

**Authors: A Laas and T Boezaart**

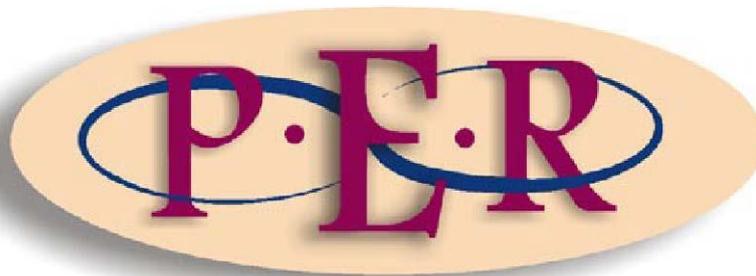
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**THE LEGISLATIVE FRAMEWORK REGARDING BULLYING  
IN SOUTH AFRICAN SCHOOLS**

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## THE LEGISLATIVE FRAMEWORK REGARDING BULLYING IN SOUTH AFRICAN SCHOOLS

A Laas\*

T Boezaart\*\*

### 1 Introduction and conceptual framework

#### 1.1 Introduction

At a recent symposium hosted by a teachers' union, the Suid-Afrikaanse Onderwysersunie (SAOU), the fact that schools across the country are in the grip of violence was once again emphasised.<sup>1</sup> Upon closer inspection it appears that the violence and "unruly" behaviour is often directed at a particular child victim and takes the form of bullying. A recent incident may be used as an example, where a twelve year-old boy was victimised and beaten up by a sixteen year-old with the result that the smaller boy was later too fearful to return to school. Ironically, the school in issue displays a huge welcoming sign at the entrance of the premises proclaiming that it is a safe school where weapons are not allowed.<sup>2</sup> The same newspaper recently reported a very serious incident involving another school: this time a boy was killed at school in an incident where "[b]ullying and eventual retaliation have been blamed for the death".<sup>3</sup>

Bullying is a global phenomenon that has the potential of impacting on children both physically and psychologically. It sometimes causes children to drop out of school and permanently damages both the psyche and education of the child. As indicated above, children are sometimes even killed in the process. When these incidents occur at school, and a recent study revealed that a substantial amount of all bullying

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\* Annelie Laas. LLB (NWU) LLM (Pretoria). Annelie Laas was enrolled for her LLD degree in the Department of Private Law at the University of Pretoria when she wrote the first draft of this article. However, her sudden and untimely death on 7 July 2014 brought an end to her research on the advantages of a restorative justice approach to bullying and her passionate efforts to curtail bullying in schools.

\*\* Trynie Boezaart. BA (Law) LLB LLD (Pretoria). Professor and Head of Private Law, University of Pretoria. Email: Trynie.Boezaart@up.ac.za.

<sup>1</sup> Makhubu *Pretoria News* 1.

<sup>2</sup> Abreu *Pretoria News* 1.

<sup>3</sup> Makhubu *Pretoria News* 1.

incidents does occur in the school context,<sup>4</sup> the parties involved are often minors, and therefore a critical analysis is necessary with regard to the rights of the victim and the offender. In this context the relationship and interaction between the *Protection from Harassment Act* 71 of 2011, the *Child Justice Act* 75 of 2008, the *Children's Act* 38 of 2005 and the *South African Schools Act* 84 of 1996 call for critical analysis.

## 1.2 Bullying

Bullying is a far-reaching phenomenon touching the lives not only of learners<sup>5</sup> but of other role-players as well. This paper exclusively focuses on learner-on-learner bullying. Other forms of bullying which occur in the education environment are educator-targeted bullying (ETB)<sup>6</sup> and cyber-bullying.<sup>7</sup>

The *Oxford English Dictionary*<sup>8</sup> describes a "bully" as "a person who deliberately intimidates or persecutes those who are weaker". Olweus<sup>9</sup> defines bullying as follows:

[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.<sup>10</sup>

<sup>4</sup> See para 2 below.

<sup>5</sup> Burton 2008 [http://www.cjcp.org.za/uploads/2/7/8/4/27845461/research\\_bulletin\\_2\\_-\\_snapshot\\_results\\_of\\_school\\_violence\\_study.pdf](http://www.cjcp.org.za/uploads/2/7/8/4/27845461/research_bulletin_2_-_snapshot_results_of_school_violence_study.pdf). The Centre for Justice and Crime Prevention (CJCP) undertook the National Schools Violence Study (NSVS) in 2011 (SACE 2011 <http://www.sace.org.za/upload/files/School%20Based%20Violence%20Report-2011.pdf>) and found that 15,3% of all learners (roughly 1 821 054 learners) had experienced some or other form of violence at school, of which bullying is one form. See para 1.3 below.

<sup>6</sup> De Wet 2010 *SAJE* 189-201 defines ETB as: "[A]ggressive 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".

<sup>7</sup> Cyber-bullying can be defined as "harassing, humiliating, threatening or embarrassing another person through electronic methods" such as short messaging, email or text messaging. Definition obtained from Cyberbullying date unknown <https://sites.google.com/site/hirehgiurehg/gallery>. Also see Laas *Combating Bullying in Schools* 18.

<sup>8</sup> Stevenson and Waite *Concise Oxford English Dictionary* 184.

<sup>9</sup> He founded the Olweus Bullying Prevention Programme. His research started in 1970 in Sweden and progressed to the United States. In 1983 three teenage boys committed suicide most likely due to severe bullying and this incident triggered the development of the first Olweus Bullying Prevention Programme. His research and programmes are used globally. Hazelden Foundation date unknown <http://www.violencepreventionworks.org/public/bullying.page>.

This definition of bullying encompasses three main elements, namely:

- (a) Bullying is a form of aggressive behaviour where the bully acts out and behaves in a negative manner.
- (b) Bullying forms a behavioural pattern over time.
- (c) Bullying results from a power imbalance.<sup>11</sup>

It is submitted that the term "bullying" ought to have a wider rather than narrower interpretation. In a broader context, bullying can be defined as an intentional wrongful act (whether a physical act, in verbal or written form or even a gesture) which takes place repeatedly; performed by either an individual or group of persons.<sup>12</sup> Against the background of this definition it is suggested that in the context of education the characteristics of bullying may include the following:

- (a) creating a pattern of victimisation;
- (b) harm to a learner/his property;
- (c) an emotional assault on the learner;
- (d) control over the victim through fear;
- (e) disruption of the orderly function of school activities through negative behaviour; and
- (f) creating a counterproductive learning environment through hostility.

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<sup>10</sup> Hazelden Foundation date unknown <http://www.violencepreventionworks.org/public/bullying.page>.

<sup>11</sup> Hazelden Foundation date unknown <http://www.violencepreventionworks.org/public/bullying.page>.

<sup>12</sup> Also see the definition of bullying by Bully OnLine (Tim Field Foundation date unknown <http://bullyonline.org/workbully/amibeing.htm>) (a vast resource of material and research on bullying and related matters) which includes "unwarranted or invalid criticism, nit-picking, fault-finding, also exclusion, isolation, being singled out and treated differently, being shouted at, humiliated, excessive monitoring", as examples of wrongful acts in the context of bullying.

From the above it is clear that bullying encompasses far more than mere childish bickering or competition. Bullying is a psychologically motivated act which infringes on various rights of learners and can even lead to the victim's death.<sup>13</sup>

### **1.3 Violence**

The abovementioned definition of bullying makes it clear that violence frequently plays a part in bullying. One therefore needs to understand what violence is and how it relates to bullying in order to conceptualise the act of bullying. The *Oxford English Dictionary*<sup>14</sup> defines violence as "... behaviour involving physical force intended to hurt, damage or kill". This definition is too narrow because it addresses only physical violence. Viewed in this way, violence is very similar if not identical to assault.<sup>15</sup> A key component of assault is violence, either involving the perpetration of violent behaviour directed at the victim or by giving the victim the impression that he or she is under immediate threat of violence.<sup>16</sup> In reality, violence includes many other elements, such as the abusive exercise of power, emotional and psychological violence or injury.<sup>17</sup> The World Health Organisation (WHO) provides a very broad definition of violence, which includes aspects of physical, emotional and sexual

<sup>13</sup> 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 the law of delict), psychology, sociology, etc. These disciplines must work in conjunction with one another to ultimately provide a cohesive solution. See Boezaart "Child Law" 4 on the holistic nature of various aspects of child law.

<sup>14</sup> Stevenson and Waite *Concise Oxford English Dictionary* 1613.

<sup>15</sup> Burchell *Principles of Criminal Law* 680 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* 475 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 onmiddellik sal plaasvind." Note that Stevenson and Waite *Concise Oxford English Dictionary* 555 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 mention violence but uses the word "force" instead. The application of force, according to Burchell (Burchell *Principles of Criminal Law* 680, 684), encompasses violent force applied to a human person, which leads to wounding, bruising, breaking or mutilation. Thus violence and force can be deemed as synonymous terms.

<sup>16</sup> Burchell *Principles of Criminal Law* 685 notes that to inspire fear also constitutes assault. Also see Snyman *Strafreg* 478.

<sup>17</sup> See the definition of violence from FARLEX Free Dictionary date unknown <http://www.thefreedictionary.com/violence>.

abuse.<sup>18</sup> This broad definition of violence establishes the link between violence and bullying and reveals that bullying is in fact a form of violence.<sup>19</sup> This is the reason why bullying constitutes a direct threat to school safety and the wellbeing of not only learners but of educators and non-educating staff as well.

On the other hand it should also be acknowledged that although bullying is a form of violence it has root causes different from many other forms of violence, and that preventing bullying therefore requires a different approach.<sup>20</sup> Bullies and sometimes also the victims of bullying suffer from psychological issues related to low self-esteem and depression,<sup>21</sup> and these are not the only catalysts to violent behaviour in children who are involved in bullying.<sup>22</sup>

#### **1.4 Harassment**

The *Protection from Harassment Act* 17 of 2011, which was signed into law on the 27<sup>th</sup> of April 2013, contains a detailed definition of harassment in section 1(1), which *inter alia* encompasses the following elements:

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<sup>18</sup> New Zealand Ministry of Justice date unknown <http://www.justice.govt.nz/publications/global-publications/s/safer-communities-action-plan-to-reduce-community-violence-sexual-violence/definition-of-violence> states the following as per the WHO: "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."

<sup>19</sup> Burchell *Principles of Criminal Law* 680 points 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 reflected in the criminal justice system, as force and violence directed towards a human being are prohibited and punishable.

<sup>20</sup> Bullying Statistics 2013 <http://www.bullyingstatistics.org/content/bullying-vs-violence.html>.

<sup>21</sup> Bullying Statistics 2013 <http://www.bullyingstatistics.org/content/bullying-vs-violence.html>.

<sup>22</sup> The 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. In this connection Theron "Gedragsversteuring" 415-446 lists the following behavioural disorders in children: "opponerend-uitdagende versteuring [oppositional defiant disorder], vermydingsversteuring [avoidance disorder], oormatige-angstversteuring [extreme anxiety disorder]", *inter alia*. These behavioural disorders can be caused in victims as a result of bullying, and in bullies as a result of a negative home environment. Also see Laas *Combating Bullying in Schools* 33-60.

(a) Conduct aimed at causing harm or the belief that harm is imminent through: (i) Following or watching the victim at his or her home or place of study; (ii) Communicating with the victim through verbal, written or electronic media; or (iii) Sending letters, emails or other objects to the victim. (b) The said conduct could also amount to sexual harassment.

When comparing the definition of harassment in the Act with the definition of bullying provided above<sup>23</sup> it becomes evident that there are similarities and differences between the two concepts. The similarities are the following: in both contexts the negative behaviour of the perpetrator is aimed at causing harm, or at least instilling fear of harm; the definition of harm is very similar in both contexts, ranging from physical and psychological harm to economic harm; and the negative behaviour is aimed at exercising control over the victim. The differences are that bullying often takes place in the educational context, for the spectator(s) to see, and involves the show of force. Furthermore, bullying is seen as threatening conduct over a period of time, but the *Protection from Harassment Act* makes no mention of continuous torment as a qualification or prerequisite for harassment. However, the fact that it is not mentioned as a prerequisite in the Act does not mean that the harassing behaviour cannot include threatening conduct over a period of time. It can be inferred from the above that the meanings of the terms "harassment" and "bullying" are similar though not identical. In those instances where harassment includes bullying, the victims can benefit from this Act, as it provides complainants with a civil remedy.

### **1.5 Restorative justice**

Walgrave<sup>24</sup> describes restorative justice as "an option for doing justice after the occurrence of an offence that is primarily oriented towards repairing the individual, relational and social harm caused by the offence". In a bullying incident there will always be a bully and a victim. In a school setting, and specifically when learner on learner bullying takes place, both of these parties will generally be children. Therefore the conventional punitive approach to restore justice might not be the most appropriate one. An alternative approach is called for, and restorative justice is

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<sup>23</sup> See para 1.2 for a definition of bullying.

<sup>24</sup> Walgrave "Restorative Justice" 122.

well worth considering.<sup>25</sup> Since restorative justice can also be described as dealing with issues of both the victim and the transgressor in such a way that there is healing on both sides, including communal healing, this may be an appropriate alternative solution.<sup>26</sup>

Braithwaite proposes a framework for restorative justice that includes the following limiting and expansive standards:<sup>27</sup> limiting standards *inter alia* encompass accountability, listening respectfully, objective and equal concern for the involved parties, respect for human rights and empowerment. Expansive standards focus on the restoration *inter alia* of dignity, damaged relationships, monetary loss, freedom and peace, as well as preventing recidivism. Both the limiting and expansive standards should be considered if bullying occurs in the school setting.

## 2 Prevalence of bullying

Bullying, violence and harassment are not dissimilar.<sup>28</sup> Current research into violence in schools is of critical importance in order to ascertain if prevention methods are effective, yet statistics are not being kept up to date. A few studies have been conducted in South Africa, namely in 2002, 2008 and fairly recently again in 2012.

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<sup>25</sup> See *Le Roux v Dey* 2011 3 SA 274 (CC) para 197 for the view that the Roman Dutch law should be developed to recognise the value of restorative justice when dealing with child perpetrators in the education context.

<sup>26</sup> Batley "Restorative Justice" 21-32. Skelton *Theory and Practice of Restorative* 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. Furthermore, 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. However, the Department of Justice and Constitutional Development defines restorative justice as: "Restorative Justice is an approach to justice that aims to involve the parties to a dispute and others affected by the harm (victims, offenders, families concerned and community members) in collectively identifying harms, needs and obligations through accepting responsibilities, making restitution, and taking measures to prevent a recurrence of the incident and promoting reconciliation. Restorative Justice sees crime as an act against the victim and shifts the focus to repairing the harm that has been committed against the victim and community. It believes that the offender also needs assistance and seeks to identify what needs to change to prevent future re-offending." The Department of Justice and Constitutional Development date unknown <http://www.justice.gov.za/rj/rj.html>.

<sup>27</sup> Braithwaite 2002 *Brit J Criminol* 569.

<sup>28</sup> See paras 1.2-1.4.

The first South African National Youth Risk Behavioural Survey was conducted by the Department of Health in 2002.<sup>29</sup> According to the results, 49,3% of secondary school pupils in the Free State had been bullied in the month preceding the survey.<sup>30</sup> A survey of 207 learners indicated that 60,9% had been bullied at some point in their lives.<sup>31</sup>

In 2008 over a million South African learners were subjected to some form of violence<sup>32</sup> at school.<sup>33</sup> It is unlikely that these statistics have declined over the past few years, as media reports on bullying have been escalating.<sup>34</sup> A National Schools Violence Study (NSVS) was undertaken by the Centre for Justice and Crime Prevention (CJCP).<sup>35</sup> It was the largest national survey conducted with regards to school violence to date and included 120 primary schools, 139 principals, 277 teachers and 6 787 learners.<sup>36</sup> The findings of the NSVS were the following:

- (a) 10,8% of participants had been threatened with violence in the past;
- (b) 7,5% of participants had been the victim of assault;
- (c) 3,19% of participants had been robbed;
- (d) 1,4% of participants had been the victim of some sort of sexual violence; and
- (e) 12% of participants had been made to feel inferior.<sup>37</sup>

In 2012 a study conducted by the University of South Africa established that out of a research sample of 3 371 learners, 1 158 (34.4%) had been victims of bullying.<sup>38</sup> Emotional bullying is more prevalent, with 55.3% of learners falling victim to such

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<sup>29</sup> De Wet 2007 *SAJE* 191-208.

<sup>30</sup> De Wet 2007 *SAJE* 191-208.

<sup>31</sup> De Wet 2005 *SAJE* 83 notes that a survey was undertaken in 2002 in a Gauteng research project into bullying and the study further showed that, in the preceding year (2001), 90% of learners had been the victims of bullying.

<sup>32</sup> Not necessarily bullying and if so, not restricted to learner-on-learner bullying. However, see para 1.3 on the relationship between violence and bullying.

<sup>33</sup> See para 1.2 above.

<sup>34</sup> Abreu *Pretoria News* 1; Makhubu *Pretoria News* 1.

<sup>35</sup> See para 1.2 above.

<sup>36</sup> Van der Westhuizen and Maree 2010 *Acta Criminologica* 1.

<sup>37</sup> Van der Westhuizen and Maree 2010 *Acta Criminologica* 2.

<sup>38</sup> Youth Research Unit *Nature, Extent and Impact of Bullying*.

bullying, 38.4% being physically victimised, 16.9% being tormented via social media and 2.8% being the victims of verbal bullying. This study also shows that 29.3% of bullying incidents take place at school after class and 32.2% of bullying incidents occur during class.

### 3 Legislative framework

The aim of this section is to analyse the present South African legal framework with regards to bullying and to explore the relief provided for in the *Protection from Harassment Act* in finding viable solutions to this problem.

#### 3.1 *The Constitution of the Republic of South Africa, 1996*

Bullying may violate a number of constitutional rights but this paper will focus on only a few such rights. Due to the large body of information dealing with the various constitutional rights, only the most important rights will be mentioned briefly in this context.<sup>39</sup> The first right which is often violated is the victim's right to equality. In terms of our *Constitution* no individual<sup>40</sup> may discriminate against another person based on race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.<sup>41</sup> The importance of equality in the bullying phenomenon pertains to the reasons why learners are bullied.<sup>42</sup> It ranges from (the victim's) height, weight, age, race, gender, sexual orientation, socio-economic circumstances, disability and sometimes just the perception that a child is weak or too academically inclined.<sup>43</sup> Bullying is unconstitutional because the act of bullying infringes on the constitutional rights of the victims, but the perpetrator's conduct is frequently based on exactly

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<sup>39</sup> The constitutional rights infringed upon are *inter alia* equality (s 9), human dignity (s 10), freedom and security of the person (s 12), children's rights (s 28) and the right to education (s 29).

<sup>40</sup> Section 9(4) of the *Constitution of the Republic of South Africa, 1996* provides that no *individual* (own emphasis added) may discriminate against another person based on the criteria as set out in s 9(3).

<sup>41</sup> Section 9(3) of the *Constitution*.

<sup>42</sup> The purpose of this paper is not to examine the psychology behind bullying. It is therefore sufficient to state that there are many factors that contribute to bullying, some of which are externally influenced (by society, family and friends) and others have an internal origin (for example, mental disorders in both the victim and the bully).

<sup>43</sup> See Laas *Combating Bullying in Schools* 33-60.

those grounds listed in section 9 of the *Constitution* on which discrimination may not occur.

In a bullying incident, the victim's dignity is furthermore at risk. Human dignity is not only a right, but also a constitutional value.<sup>44</sup> Dignity gives human life value. It highlights a person's uniqueness and self-worth.<sup>45</sup> When a bullying incident is scrutinised, and in particular also the ultimate goal of bullying (showcasing power, intimidation, causing physical/emotional harm and humiliation), it is clear that when s/he is bullied the victim's dignity is negatively impacted upon.<sup>46</sup>

Section 12 of the *Constitution* guarantees protection against violence, torture and cruel and inhumane treatment. This section automatically includes the protection of learners against bullying.<sup>47</sup> Each individual is afforded the right of control over his or her own body.<sup>48</sup> It must be borne in mind that section 12 not only protects the physical integrity of individuals, but also their psychological wellbeing.<sup>49</sup> This holds that learners are also afforded constitutional protection against verbal bullying, social exclusion and other forms of non-physical bullying. It thus becomes clear that section 12 of the *Constitution* intricately ties into the bullying phenomenon, as the right to the freedom and security of the person protects everything that bullying transgresses.

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<sup>44</sup> Section 1 of the *Constitution* enshrines human dignity as a constitutional value, whereas s 10 protects human dignity as a constitutional right: *Dawood v Minister of Home Affairs; Shalabit v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 8 BCLR 837 (CC) para 35. Cheadle, Davis and Haysom *South African Constitutional Law* 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."

<sup>45</sup> Cheadle, Davis and Haysom *South African Constitutional Law* 129 point out that human dignity and all that it encompasses tie into the humanity of the individual. Dignity is an inalienable right and not a privilege granted by the state.

<sup>46</sup> The definition in para 1.2 above makes it clear that one's dignity cannot stay intact when one falls victim to bullying. Through experiencing intimidation, physical and or emotional harm and humiliation, such a learner is stripped of his or her human dignity.

<sup>47</sup> Harm as defined in the *Protection from Harassment Act* 17 of 2011 is not only physical, but includes psychological and emotional elements as well. As bullying does in fact include a physical and psychological element in most cases, it is evident that s 12 of the *Constitution* is relevant.

<sup>48</sup> Section 12(2) of the *Constitution*. This also means that every individual has the right to be left alone and is guaranteed autonomy. Also see Prinsloo 2006 *SAJE* 311; Smit 2007 *CARSA* 53-59 for shocking information regarding school violence.

<sup>49</sup> Section 12(2) explicitly states that everyone has the right to physical and psychological integrity. Also see Currie and De Waal *Bill of Rights Handbook* 286.

One's right to privacy is related to one's identity, which in turn influences one's sense of oneself and thus one's right to dignity. There are a number of ways in which a learner's right to privacy is transgressed in a bullying incident: for example, if the bully gets hold of the victim's cellular phone or personal diary and acquaints himself or herself with private information, this constitutes an invasion of privacy. If the bully then goes further by making the personal details known to others, the victim's right to privacy and dignity has been infringed.

Children are afforded special and additional constitutional protection through section 28 of the *Constitution*. It is explicitly stated in section 28(1)(d) that children have the right to be protected against maltreatment, neglect, abuse and degradation. The paramountcy of the child's best interests is also entrenched in section 28(2).<sup>50</sup> Bullying goes against the best interests of the child and adversely affects a child's ability to develop and learn.<sup>51</sup> Bullying behaviour on school grounds endangers the lives of learners.<sup>52</sup> It is therefore clear that bullying, measured against children's rights, should not to be tolerated.<sup>53</sup>

The right to education is an important fundamental human right because it promotes the exercise and enjoyment of other fundamental rights.<sup>54</sup> Education is an unqualified and composite right that demands priority.<sup>55</sup> The state is obliged to

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<sup>50</sup> Also see ss 7 and 9 of the *Children's Act* 38 of 2005; ss 2 and 3 of the *Child Justice Act* 75 of 2008. See *Laerskool Middelburg v Departementshoof, Mpumalanga* 2003 4 SA 160 (T) 177-178 for the application of this principle in the education context.

<sup>51</sup> Such behaviour will ultimately stultify emotional development and impair a child's ability to learn. Reyneke 2010 *JJS* 89 states that the impact of violence in schools can be seen in a learner's performance, as concentration problems start to occur, poor overall performance is evident, dropout levels increase etc. Being subjected to violence not only affects a victim's rights to bodily integrity but it also adversely affects his or her right to dignity. A perpetrator of violence often sees his or her victim as no more than an object against which to vent anger and frustration.

<sup>52</sup> Van Jaarsveld 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 2009 *AJPHRD* 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.

<sup>53</sup> Section 2(b) of the *Children's Act* 38 of 2005 holds 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.

<sup>54</sup> Such as political, economic, social and cultural rights: Bekker "Right to Education" 1; Veriava and Coomans "Right to Education" 57; Malherbe "Education Rights" 399. For a full exposition of s 29 of the *Constitution*, see Woolman and Bishop "Education" 57-i – 57-95.

<sup>55</sup> Van Bueren *Rights of the Child* 233-255.

respect, protect and promote the right to basic education.<sup>56</sup> This means that, at the bare minimum, the state must provide facilities for the enjoyment of the right and eradicate the elements violating the full enjoyment of the right to education.<sup>57</sup> Ideally, children should be able to take advantage of this right without being obstructed in doing so. Bullying in the education context has severe consequences which adversely affect all those involved. This means that it will negatively impact on a learner's academic performance, which goes against the essence of section 29.<sup>58</sup> The escalation of bullying and school violence is devastating and counterproductive to proper education.<sup>59</sup>

### **3.2 Legislation**

National legislation builds on the constitutional framework that has been highlighted above in the context of bullying. With regard to bullying and school safety, four Acts are important, namely the *South African Schools Act* 84 of 1996, the *Children's Act* 38 of 2005, the *Child Justice Act* 75 of 2008 and the *Protection from Harassment Act* 17 of 2011. The essence of these enactments will be briefly mentioned with special emphasis on the impact thereof on the topic under discussion.

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<sup>56</sup> Sections 7(2), 29(1)(a) and (b) of the *Constitution*.

<sup>57</sup> *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 3 SA 165 (CC) para 9 referring to s 32(a) of the Interim *Constitution (Constitution of the Republic of South Africa 200 of 1993)*; *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 5 SA 87 (WCC) 90; Malherbe "Education Rights" 407. Also see Currie and De Waal *Bill of Rights Handbook* 638.

<sup>58</sup> In order to ensure that learners have a physically and mentally safe environment for healthy learning, the onus vests not only upon schools but also upon learners to respect and promote the rights of other learners at the school. One of the principles underlying the *Constitution* is *ubuntu*, which translates into mutual respect for one another. Where learners respect one another there will be less bullying and a more productive climate of learning. Also see s 16 of the *Children's Act* 38 of 2005, which explicitly provides for every child to have responsibilities appropriate to the child's age and ability.

<sup>59</sup> Smit 2007 *CARSA* 53-59. Smit notes that, if violence is allowed to become accepted conduct, gang-related violence in schools will escalate, exposing more learners to unstable and violent behaviour and gang involvement in schools. Joubert "School Discipline" 502-520 states that schools have a legal duty to provide learners with a safe, secure environment, protecting them against harm which might adversely affect their physical and psychological wellbeing or infringe upon their fundamental human rights.

### 3.2.1 *The South African Schools Act 84 of 1996*

The *South African Schools Act* 84 of 1996 (SASA) provides that governing bodies of public schools must adopt a code of conduct for the learners after proper consultation with the various role-players.<sup>60</sup> The code of conduct comprises a set of rules which sets the standard for learner behaviour, and encourage self-discipline and mutual respect.<sup>61</sup> It outlines positive behaviour but also indicates how misbehaviour will be dealt with.<sup>62</sup> A code of conduct provides the regulatory framework within which a safe, secure, disciplined and purposive learning environment may be established.<sup>63</sup> It must also improve and maintain the quality of the educating process.<sup>64</sup>

At this point it is necessary to establish what discipline entails. School discipline is defined as positive actions whereby a child is taught confidence and self-control.<sup>65</sup> These actions are contained in a well-planned process rather than a single act.<sup>66</sup> Within the context of a school or learning environment, discipline ought to be viewed from a positive and not from a punitive perspective.<sup>67</sup> Discipline and punishment should not be seen as conjunctive terms, as discipline aims at instilling positive behavioural values, whereas punishment bears a negative connotation. The distinction between discipline and punishment becomes clearer against the background of the three categories of discipline, namely:<sup>68</sup>

- (a) Preventive discipline, which comprises basic rules and consequences.
- (b) Corrective discipline, which occurs when an educator corrects negative behaviour (anti-social, deviant, disruptive behaviour).

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<sup>60</sup> Section 8(1) of the *South African Schools Act* 84 of 1996 (hereafter SASA).

<sup>61</sup> Bray "The South African Schools Act" 484.

<sup>62</sup> The code of conduct must also contain provisions of due process which have to be followed in disciplinary procedures: s 8(5) of SASA.

<sup>63</sup> Section 8(2) of SASA.

<sup>64</sup> Section 8(2) of SASA.

<sup>65</sup> Joubert "School Discipline" 503.

<sup>66</sup> Joubert "School Discipline" 503.

<sup>67</sup> Joubert "School Discipline" 502. The definition of "punitive" accessed from FARLEX Free Dictionary date unknown <http://www.thefreedictionary.com/punitive> is "[i]nflicting or aiming to inflict punishment".

<sup>68</sup> Joubert "School Discipline" 503.

(c) Supportive discipline, which ensures the establishment of positive working relations amongst learners.

A code of conduct aims at rectifying misconduct (conduct that will not be tolerated, for example deviant, defiant, or disruptive behaviour) and makes provision for the procedures that attend to learner misconduct.<sup>69</sup> In general, schools depend on their code of conduct to address bullying, but unfortunately bullying is hardly ever explicitly mentioned therein as a transgression.<sup>70</sup> It is submitted that clearly defining bullying and spelling out the consequences thereof in the code of conduct would enhance school discipline because it would identify the act of bullying as misconduct which could be serious and which would be dealt with accordingly. If bullying were to be clearly defined in the code of conduct, the relationship between bullying and other forms of misconduct would also become apparent.

The SASA contains a prohibition of initiation practices.<sup>71</sup> Unfortunately, bullying is yet again not explicitly mentioned. However, most of the elements of bullying are identified as conduct which will not be tolerated in terms of section 10A,<sup>72</sup> that is:

- (a) the endangerment of mental or physical wellbeing;<sup>73</sup>
- (b) undermining human dignity;<sup>74</sup>
- (c) humiliation;<sup>75</sup>
- (d) undermining the rights as set out in the Bill of Rights;<sup>76</sup> and/or

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<sup>69</sup> It is important that the principle of due process must also be incorporated in the code of conduct. Due process is explicitly mentioned in s 8(5)(a) of SASA, but is also enshrined in s 33 of the *Constitution*. This principle is important as a school must follow strict procedures where a learner is disciplined for misconduct. Bray 2005 *SAJE* 134 emphasises the importance of school discipline to an effective teaching and learning environment. Thus disciplinary measures ought not to be seen as negative but rather as a means by which to establish and maintain a well-disciplined school.

<sup>70</sup> Mollo *Legal Perspective* 93.

<sup>71</sup> Section 10A of SASA.

<sup>72</sup> Also see para 1.2 for a definition of bullying to be compared to (a)-(e) in the text above. The similarities are clear, but bullying is not mentioned *eo nomine*. It could in some instances be read in.

<sup>73</sup> Section 10A(3)(a) of SASA.

<sup>74</sup> Section 10A(3)(b) of SASA.

<sup>75</sup> Section 10A(3)(c) of SASA.

(e) the destruction of private property.<sup>77</sup>

When comparing the above-mentioned elements with the definition of bullying, the inference can be drawn that initiation practices may well be a form of or disguise for bullying.<sup>78</sup> Initiation practices deprive a learner of his or her intrinsic human dignity.<sup>79</sup> It would be a step in the right direction to amend the SASA to include the term "bullying" in section 1. Bullying should also be addressed in the code of conduct of each and every school.

### 3.2.2 *The Children's Act 38 of 2005*

Section 2 of the *Children's Act* encompasses the objectives of the Act. These include *inter alia* giving effect to the constitutional rights of children, such as the protection against maltreatment, abuse and neglect and very importantly, they provide for the promotion of the best interests of the child.<sup>80</sup> This Act also aims at providing structures and means for promoting and monitoring the physical, psychological, intellectual, emotional and social development of children,<sup>81</sup> while protecting them from physical and emotional harm.<sup>82</sup> The objectives of the *Children's Act* are thus aligned with the eradication of bullying in schools.

Section 6 of the *Children's Act* contains the general principles applicable in children's matters. Pertinent to this article is section 6(2),<sup>83</sup> which governs all proceedings,

<sup>76</sup> Section 10A(3)(d) of SASA.

<sup>77</sup> Section 10A(3)(f) of SASA.

<sup>78</sup> See para 1.2 for a definition of bullying. In instances where initiation practices infringe upon the dignity of a learner, cause him or her physical or emotional harm and humiliate the learner, this is parallel to bullying, as the aim of bullying is to humiliate another person. It is further argued that the similarity between the two occurrences lies in the outcome, which is that a learner feels degraded and sometimes defamed. Also see Laas *Combating Bullying in Schools* 33-60.

<sup>79</sup> Malherbe "Impact of Constitutional Rights" 425 states that human dignity underwrites most if not all fundamental rights.

<sup>80</sup> Sections 2(b)(iii) and (iv) of the *Children's Act* 38 of 2005 (hereafter the *Children's Act*). The best interest standard is constitutionally underpinned in s 28(2) of the *Constitution*. Also see Skelton and Proudlock "Children's Act" 1-31.

<sup>81</sup> Section 2(d) of the *Children's Act*.

<sup>82</sup> Section 2(f) of the *Children's Act*.

<sup>83</sup> Section 6(2) of the *Children's Act* holds the following: "All proceedings, actions or decisions in a matter concerning a child must- (a) respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act, subject to any lawful limitation; (b) respect the child's inherent dignity; (c) treat the child fairly and equitably; (d) protect the child from unfair discrimination on

actions and decisions in matters concerning a child. The approach followed in section 6(2) correlates with both the *Constitution* as well as with international trends.<sup>84</sup> The general principles are all inclusive and encompass fundamental rights as enshrined in Chapter 2 of the *Constitution*, the standard of best interest of the child, as well as all other principles mentioned in the Act.<sup>85</sup> The importance of dignity is also highlighted.<sup>86</sup> This has the implication that children have the right to be treated as people, to be taken seriously and to be acknowledged as rights-bearers. Section 6(2) also includes a reference to equality, yet another important fundamental right covered in section 9 of the *Constitution*.<sup>87</sup> Finally, section 6(4) proclaims that a conciliatory and problem-solving approach is fitting in dealing with matters which involve children.<sup>88</sup>

The standard of best interest of the child has been part of South African law for a number of years, and the importance thereof has been endorsed by case law.<sup>89</sup> Section 28(2) of the *Constitution* emphasises the paramountcy of the best interests of the child.<sup>90</sup> Similarly, the *Children's Act* built on this constitutional provision by expanding upon what the best interests of the child are<sup>91</sup> and provides that in all matters pertaining to the care, protection and wellbeing of a child the best interest of the child will be of paramount importance. What the best interests of a child may

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any ground, including on the grounds of the health status or disability of the child or a family member of the child; (e) recognise a child's need for development and to engage in play and other recreational activities appropriate to the child's age".

<sup>84</sup> Boezaart "General Principles" 2-4.

<sup>85</sup> Section 6(2)(a) of the *Children's Act*.

<sup>86</sup> Section 6(2)(b) of the *Children's Act*.

<sup>87</sup> Section 6(2)(c) of the *Children's Act*.

<sup>88</sup> Such as mediation. See para 3.2.4 below for including mediation in the conditions of a protection order in terms of the *Protection from Harassment Act* 17 of 2011.

<sup>89</sup> For instance in "custody" after divorce: *Fletcher v Fletcher* 1948 1 SA 130 (A) 134, 144-145; *Tromp v Tromp* 1956 4 SA 738 (N) 746B-C; *Shawzin v Laufer* 1968 4 SA 657 (A) 662H, 666D; *Segal v Segal* 1971 4 SA 317 (C) 323-324. See Palmer "Best Interests Criterion" 98. The term "custody" has been replaced by "care" in the *Children's Act*; see s 1 of the Act. And on the implications thereof see *WW v EW* 2011 6 SA 53 (KZP).

<sup>90</sup> Section 28(2) of the *Constitution* reads as follows: "A child's best interests are of paramount importance in every matter concerning the child." Also see also Skelton "Parental Responsibilities and Rights" 63.

<sup>91</sup> Section 7(1) of the *Children's Act* contains a list of factors for courts to consider when determining a child's best interest. In the context of bullying in schools, it is important to note that personal facts such as the child's age, maturity, gender, background and other characteristics have to be considered. The same applies to the child's physical and emotional security and development and any disability or chronic illness which the child might have. Also see s 7(1)(l) on the protection of children from physical or psychological harm.

be is a factual question, the determination of which takes place with a view to the facts of every case.<sup>92</sup> The Constitutional Court has furthermore held that a child-centred, balanced approach informed by constitutional values should be adopted when considering what is in a child's best interests.<sup>93</sup>

Rights cannot be regarded in a vacuum. In practice various rights come into play, often competing in respect of their importance.<sup>94</sup> In the context of bullying it is the rights of a child or of many children that have to be demarcated or balanced. According to the Constitutional Court's decision in *S v M*,<sup>95</sup> the correct approach is to apply the "paramountcy principle in a meaningful way without unduly obliterating other valuable and constitutionally protected interests".

With regard to bullying, section 14 of the *Children's Act* is very important. This section provides every child with the right to bring, and to be assisted in bringing, a matter to court.<sup>96</sup> The *Constitution* compels the state to respect, protect and promote the rights of all citizens.<sup>97</sup> In order to fully comply with section 7(2) of the *Constitution* and section 14 of the *Children's Act*, procedures must be in place to facilitate upholding the rules of natural justice,<sup>98</sup> which have a bearing on the rights of the victims and perpetrators of bullying.<sup>99</sup> Adherence hereto manifests *inter alia* in

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<sup>92</sup> Heaton 2009 *JJS* 9 aptly explains this child-centred individualised approach as follows: "Everybody or person who has to determine the child's best interests must evaluate each individual case or situation in light of the individual child's position and the effect that the individual child's circumstances are having or will probably have on the child."

<sup>93</sup> *S v M* 2008 3 SA 232 (CC) paras 15, 18, 25; Heaton 2009 *JJS* 14. A child-centred approach in terms of addressing bullying is necessary because both the perpetrator and the victim in a bullying incident are children. The decisions made in such an approach affect their lives and therefore it is submitted that their opinions and best interests are paramount. Heaton also pleads for a balanced approach to be adopted when incorporating cultural and religious rules and practices in determining the child's best interests: Heaton 2009 *JJS* 12. See *Bhe v Magistrate, Khayalitsa*; *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC) paras 234, 235; *MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC); *AD v DW* 2008 3 SA 183 (CC) para 50.

<sup>94</sup> *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) para 15/768B.

<sup>95</sup> *S v M* 2008 3 SA 232 (CC) para 25 249D. Also see para 15 244F: "... that the courts must function in a manner which at all times shows due respect for children's rights".

<sup>96</sup> The victim of the bullying incident could apply for a protection order in terms of the *Protection from Harassment Act* 17 of 2011. See para 3.2.4 below.

<sup>97</sup> Section 7(2) of the *Constitution*.

<sup>98</sup> Rules of natural justice relevant in this instance *inter alia* include due process and *audi alteram partem*.

<sup>99</sup> Procedures ought to include a check list of tasks to be performed in order to facilitate solving the issue, such as contacting the parents of the parties involved, getting written statements from all

section 8 of the SASA as it lays the foundation for school discipline and the subsequent drafting and maintenance of a code of conduct for learners. The state is also bound by section 60 of the SASA, which provides that it can be held liable for the damage, loss or injury incurred by a learner through the activities of a public school. This would be possible where, for example, a school is aware of a specific learner's continuous problems with bullies but fails to intervene. The school can be held liable in delict and can be ordered to pay damages to the plaintiff (the learner assisted by his or her parents or guardian or curator *ad litem*).

Section 15 of the *Children's Act* enhances the provision of justice for children by providing a list of people that have the right to approach a competent court on behalf of a child.<sup>100</sup> It is reminiscent of section 38 of the *Constitution*, but applies specifically to children. This section is very important, as it does not limit the people who may approach the court to the child or his or her parents or guardian only.

The means through which justice can be sought and achieved includes restorative justice.<sup>101</sup> It must always be borne in mind that seeking and serving justice within the context of a bullying incident by no means aims at discriminating against any of the involved parties.<sup>102</sup> When a balance is disturbed by one learner, causing harm to another learner, whether physical, emotional or both, the equilibrium needs to be restored. Even though accountability is important, it is submitted that if a programme or process focuses solely on accountability it will be more punitive rather than restorative. Therefore, balance is necessary with regard to accountability for the bully's actions, the moral obligation of the bully toward the victim, vindication for

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involved parties, meeting with the parents and the involved parties, following up on the incident, and any other necessary aftercare precautions.

<sup>100</sup> Section 15 of the *Children's Act* reads as follows: "(1) Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights or this Act has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. (2) The persons who may approach a court, are: (a) A child who is affected by or involved in the matter to be adjudicated; (b) anyone acting on the interests of the child or 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; and (d) anyone acting in the public interest."

<sup>101</sup> See para 1.5 for a definition of restorative justice.

<sup>102</sup> The relevance of having access to courts and restorative justice is based on the fact that restorative mediation is one form of restorative justice that could work well to facilitate an amicable solution in terms of bullying. It is postulated that just as a child has access to a court, a child should have access to these alternative methods of justice as well.

the pain of the victim, and dealing with other issues arising from the bullying incident, such as bystander involvement.<sup>103</sup>

### 3.2.3 *The Child Justice Act 75 of 2008*

The *Child Justice Act* is ground-breaking legislation which sets out the requirements establishing the criminal liability of children and also aims at rectifying injustice through restorative justice processes. 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.<sup>104</sup>

Thus, punitive justice through which a person is punished for wrongdoing is not the focus of the Act, but rather restorative justice by means of which a child can be rehabilitated.<sup>105</sup> This Act suggests that a shift in moral perspective is needed within broad South African society towards the child justice system.

Section 2<sup>106</sup> of the *Child Justice Act* outlines the context within which this legislation must be read.<sup>107</sup> First and foremost, the Act seeks to regulate a legislative framework for children who come into conflict with the law. One of the most

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<sup>103</sup> There are typically two types of bystanders, active defenders and passive bystanders. The latter neither take part in the incident nor defend the victim, but look on. The former actively get involved to try and help the victim. Information accessed from Hazelden Foundation date unknown <http://www.violencepreventionworks.org/public/bullying.page>. These children cannot be disregarded and should also be included in restorative justice processes as they ought to be taught how to deal with bullying at the time and *ex post facto*. Counselling may be needed if the incident was serious in nature.

<sup>104</sup> Preamble to the *Child Justice Act 75 of 2008* (hereafter the *Child Justice Act*).

<sup>105</sup> Sloth-Nielsen and Gallinetti 2011 *PER* 64 note that the promulgation of the *Child Justice Act* introduces a new era of alternative dispute resolution in terms of restorative justice and diversion as alternatives to the formal criminal justice system.

<sup>106</sup> 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; foster a child's human dignity; underwrite the importance of a child's respect for the fundamental rights of others through accountability; promote 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, instead using appropriate alternative means by which to establish accountability and rehabilitation; and use diversion.

<sup>107</sup> Gallinetti *Getting to Know the Child Justice Act* 12. Sloth-Nielsen and Gallinetti 2011 *PER* 68 observe that s 2 is reminiscent of the preamble to the Act.

important aims of the Act is to uphold a child's constitutionally protected rights.<sup>108</sup> Furthermore, a balance is created between the rights of the accused child and the rights of the community.<sup>109</sup> The focus is placed on rehabilitation and support rather than on ostracising a child offender.<sup>110</sup>

When dealing with a child offender, the action taken should be proportionate to the offence committed as well as the circumstances of the child offender.<sup>111</sup> A child accused of committing a crime must be afforded the opportunity to participate in any proceedings affecting him or her.<sup>112</sup> Undue delay must be avoided when working within the child justice system, as it may be detrimental not only to the offender's psyche but also to that of the victim.<sup>113</sup>

Bullying can contain a criminal element, a fact which is evident also in the countless media reports on bullying.<sup>114</sup> The *Child Justice Act* 75 of 2008 ensures a separate criminal justice system for children found guilty of a crime.<sup>115</sup> This Act divides the persons to whom it applies into three categories: children below 10 years of age; children 10 years and older but younger than 18,<sup>116</sup> and young people 18 years of age and older but under 21 years.<sup>117</sup> In the context of learner-on-learner bullying at

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<sup>108</sup> Section 2(a) of the *Child Justice Act*, as well as s 28(1)(g) of the *Constitution*. Also see para 3.1.

<sup>109</sup> Gallinetti *Getting to Know the Child Justice Act* 12. Sloth-Nielsen and Gallinetti 2011 *PER* 71 also propose that through s 2(b)(ii) and (iv) the Act seeks to re-establish balance, seeing that it highlights the interest not only of victims but also of society insofar as it is affected by the crime.

<sup>110</sup> Gallinetti *Getting to Know the Child Justice Act* 12.

<sup>111</sup> Section 3(b) of the *Child Justice Act*. Bullying can involve a variety of recognised offences, ranging from the minor to the serious. A "one size fits all" approach can therefore not 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.

<sup>112</sup> Section 3(c) of the *Child Justice Act*. It is imperative to always hear the other side (*audi alteram partem*). The rules of natural justice also apply to child justice and especially in instances of bullying the views of both sides need to be taken into account in order to make a correct evaluation of the event.

<sup>113</sup> Section 3(f) of the *Child Justice Act*. Sloth-Nielsen and Gallinetti 2011 *PER* 73 note that this requirement is endemic to the African criminal justice system.

<sup>114</sup> See paras 1.2 and 1.3 above.

<sup>115</sup> Gallinetti "Child Justice" 635-664.

<sup>116</sup> Gallinetti "Child Justice" 650 correctly states that the procedures set out in the *Child Justice Act* are intended to protect children whilst they are in the criminal justice system.

<sup>117</sup> Gallinetti "Child Justice" 650. 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 benefit from the procedures stipulated in this Act.

school, the perpetrator will usually<sup>118</sup> be a child and would thus fall into one of the first two categories. Before considering the perpetrator's criminal responsibility, it will have to be established whether the child has criminal capacity.

According to section 7(1) of the *Child Justice Act* a child who, at the time when the offence is committed, is under 10 years of age cannot be prosecuted.<sup>119</sup> In terms of section 7(2) of the Act, a child of 10 years and older but under the age of 14 is presumed to be *doli incapax*. However, this assumption is rebuttable and if it were found beyond reasonable doubt that the child had the necessary criminal capacity, he or she could be held criminally liable for his or her offence. In essence, the *doli incapax* rule is still in force, but the minimum age for criminal responsibility has changed. A child over the age of 14 is presumed to have full criminal capacity.<sup>120</sup>

The Act furthermore lays down specific procedures to be followed where a suspected child offender is under the age of 10 at the time the offence was committed.<sup>121</sup> It is suggested that sections 9(3)(a)(ii) to (v) are very important in the context of bullying. Counselling or therapy is explicitly mentioned.<sup>122</sup> Where a suspected child

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<sup>118</sup> There are instances where young people aged 18 and 19 are still in school. Also see Laas *Combating Bullying in Schools* 127 fn 420.

<sup>119</sup> Section 9 of the *Child Justice Act* provides for a specific procedure in dealing with children under the age of 10 accused of a criminal offence. This means that a child under the age of 10 may not be arrested, but is to be handed over to his or her parents or legal guardian. Thereafter, a probation officer must assess the child as per Ch 5 of the Act and may refer the child for counselling, a specially designed programme to suit the needs of a child under the age of 10, and must arrange for a meeting to be attended by the child, his or her parents or legal guardian and any other relevant person. Thus, if the perpetrator is a child below the age of 10, the child will not be totally exempted from facing the consequences of his or her actions in some way.

<sup>120</sup> Gallinetti "Child Justice" 650. Age is also a crucial factor with regard to delictual accountability. A child under the age of seven (an *infans*) has no capacity to litigate and any legal action brought before a court should be done by the parent or guardian on behalf of the *infans*. A minor has limited capacity to litigate and can institute proceedings or be summonsed with the help of his or her parents or legal guardian. In terms of accountability, a person can be held accountable if he has the mental capacity to distinguish between right and wrong and acts in accordance with this realisation. An *infans* is regarded as *doli et culpae incapax* and cannot be held liable based on fault. A rebuttable presumption exists regarding the accountability of a minor between the ages of seven and 12 for girls and 14 for boys pertaining to unlawful acts. Drawing a distinction based on sex is in direct contravention of s 9(2) and (3) of the *Constitution* and therefore accountability should be at the age of 14 for both boys and girls.

<sup>121</sup> 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 such a person cannot be found, to a child and youth care centre. Upon taking these steps, a probation officer must be notified. Also see Gallinetti *Getting to Know the Child Justice Act* 15; Gallinetti "Child Justice" 649.

<sup>122</sup> Section 9(3)(a)(ii) of the *Child Justice Act*. Also see Laas *Combating Bullying in Schools* 33-58.

offender is under the age of 10, rehabilitation will be not only beneficial but also necessary to correct a possibly skewed cognitive framework. Programmes designed to suit the specific needs of a particular child are also mentioned.<sup>123</sup> 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/guardian.<sup>124</sup> The aim of such a meeting is to assist the probation officer in understanding the circumstances relating to the allegations against the child and, following this, to draft a plan suited to the child and the relevant circumstances.<sup>125</sup>

The *Child Justice Act* also provides for the possibility of diverting matters away from the formal criminal justice system and appropriate diversion options. Diversion aims to deal with children outside the criminal justice system, underlines the importance of accountability, meets the needs of the child in question, promotes the reintegration of the child into his or her community, provides a platform for the victim to express his or her feelings, promotes reconciliation, prevents stigmatisation of the child offender, reduces re-offending potential, prevents a criminal record, and promotes human dignity.<sup>126</sup> Diversion<sup>127</sup> applies at two levels depending on the seriousness of the offence and pertaining to the schedules containing the lists of offences.<sup>128</sup> Schedule 1 contains minor offences, Schedule 2 more serious offences, and Schedule 3 the most serious offences. Bullying has not been recognised as a crime in South African law as yet and unfortunately no mention has therefore been

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<sup>123</sup> Section 9(3)(a)(iii) of the *Child Justice Act*.

<sup>124</sup> Also see s 53(7) and 61 of the *Child Justice Act* in this regard.

<sup>125</sup> Section 9(4) of the *Child Justice Act*.

<sup>126</sup> Section 51 of the *Child Justice Act*. Also see Gallinetti *Getting to Know the Child Justice Act* 43. Sloth-Nielsen and Gallinetti 2011 *PER* 75 further note that there are six diversion orders that encompass elements of *ubuntu*. These include family time orders (which oblige 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); and 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 suggested that all of these 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 to work on behaviour, and lastly to mend fences with his or her peers. If this is done, the chances of the child's reoffending (bullying again) will be slim to non-existent.

<sup>127</sup> Section 53 of the *Child Justice Act* includes a few options with regard to diversion ranging from an apology (written or oral) to symbolic restitution (which can range from a hand crafted gift to a hug) to either the victim and or the community.

<sup>128</sup> Section 53(2)-(7) of the *Child Justice Act*. Also see Gallinetti *Getting to Know the Child Justice Act* 44. The two levels are divided so that minor offences (Sch 1) fall under level one whereas more serious and serious offences (Sch 2 and 3) fall under level 2.

made of bullying in the schedules annexed to the *Child Justice Act*.<sup>129</sup> However, diversion serves as an excellent example of how to deal with a bully, after the incident. Instead of having the child ostracised, he or she can be held accountable for his or her actions without punishment that will exclude him or her from the community. If this is done, a bully will be able to learn from the experience and through counselling, therapy and family group conferencing be equipped to better deal with his or her issues. This in turn will assist the child in making better choices with regard to social behaviour. It is crucial to closely monitor compliance<sup>130</sup> with a diversion order.<sup>131</sup> A probation officer must be designated to monitor the child's compliance with the diversion order.<sup>132</sup>

### 3.2.4 *The Protection from Harassment Act 17 of 2011*

The *Protection from Harassment Act* is the latest addition to the legal framework that can be employed to enforce the rights of the victims of bullying.<sup>133</sup> The preamble to the Act<sup>134</sup> *inter alia* provides that the aim of the Act is to afford harassment victims with a (civil) remedy against harassment.<sup>135</sup> As previously stated, a parallel can be drawn between bullying and harassment<sup>136</sup> and the Preamble of the *Protection from Harassment Act* explicitly states that the aim of the Act is to consider the best interests of the child as of paramount importance. It is therefore clear that

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<sup>129</sup> The *Protection from Harassment Act 17 of 2011* gives a wide definition of harassment in s 1, which could be applied to bullying. However, bullying is not mentioned *eo nomine*. Children are mentioned but in a broad sense and no mention is made of a child as a perpetrator. Bullying is a *sui generis* offence and therefore it is argued that it ought to have a particular legal definition. See para 3.2.4 below.

<sup>130</sup> 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, the compliance officer must report 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.

<sup>131</sup> Gallinetti *Getting to Know the Child Justice Act* 48.

<sup>132</sup> Gallinetti *Getting to Know the Child Justice Act* 48.

<sup>133</sup> It became law on 27 April 2013. See Proc R9 in GG 36357 of 12 April 2013.

<sup>134</sup> The preamble also mentions the rights to equality, privacy, dignity, freedom and security of the person, which includes the right to be free from violence.

<sup>135</sup> Preamble to the *Protection from Harassment Act 17 of 2011* (hereafter the *Protection from Harassment Act*). It is also important to note that the preamble is constitutionally in accordance with s 28(2) as well as ss 7 and 9 of the *Children's Act 38 of 2005* when it states that a child's best interest should be regarded as of paramount importance. The inference could be made that the Act follows a victim-centred approach.

<sup>136</sup> See para 1.4.

the *Protection from Harassment Act* can be applied to situations of bullying and that it aims at addressing the interests of children.

The victim of bullying can apply for a protection order against a child-bully. According to section 2(3)(a) of the Act, such an application may be brought on behalf of the complainant by someone who has a material interest in the matter. In the instance of bullying, such a person could be the parent or legal guardian of the victim. However, section 2(4) also provides that a child may apply for a protection order without the assistance of his or her parents. It is evident therefore, that section 2(4) of the *Protection from Harassment Act* goes beyond sections 14 and 15 of the *Children's Act* by reducing the common law limitations on a child's capacity to litigate and to have access to a court of law. Furthermore, if the complainant is not represented in this application by a legal representative, the clerk of the court must inform the complainant of his or her right to also lodge criminal charges against the respondent for *crimen iniuria*,<sup>137</sup> assault, trespass, extortion or any other offence that has a bearing on the person or property of the complainant.<sup>138</sup> It has been stated that bullying could encompass several criminal acts. In dealing with children, the criminal acts aimed at protecting the person of the child could be considered more serious than those protecting his or her property. However, this is not necessarily the case.

Such a protection order then prohibits the bully from further harassing the victim and eliciting another individual's assistance in order to harass the victim.<sup>139</sup> Furthermore a court may order additional conditions<sup>140</sup> that it deems necessary to

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<sup>137</sup> Burchell *Principles of Criminal Law* 746 defines *crimen iniuria* as "unlawfully and intentionally impairing the dignity or privacy of another person". It has already been indicated above that the dignity and privacy of the victim of bullying is at stake and therefore a charge of *crimen iniuria* could be appropriate if the criminal justice route is taken, perhaps in the case of serious violations. Typical situations where a criminal charge could be employed would be in cases of peeping (spying) or indecent exposure. Also note that age, ie the youth of the victim, could be a factor affecting the seriousness of the impairment of the victim's dignity: Burchell *Principles of Criminal Law* 754. There is also a link between the protection of dignity and the essence of humanity or *Ubuntu*. Burchell *Principles of Criminal Law* 746.

<sup>138</sup> Section 2(2)(b) of the *Protection from Harassment Act*.

<sup>139</sup> Section 10(1)(a) and (b) of the *Protection from Harassment Act*.

<sup>140</sup> Chapter 8 of the *Child Justice Act* deals with diversion as a means of seeing justice served without recourse to a punitive system. Furthermore, victim-offender mediation should work well

ensure the safety and wellbeing of the victim.<sup>141</sup> These conditions could be most valuable in learner on learner bullying. The imposing of conditions provides an opportunity to engage the bully in therapy, to involve the family in a group conference, and embark on mediation and restorative justice processes that could even limit or prevent the criminal prosecution of the child.

A child-victim of bullying may thus seek immediate relief through a protection order in accordance with the *Protection from Harassment Act*, and he or she could invoke this remedy with or without the assistance of parents and guardians. However, the child-respondent could be served with an interim protection order even in his or her absence and without notice.<sup>142</sup> Where for example a bully is a child under the age of 10 years, he or she cannot be criminally prosecuted in terms of the *Child Justice Act* but a protection order can be issued against him or her in terms of the *Protection from Harassment Act* irrespective of age. The implication is that such a protection order would be followed by an arrest warrant, should the respondent (the bully) contravene any of the terms as set out in the protection order.<sup>143</sup> This means that the child in the example mentioned might be arrested,<sup>144</sup> even though he or she was under 10 years of age. Such a situation could indicate that there are discrepancies between the *Protection from Harassment Act* and the *Child Justice Act*. It is submitted that prosecuting a child below the age of 10 years in terms of the *Protection from Harassment Act* would be ill advised as it would contradict the aim of the Act, which *inter alia* upholds the paramountcy of the best interest of the child.<sup>145</sup>

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in this instance. Naudé, Prinsloo and Ladikos 2003 *Acta Criminologica* 10 state that mediation ought to be used in accordance with the principles of restorative justice.

<sup>141</sup> Section 10(2) of the *Protection from Harassment Act*.

<sup>142</sup> Section 3(2) of the *Protection from Harassment Act*.

<sup>143</sup> Section 9(6) of the *Protection from Harassment Act*.

<sup>144</sup> Section 11(1)(a) of the *Protection from Harassment Act*.

<sup>145</sup> Preamble to the *Protection from Harassment Act*. Also see s 28(2) of the *Constitution*; ss 7 and 9 of the *Children's Act*, and s 2 of the *Child Justice Act*. It is suggested that even though it is necessary for a victim's rights to be protected, especially where the victim is a child, the respondent's rights should also be taken into consideration, especially when the respondent is a child.

#### **4 The *Protection from Harassment Act 17 of 2011*, the child and restorative justice**

One of the main elements of a successful action plan against bullying includes a proper strategy to deal with the incident *ex post facto*. It is possible that the *Protection from Harassment Act 17 of 2011* may pose an immediate form of relief by preventing a bully from engaging in any kind of abusive conduct towards the victim.<sup>146</sup> However, the long-term impact of bullying also requires attention. The issuing of a protection order will not completely solve the problem, but can be used as a starting point in severe cases of bullying. Restorative justice processes ought to accompany or immediately follow upon a protection order to prevent further damage, as well as to set the victim's healing and restoration in motion.<sup>147</sup> It is suggested that where a child is involved as a respondent under the *Protection from Harassment Act*, diversion rather than immediate arrest should be implemented. Regulations that reconcile the *Protection from Harassment Act* with the *Child Justice Act* ought to be drafted so that the two pieces of legislation can work with, instead of against, each other. Restorative justice is an appropriate mechanism to incorporate into a bullying plan, as both parties could learn valuable lessons from the process.<sup>148</sup>

#### **5 Conclusion and recommendations**

The inception of the *Protection from Harassment Act 17 of 2011* is ground-breaking and brings widespread relief for all victims of harassment, including children. However, in the context of learner-on-learner bullying, special conditions should be put in place. The *Protection from Harassment Act* should be read in conjunction with the *Child Justice Act 75 of 2008*. The *Protection from Harassment Act* mentions children only in connection with complainants but fails to mention the procedure where the respondent is a child.<sup>149</sup> The crimes as stipulated in Schedule 1 of the

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<sup>146</sup> See para 3.2.4.

<sup>147</sup> See para 3.2.2.

<sup>148</sup> See para 1.5.

<sup>149</sup> Section 1 of the *Protection from Harassment Act* defines a child as a minor under the age of 18. This definition pertains to s 2(4) of the Act, whereby a child may apply for a protection order with or without the help of a parent or legal guardian.

*Child Justice Act* 75 of 2008 include *inter alia crimen iniuria* and defamation.<sup>150</sup> Bullying can comprise a physical or psychological element or both.<sup>151</sup> This means that following a bullying incident, different aspects of the law become relevant. The *Protection from Harassment Act* provides a civil remedy with a criminal law implication where a defendant contravenes the terms of the protection order since an arrest warrant is issued along with the protection order for such instances where it is necessary.<sup>152</sup> The *Child Justice Act* is an important mechanism to be used in instances where the parties involved are children, or young people under the age of 21, since the aim of the Act (being in line with restorative justice and *ubuntu*) is not to punish but to rehabilitate and to reconcile. Depending on age, a bully can be held criminally liable for a myriad of criminal acts, including assault, intimidation, murder, culpable homicide, *crimen iniuria*, theft, malicious injury to property and arson, depending on the facts of each case. Though the definition of harassment<sup>153</sup> is not synonymous with that of *crimen iniuria*,<sup>154</sup> it is submitted that both actions impair the dignity, privacy and freedom of the victim.<sup>155</sup> It is therefore suggested that additional regulations be drafted in order to regulate the conjunctive working of the *Protection from Harassment Act* and the *Child Justice Act*. Where a respondent is a minor, the *Child Justice Act* ought to be taken into account and applied in terms of the procedure following the action instituted through the *Protection from Harassment Act*.

Bullying is not mentioned *eo nomine* in either the *Child Justice Act* or the *Protection from Harassment Act*, but circumstances could justify the application of a protection order followed by a restorative justice programme in order to facilitate rehabilitation and healing for both bully and victim. Where this is done, the mechanisms provided in both of these statutes will be used to enhance the provision of justice for children.

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<sup>150</sup> Sch 1 to the *Child Justice Act*.

<sup>151</sup> See Laas *Combating Bullying in Schools* 33-60.

<sup>152</sup> See para 3.2.4.

<sup>153</sup> See para 1.4.

<sup>154</sup> See para 3.2.4.

<sup>155</sup> In both instances, communication, be it verbal, written or electronic, is used to emotionally injure the victim.

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**LIST OF ABBREVIATIONS**

AJPHRD	African Journal for Physical, Health Education, Recreation and Dance
Brit J Criminol	British Journal of Criminology
CARSA	Child Abuse Research in South Africa
CHR	Centre for Human Rights
CJCP	Centre for Justice and Crime Prevention
ETB	Educator-targeted Bullying
ISS	Institute for Security Studies
JJS	Journal for Juridical Science
NSVS	National Schools Violence Study
PER	Potchefstroomse Elektroniese Regstydskrif / I Potchefstroom Electronic Law Journal
SACE	South African Council for Educators
SAJE	South African Journal of Education
SAOU	Suid-Afrikaanse Onderwysersunie
SASA	South African Schools Act
WHO	World Health Organisation