examples of bullying should be provided, but it should be explicitly stated that the list provided is not exhaustive, but rather a guideline in terms of an *ad hoc* determination of the applicability of the term bullying to a certain set of circumstances.[8] Thus it is suggested that the following be added to the abovementioned definition: Bullying includes, but is not limited to the infliction of physical and/or psychological pain and distress, harassment, social exclusion, intimidation, theft, destruction of property and public humiliation.[9]

Bullying and violence in schools are related to each other. However, bullying is not necessarily violence and vice versa.[10] A further expansion ought to be added, which includes "any related violence". Doing that

6 See par 2.4.2.
7 See par 5.4.2.1.
8 *Ibid*.
9 See chapter 5 footnote 517 and par 8.5.1.
10 It is postulated that bullying is not necessarily underpinned by violence, nor does it always lead to violence. Examples of bullying that excludes violence are social exclusion, spreading of rumours etc. See also pars 2.4.1-2.4.3 and 8.5.1.

would provide a wider scope is provided for school administration to deal with bullying and violence in schools.[11]

9.3 The status of children with regard to bullying

Holding a person accountable for bullying is further complicated by the fact that bullying takes place between children of school age which means that these children are below the age of 18.[12] Depending on age, children may not be prosecuted or held delictually accountable. The *status quo* pertaining to the legal status of minors can be summarised as follows:

a) Children below the age of 10 (*infantes*) cannot be prosecuted. In terms of the law of delict a child below seven can not be held delictually accountable for their actions or inactions, thus they are *doli et culpae incapax*.[13]
b) Children above the age of 10 but below 14 function within a rebuttable presumption that they are *doli incapax*. In terms of the law of delict, a further distinction is drawn, as girls between the ages of seven and 12 are presumed to be *doli incapax* whereas for boys the ages are seven and 14.[14]
c) A child above the age of 14 has full criminal capacity. A minor below the age of 18 but over the age of 14 can be held delictually liable.[15]

It is argued that a simple method ought to be used when determining the liability of a child with respect to bullying. The above elements should be used as a yardstick. However, where a child below the age of 10 bullies another child it should still be dealt with through restorative justice

11 *Ibid*.
12 As stated in chapter 4 above, there are various role players in a bullying incident. Bystander behaviour has both criminal and civil consequences and therefore bystander training could prove useful in eradicating bullying. A bully thrives on attention, which he or she receives from onlookers. Where the audience is eliminated, it is stated that the bully could ultimately stop his or her behaviour. However, bystander behaviour should form part of the plan and not be the ultimate solution.
13 See par 5.4.1.1.4 and 5.4.3.1.
14 See par 5.4.1.1.6, 5.4.1.1.7 and 5.4.3.1.
15 See par 5.4.1.1.4 and 5.4.3.

mechanisms such as therapy.[16] Depending on the seriousness of the bullying, a child above the age of 10 but below 18 should also be handled by means of restorative justice, which includes rehabilitation, reconciliation and accountability.[17] Where bullying behaviour ends in serious bodily harm or death, it is argued that bullying as such only applies as a catalyst but then it ought to be looked at as either assault or bullycide.[18] Thus, the incident should then be managed in terms of the provisions as set out in the Child Justice Act 75 of 2008.[19]

9.4 Persisting *lacunae* in terms of bullying

Currently, South Africa has no legislative measures in place that specifically mention or address bullying amongst learners.[20] General provisions that aim to protect people (and specifically children) do exist.[21] It is argued that these provisions are not enough, as bullying has been escalating in the last few years, which makes it evident that the current system is failing.[22] South Africa has a vast resource of defined criminal acts, whether common law or statutory crimes.[23] Therefore, it is submitted that bullying should also be properly defined as starting point for its eradication.[24] In order to eliminate the possibility of legal uncertainty pertaining to learner-on-learner bullying, legislative measures ought to be drafted and implemented as a basis upon which to protect learners.

9.5 Bullying: a crime

Bullying is an offence, though not statutorily recognised, because it impairs the bodily and psychological integrity of the victim and such a

16 See chapter 3 as well as par 5.4.1.1.8 and chapter 6.
17 See par 5.4.1.1.8 and chapter 6.
18 See par 2.4.4 and 5.4.2.3.
19 See par 5.4.1.1.8.
20 See chapter 5.
21 *Ibid*. These include sections 12 and 28 of the Constitution, the Children's Act 38 of 2005 and the Child Justice Act 75 of 2008.
22 See par 1.2.1.
23 See par 5.4.
24 See par 9.2.

person's property is often also damaged or destroyed.[25] As previously mentioned, bullying is a psychologically motivated act with legal consequences.[26] It is argued that bullying is a *sui generis* offence.[27] Bullying is rarely explicitly mentioned in case law.[28] Furthermore, bullying cuts through the traditional divide between physical and psychological onslaughts on the victim by more often than not encompassing both a physical and psychological element.[29] The fact that the role players in a bullying incident are children complicates the matter, as there are different ages of criminal responsibility and delictual liability involved.[30] Many bullies are the victims of bullying by their parents, family or older siblings at home, or live in hostile and/or violent conditions and therefore act out what they see at home.[31] Merely administering punitive justice, whether in the form of corporal punishment,[32] sarcasm, social exclusion or verbal reprimanding, *et cetera*, does not teach the child any positive lesson, but rather, through the conduct of his or her elders, that bullying and violence are used as problem-solving mechanisms. Two wrongs do not create a right and punishment is not a "quick fix". By applying restorative justice, the reason for the bullying behaviour can be addressed and eliminated and therefore reoffending will most likely not occur.

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25 Bullying has a seriously adverse effect on the parties involved. Not only the victim, but also the bully and bystanders may be affected psychologically through continued bullying. The effects range from depression to poor academic performance, truancy from school, isolation from family and peers, to suicidal ideation and in severe cases, suicide. See par 3.6.

26 There are different causes for bullying behaviour in children, most if not all of them psychological in nature. Therefore, a system of punitive justice will fail when addressing bullying, as the root of the problem should be addressed instead of merely "removing" the problem by punishing the child. It is further stated that reoffending will be imminent where the child does not receive the proper help to realise accountability and be rehabilitated and reintegrated into the community. Parent training or assistance is also a viable option since healing needs to start within (the family).See pars 3.4, 3.5 and 3.5.2.4.

27 See chapter 6 footnote 77.

28 See par 5.5.1.2 for a discussion on *Dowling v Diocesan College and Others* 1999 (3) SA 847 (C).

29 See chapter 3 as well as chapter 6 footnote 77.

30 See chapter 4 as well as par 9.3.

31 Section 111 of the Children and Young Persons (care and protection) Act 1998 (New South Wales) includes a provision for assistance where there is a breakdown in the parent-child relationship. Such a provision can prove to be integral to a holistic onslaught against bullying in schools. See footnote 29.

32 See par 5.3.2.1.3 as well as chapter 8 footnote 94.

Even though it is postulated that bullying should be incorporated into legislation as a crime, it does not mean that a child who is guilty of bullying will have a criminal record.[33] It is imperative that children realise the extreme seriousness of bullying, and by legislating against bullying behaviour, the importance the matter may be communicated.

9.5.1 *Bullycide*

As noted previously, bullycide is the act whereby a child commits suicide in response to bullying or kills the person bullying or her.[34] It is not *eo nomine* a crime in South Africa, but a new term to illustrate the seriousness of bullying. Therefore, a child cannot be held liable for bullycide, as it is not a recognised offence.[35] However, it is submitted that bullycide ought also be included in South African law and that the legislation should include specific methods and programmes to treat the offender as well as the families of the victim and offender.[36] Possible criticism against the criminalisation of bullycide may be that it is hard to prove and unjustifiable.[37] However, by applying the test for a *conditio sine qua non*, the argument that it is not feasible is proven to be void.[38] A possible solution would be to draft "bullying" legislation as an all-encompassing piece of legislation, which provides definitions of key aspects, the procedure to be followed in instances of bullying, as well as guidelines on the consequences of bullying.

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33 As previously stated, where bullying turns to physical assault or even bullycide, the child justice system should handle the matter and such a child may consequently have a criminal record.

34 See par 2.4.4 and 5.4.2.3.

35 See par 5.4.2.4.

36 See par 5.4.1.1.8 for a discussion on diversion. Even though bullycide is a very serious issue, the offender must not be disregarded or stigmatised. Such a child must be assisted with regard to rehabilitation so that he or she may learn valuable lessons. This does not mean that by merely apologising, an offender is cleared of responsibility. On the contrary; restorative justice practices underline the vital importance of accountability. See also chapter 6.

37 See par 5.4.2.3.1 for an explanation of *novus actu sinterveniens*.

38 Bullycide ought not to be limited to the combination of "bullying and suicide", but should also be applied to bullying and homicide, where the bully directly contributes to the death of the victim, or where the victim murders the bully. See also par 2.4.4 and 2.4.5 with regard to bullycide, suicide, murder and culpable homicide, as well as par 5.4.2.3.2 pertaining to a *conditio sine qua non*.

9.6 South African anti-bullying legislation

As stated previously, in the context of bullying, South Africa has to rely on general child, child justice and education law to adjudicate matters pertaining to learner-on-learner bullying. There are no specific legislatively enforceable measures within which schools can function in terms of bullying. Internationally, specifically in the United States of America, the trend is to enact so-called "anti-bullying legislation". This form of prevention is, however, not without criticism. One of the main arguments against this type of legislation is the fact that bullying increases in response to the intensive advocacy work and "zero tolerance" approach schools and the legislature follows in respect of bullying.[39] Furthermore, it is submitted that one does not maintain peace by declaring war. By disregarding the seriousness of bullying, however, South Africa fails to protect its children. Specifically in the South African context, advocacy work is needed, legislation and policy[40] are needed, but these should not be as liberal and fanatic as in the United States of America.

Legislation and policy cannot be enforced without proper advocacy work, as learners, parents and schools must know their rights and responsibilities with regard to school safety and bullying.

9.6.1 *The Bullying and School related Violence Bill*

It is suggested that the South African legislature accept legislation to provide for adequate measures against bullying.[41] It is further postulated that the legislation should referred to as the *Bullying and School related Violence Act*. This piece of legislation should include key definitions

39 Kalman "The 'perfect' anti-bully law" 2009 *Psychology Today* accessed from http://www.psychologytoday.com/blog/the-bully-witch-hunt/200903/the-perfect-anti-bully-law on 2012-09-24.

40 Australia has various policies pertaining to bullying and violence in schools, all of which address bullying *eo nomine*. See par 8.5.1 as well as 8.8.4.

41 A useful resource in terms of a framework for implementation by schools against bullying, is the Olweus intervention plan. See par 5.3.3.1.

such as bullying,[42] violence,[43] bullycide,[44] educator,[45] learner,[46] parent[47] and restorative justice.[48]

Furthermore, it should include a standard procedure for dealing with bullying. This can then be divided into different procedures, allocated to different grades of bullying, based on seriousness.[49] It is suggested that a checklist be drafted, which would then initiate the procedure. This would include:

a) bringing order to the situation;[50]
b) reporting the incident to an educator or principal;
c) speaking separately to the parties involved;[51]
d) at the discretion of the principal, addressing the parties involved together;
e) informing the parents of all parties involved of the bullying incident;
f) convening a meeting with the parents or guardian of the parties involved where the circumstances call for more serious intervention;
g) finding a suitable solution via a family group conference;
h) seeking possible solutions that could include victim-offender mediation, community service, therapy, *et cetera*; and
i) following up the incident by maintaining contact with not only the parties involved but also their parents.

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42 See par 2.4.2.and 9.2.
43 See par 2.4.1.
44 See par 2.4.4.and 9.5.1.
45 See par 2.4.9.
46 See par 2.4.8.
47 A parent can be defined based on the definitions found in section 1 of the Children's Act 38 of 2005 as well as article 5 of the CRC and article 20 of the ACRWC.
48 See par 2.4.6 and chapter 6.
49 This is based on chapter 6 of the Child Justice Act 75 of 2008, which draws a distinction between diversion methods based on the seriousness of the crime committed.
50 Where physical bullying or serious verbal abuse has transpired, an educator or sometimes even fellow learners must separate the parties involved to ensure that the incident ends.
51 It is of vital importance for a child to be able to tell a principal or educator his or her side of the incident, following the rules of natural justice (*audi alteram partem*) as well as *inter alia* section 14 of the Children's Act 38 of 2005.

Such a checklist should be the point of departure for any investigation relating to bullying and violence in schools. Furthermore, it ought to be explicitly stated that room is left for the drafting of an anti-bullying policy, which runs in conjunction with the existing code of conduct for learners.[52] Such a policy should be mandatory for all schools. Each school governing body will then personalise the policy to suit the needs of the learners and school, just as is currently the case with codes of conduct.

Legislation that can support the proposed act includes the Constitution, South African Schools Act 84 of 1996, Children's Act 38 of 2005 and the Child Justice Act 75 of 2008. The proposed legislation should be regarded as a further specialisation of child law, aimed at protecting all children, not only victims, but also bullies and bystanders.[53]

The suggested policy must also provide for restorative justice aims such as reconciliation, accountability and restoration.[54] This would mean that punitive justice through which a child is pertinently punished will be excluded and thus it is submitted that the culture of violence in South African schools can be abolished in time.[55] This Act should also explicitly criminalise bullying and bullycide in order to demonstrate the seriousness of the matter, as well as the low tolerance for unacceptable behaviour. However, as noted previously, the focus should not be on the deed (bullying), but rather on the effects the act or omission had on the victim.

9.7 International trends in combating bullying

It would seem as though various countries combat bullying by implementing legislation and/or policy to the effect that bullying is

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52 Such a policy can be annexed to the code of conduct. See par 5.3.2.1.1 for an overview of section 8 of the South African Schools Act 84 of 1996.

53 Raising and developing a child's full potential is not the responsibility of only a school, but largely relies on the care and protection of parents. Therefore, a provision must be included to obligate parents to communicate with the school often, especially with regard to written notices or communications, but also telephonic communications and personal appointments. A child's "safety net" is thus secured and development can occur at optimum level in response to the joint efforts of the parents and the school. See chapter 8 footnote 69.

54 See chapter 6.

55 See par 3.7.

outlawed.[56] However, it needs to be asked whether coming down hard on bullies will yield a sustainable solution. It is argued that one has to be hard on the act (or omission), but soft on the person. This means that punitive justice ought to be very low on the list of priorities so that healing can commence collectively. In the context of Australia, almost every jurisdiction has a policy specifically pertaining to bullying. Federal law also provides for a national framework upon which the various jurisdictions can base their policies.[57] These policies ensure the safety of all learners and must be applied properly.[58] It is evident that South Africa is new to the fight against school bullying. This is made clear when examining case law which never mentions school bullying.[59] However, when looking at media reports on bullying, it ought to be blatantly obvious that bullying is escalating, potentially endangering the lives of all school-going children.

9.8 Conclusion and recommendations

Bullying is a serious issue, which has the potential to ruin countless lives. It is suggested that bullying be regarded as a volatile issue. The following recommendations are made based on the aforementioned research:

a) Legislation providing for the maintenance of school safety must be drafted.
b) Bullying must be explicitly defined in a legal sense.
c) Anti-bullying policies must be mandatory.
d) Restorative justice mechanisms must be implemented in schools.
e) Schools ought to communicate with parents and all stakeholders and improve the involvement of parents and families in schools.
f) South Africa should furthermore do away with a punitive paradigm and focus on developing well-rounded learners.

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56 See chapter 8 and par 9.6.
57 See par 8.5.
58 *Ibid*.
59 See par 8.6.2 for an exposition of *Oyston v St Patrick's College* [2011] NSWSC 269.This Australian case explicitly mentions bullying as catalyst to the plaintiff's mental distress.

g) Advocacy and training work should be done to inform and educate people on bullying, its effects and methods to address such a situation.

In light of the findings of this study, it is evident that more refined research may be useful, specifically in terms of restorative mediation practices and the effect of these processes on not only victims but also bullies.

It is the duty of all South Africans to respect, protect and promote the rights of others.[60] Furthermore, the State is obliged to ensure the safety of all South Africans and this imposes a duty on the legislature to draft legislation to the effect that bullying is outlawed. It takes a village to raise a child. This village includes parents, peers, the school and the State.

60 The best interest of the child standard ought to feature prominently in any debate regarding the suggested legislation. It is within the best interest of all children to enact anti-bullying legislation and related policies, as this would guarantee the safety of victims and bystanders as well as the proper assistance and help be afforded to bullies.

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