



LEGAL CHALLENGES FACING BULLYING AND
CYBERBULLYING BEHAVIOR

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virus
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BULLYING IS ... AS DEFINED BY OLWEUS

Bullying occurs when a “person is exposed **repeatedly** and **over time**, to **negative actions** on the part of **one or more persons**,” and involves an **imbalance of power** between the bully and the victim.

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BULLYING HAPPENS IN DIFFERENT WAYS:

(Not mutually exclusive)

- **Verbal**
 - Teasing, jokes, threats
- **Physical**
 - Blocking someone's path, physical restraint, pushing/kicking, hazing
- **Sexual**
 - Teasing, touching, slapping, pictures, emails, graffiti, sexual assault
- **Relational**
 - Exclude, rumours/gossip, ignoring/isolation
- **Electronically**
 - Texting, pictures, video clips
- **Material**
 - Hiding belongings, theft, arson, extortion, vandalism, destruction

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DEFINITION OF CYBER BULLYING

- Cyber bullying is the deliberate, malicious and repeated use of information and computer technology (**ICT**) to hurt, **humiliate** and/or **manipulate** and/or **exclude** another person or persons (Sullivan, 2011)
- Aggressive, intentional acts carried out by groups or individuals using electronic forms of contact, repeatedly and over time, against victims who **cannot easily defend themselves** (Burton & Mutongwizo, 2009)

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THE TOOLS

- Text messages (SMS, WhatsApp)
- Phone calls
- Social network sites (Facebook, Twitter, Bebo, MySpace)
- Emails
- Blogs
- Chat rooms
- Internet gaming

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PREVALENCE OF CYBER BULLYING

- In South Africa: 99% of the population has at least one mobile phone
- Own survey (2010 – secondary school learners):
 - 18.3% of learners indicated that they **regularly** experience cyber bullying
 - 54.9% indicated that they were shown **obscene pictures** on a cell phone in the preceding year
 - 24.3% indicated that **sexually insulting** remarks about them were posted on some electronic platform in the preceding year
 - 9.7% indicated that **teachers** posted sexually insulting remarks about them on some electronic platform in the preceding year

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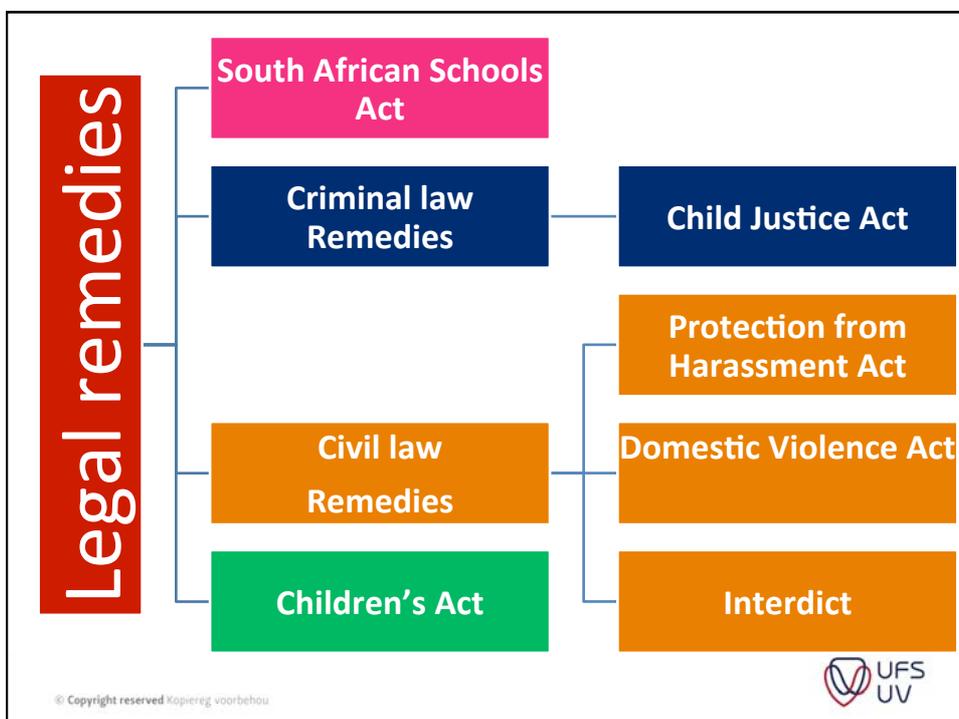


BILL OF RIGHTS

- **S 9 – Equal protection under the law**
- **S 10 – Right to dignity**
- **S 12 – Personal security**
 - Freedom from physical and emotional violence
 - Public or private source
- **S 14 – Right to privacy**
- **S 16 – Freedom of expression**
- **S 29 – Right to education**

- **S 28 – Best interests of the child**

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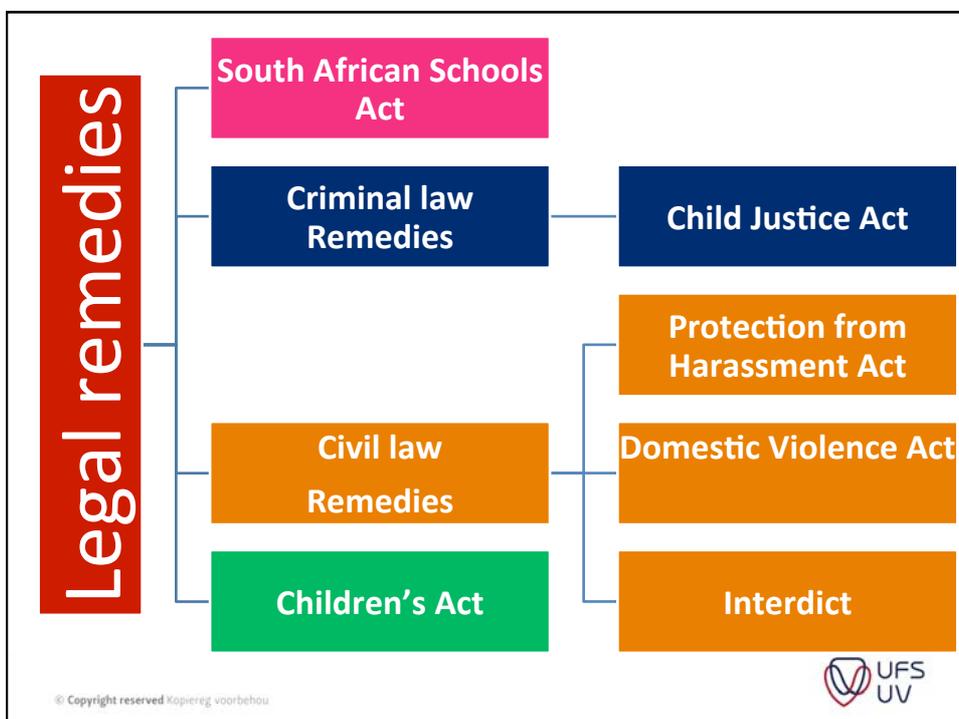


SOUTH AFRICAN SCHOOLS ACT 84/1996

- **Obligations of school governing bodies**
 - Draft code of conduct
 - Disciplinary hearing
 - Ensure support measures or structures for counselling

- **Challenges**
 - No definition
 - No focus on non-punitive measures
 - Disciplinary hearings for small children ill-advised
 - No guidance on informal strategies
 - No focus on prevention

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CRIMINAL LAW REMEDIES

- **Bullying - not criminalised**
- **Common law crimes**
 - Assault
 - Defamation
 - *Crimen injuria*
 - Extortion
 - Theft
 - Damage to property
- **Child Justice Act 75 of 2008**



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CRIMINAL LAW REMEDIES - CHALLENGES

- **Criminal capacity of children**
 - Under 10 – no criminal capacity
 - 10 - 14 years – State must prove criminal capacity
 - 14 - 18 years – Have criminal capacity
- **No criminal capacity = no prosecution**

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2 Objects of Child Justice Act

The objects of this Act are to-

- (a) **protect the rights of children** as provided for in the Constitution;
- (b) promote the spirit of *ubuntu* in the child justice system through-
 - (i) fostering children's sense of **dignity** and worth;
 - (ii) reinforcing children's **respect for human rights** and the fundamental freedoms **of others** by holding children **accountable** for their actions and safeguarding the **interests of victims and the community**;
 - (iii) supporting **reconciliation** by means of a restorative justice response; and
 - (iv) **involving parents, families, victims** and, where appropriate, other members of the community affected by the crime in procedures in terms of this Act in order to encourage the **reintegration** of children;

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2 Objects of Child Justice Act

- (c) provide for the special treatment of children in a child justice system designed to **break the cycle of crime**, which will contribute to safer communities, and encourage these children to become law-abiding and productive adults;
- (d) prevent children from being exposed to the adverse effects of the formal criminal justice system by using, where appropriate, **processes**, procedures, mechanisms, services or options **more suitable to the needs of children** and in accordance with the Constitution, including the use of diversion; and
- (e) promote **co-operation between government departments**, and between government departments and the non-governmental sector and civil society, to ensure an integrated and holistic approach in the implementation of this Act.

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CRIMINAL LAW REMEDIES – CHILD JUSTICE ACT

- **Children without criminal capacity (0-14 year of age)**
 - Assessment by probation officer
 - Programmes
 - Support service
 - Meet with parents
- Diversion programmes
 - Divert child away from criminal justice system
 - Provide programmes to address needs
 - Prosecutor diversion
 - Preliminary hearing
 - Reduce turn overtime
 - In programme - ASAP

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CRIMINAL LAW REMEDIES – CHALLENGES WITH THE IMPLEMENTATION OF THE CHILD JUSTICE ACT

- **Parents and schools reluctant**
 - Reputation of school
- **Parents of victim**
 - Too drastic
 - Secondary trauma of victim
- **Lack of knowledge of overlapping elements**
 - Cyber bullying and defamation
 - Bullying and assault
 - Invoke application of *Child Justice Act*

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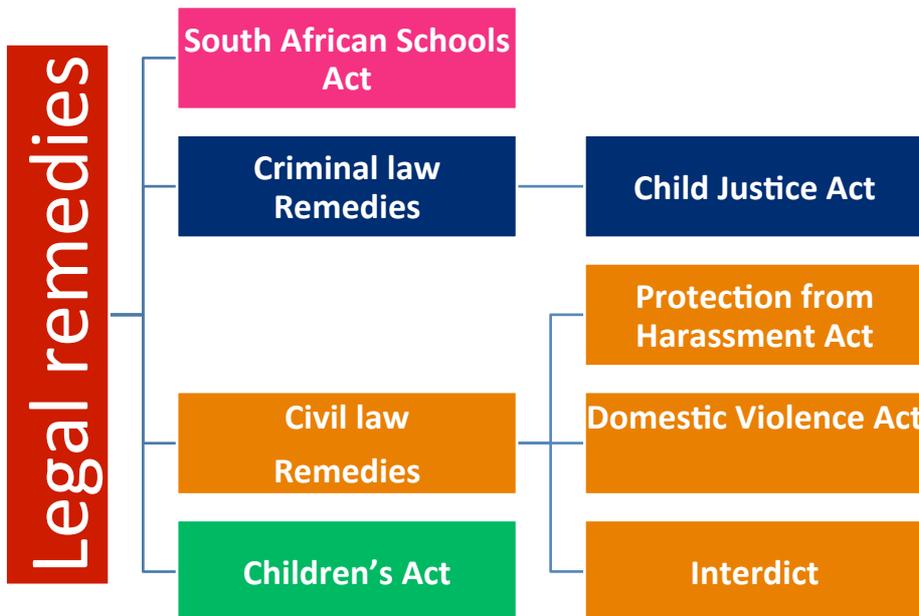


CRIMINAL LAW REMEDIES – CHALLENGES WITH THE IMPLEMENTATION OF THE CHILD JUSTICE ACT

- **Lack of knowledge of aims of *Child Justice Act***
 - Assist child, victim and families
 - Assist restoration and reconciliation

- **Implementation of *Child Justice Act* in rural areas**
 - Lack of resources
 - Physical
 - Probation officers
 - Knowledge
 - Police officials

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CIVIL REMEDY: PROTECTION FROM HARASSMENT ACT

Harassment means:

directly or indirectly engaging in conduct that the respondent knows or ought to know-

- (a) **causes harm** or inspires the **reasonable belief** that harm may be caused to the complainant or a related person by unreasonably-
 - (i) following, watching, pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, **studies or happens to be**;
 - (ii) engaging in **verbal, electronic** or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or
 - (iii) **sending**, delivering or causing the delivery of letters, telegrams, packages, facsimiles, **electronic** mail or other objects to the complainant or a related person or leaving them where they will be found by, given to, or brought to the attention of, the complainant or a related person; or
- (b) amounts to sexual harassment of the complainant or a related person;

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CHALLENGES TO GET A PROTECTION ORDER AGAINST A CHILD

- **Legal standing of child victim**
 - Can act without assistance
- **Legal standing of the child bully**
 - Limited capacity to litigate
 - Must be assisted by guardian
- **Non-compliance**
 - Constitute a criminal offence
 - *Child Justice Act* must be applied

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CHALLENGES TO IMPLEMENT COURT ORDERS

- **Effectiveness of court order**
 - Restraining order
- **Responsibility of school / teachers – if any?**
 - To give effect to the order?
 - To monitor compliance?
 - To report breach of order?
 - To testify?

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CHILDREN LIVING IN A HOSTEL

- *Domestic Violence Act 116/1998*

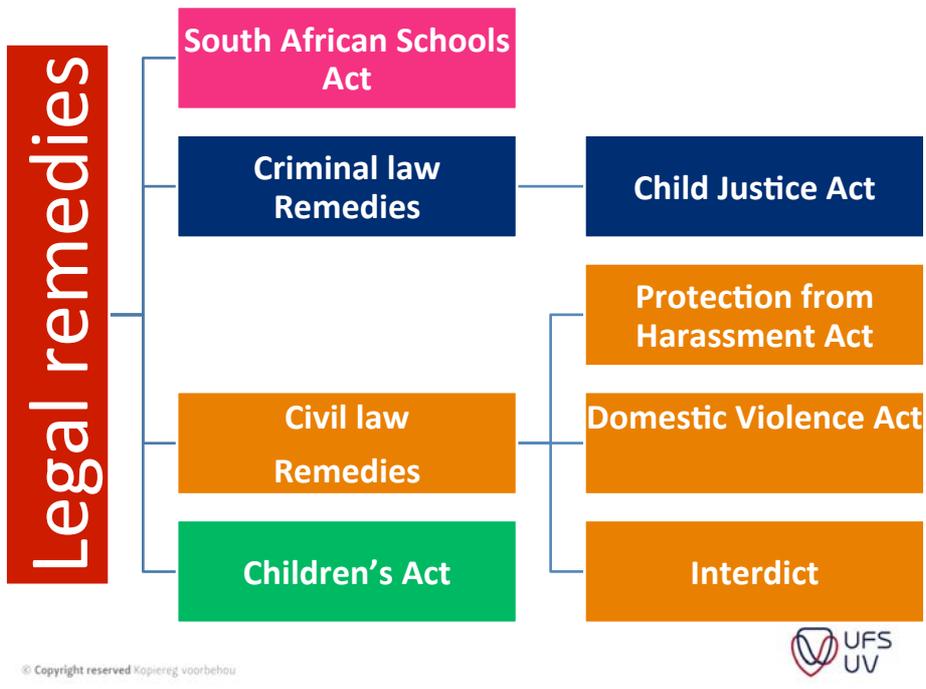
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APPLICATION FOR AN INTERDICT

- **Application for interdict**
 - Both children will need assistance with legal standing,
 - Costly
 - Time consuming

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CHILDREN'S ACT: DEFINITION OF CHILD ABUSE

'abuse', in relation to a child, means any form of harm or ill-treatment deliberately inflicted on a child, and includes-

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

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CHILDREN'S ACT – REPORT CHILD ABUSE

- **Child abuse must be reported**
 - Social workers must investigate
 - Take appropriate action
 - Counselling
 - Mediation
 - Prevention and early intervention strategies
 - Referral
 - Institute children's court proceedings

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CHILDREN'S ACT – REPORT CHILD ABUSE

- **Children's court proceedings**
 - Both bully and victim's circumstances can be investigated
- **In need of care and protection**
 - **Bully**
 - “displays behaviour which cannot be controlled by the parent or care-giver.”
 - **Victim**
 - “lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social-well being.”
- **Court secure needs and interest of bully and victim**

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CHILDREN'S ACT – CHILDREN'S COURT PROCEEDINGS

- **Orders**
 - Intervention programmes for children and parents
 - Skills development programmes
 - Rehabilitation programmes
 - Limit access to a person – eg victim of bullying
 - Any suitable order

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CHALLENGES

- **Shortage of social workers**
 - Department of Social Development
 - Department of Education
 - NGOs
- **Schools lack resources to appoint social workers**
 - No fee paying schools
- **No definition of bully / cyberbullying in Children's Act**

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SUITABILITY OF EXISTING LEGAL FRAMEWORK

- **Legal framework**
 - Flaws
 - Needs refinement
- **Most appropriate response?**
 - After the fact

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SUITABILITY OF EXISTING LEGAL FRAMEWORK

Objectives of the Children's Act

- (d) to make **provision for structures**, services and means for promoting and monitoring the sound physical, psychological, intellectual, emotional and social development of children;
- (e) to **strengthen and develop community structures** which can assist in providing care and protection for children;
- (f) to **protect children** from discrimination, exploitation and any other physical, emotional or moral harm or hazards;

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“There can be no keener revelation of a society’s soul than the way in which it treats its children.”

Nelson Mandela

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QUESTIONS THAT NEEDS TO BE CONSIDERED

1. Should a school get involved in any incidents of cyber bullying especially if the learner(s) that are involved are not both in the same school?
2. What are the legal implications regarding liability of schools if no action is taken against cyber bullying.
3. How can cyber bullies be identified considering privacy rights of the perpetrator?
4. Is existing legislation effective to address cyber bullying? For instance harassment legislation, implementation of interdicts, legal definitions of cyber bullying.
5. Can internet service providers be held accountable to content uploaded by cyber bullies?

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QUESTIONS THAT NEEDS TO BE CONSIDERED

6. Can parents be held accountable for the online actions of their children and harm that can flow from it?
7. Which human rights infringements can be associated with cyber bullying?
8. Are there any international law provisions or guidelines available to guide national legal responses?
9. Is the existing punitive and mostly criminal law response to cyber bullying in the best interests of the victim, bully and any third parties involved in the incident?
10. Should children and or adults be responsible to report cyber bullying and if so to who should it be reported?

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