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Pro Bono & Human Rights ALERT

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Developments in anti-bullying measures in South Africa: Possible jail time for bullies

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In response to social pressure placed on the State and the Department of Basic Education (DoBE), the DoBE has revealed plans to pass new laws that would allow minor school children to obtain a protection order against other minors – who both may be as young as 10 – with the potential of jail time for the bully. But is this the appropriate solve in addressing these issues?

To unpack these proposed changes, it is important to grasp the severity of bullying in South Africa. It is accurate to state that bullying is not a novel phenomenon, and that many South Africans have at one point in their lives been subjected to a form of bullying, whether it be in their formative schooling years, or during adulthood in the workplace. However, that cannot be cause to disregard the severity of this form of abuse, which can manifest itself physically, emotionally, psychologically, and otherwise. In January 2017, Minister of Basic

Education, Angie Motshekga, reported that South African students were the most bullied students in the world as concluded by an international assessment report engaged by the DoBE. Since 2017, little has been effective in curbing the widespread abuse faced by victimised children in South Africa – evidenced by the latest string of bullying-related suicides and violence. However, the question must be asked as to what the DoBE and the State can do to address a systemic issue which appears to be heavily societally influenced.

The Constitution of the Republic of South Africa clearly envisages a society where bullying is unacceptable. Bullying – understood to be 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 – directly infringes a survivor's Constitutional rights to at least: equality (section 9); dignity (section 10);



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and freedom and security of the person, which includes protection against violence, torture, and cruel, inhumane, and degrading treatment (section 12). Further, children have the rights uniquely granted to them in section 28 of the Constitution, which provides that children have the right to be protected against maltreatment, neglect, abuse and degradation. Lastly, section 28(2) of the Constitution entrenches the paramountcy of the child's best interest. Conclusively, the Constitution strongly protects against acts of bullying – conduct which clearly violates the protected rights of a child victim.

Our five pieces of legislation aimed at protecting children and combatting physical and online child-associated violence and bullying are: The **South African Schools Act 84 of 1996**; the **Protection from Harassment Act 71 of 2011**;

the **Children's Act 38 of 2005**;
Cyber Crime Act 19 of 2020 and
the **Child Justice Act 75 of 2008**.

Notwithstanding that these legislative instruments have been in force for a considerable period of time, bullying has not been curtailed. Despite these five Acts each addressing violence and discipline and providing for mechanisms to deal with correctional or restorative justice for children who display disruptive, antisocial, abusive, or aggressive behaviour, none of these Acts squarely address bullying. Evidently, these Acts, despite being a signal of legislative intent, have failed to curtail and eradicate bullying between children and comply with the Constitutional vision.

On 21 August 2023, the DoBE announced plans to make legislative changes to allow for child victims of bullying to themselves apply for protection orders against their bullies, which may in turn expose

bullies – who may be minors themselves – to possible jail time or correctional service programmes. These proposed changes – although on face value appear to be a constructive step towards curtailing bullying – are not without their own problems.

One such problem is that of the child's capacity to act – a legal element which assesses whether the child has the mental capacity to comprehend the difference between right or wrong, and act in accordance with such a distinction. Although children over 10 years of age are likely to comprehend that bullying is wrong (the extent to which will of course develop with age), they may be unable to act in accordance with this understanding – a phenomenon which the law is well-acquainted with, to the extent that children are oftentimes gripped by reactionary child-like instincts, devoid of



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adult-like comprehension. As was stated in the case of *Eskom Holdings Ltd v Hendricks* (262/2004) [2005] ZASCA 46, a court must be warned against “placing an old head on young shoulders”.

Capacity aside, for a minor child to attempt to engage in the legal administration of applying or adhering to a protection order, without the assistance of a major such as a parent or teacher, will pose administrative challenges which the DoBE will need to consider in depth. Furthermore, the changes will need to remain cognisant of the competing interests posed by the same legislation on the bully and victim – it would not be in the best interest of any child to be exposed to bullying nor the criminal justice system. These competing interests will need to be sufficiently addressed by the DoBE in any legislative amendments forthcoming.

It cannot be understated that bullying is a considerable threat to the children of South Africa, who remain at risk of lasting psychological, emotional, and possibly physical harm or death. However, in light of recent bullying-associated violence, suicide and death, it is pressing that both State and society take further measures at combatting bullying in and outside of schools. The proposed changes to laws on applications and enforcements of protection orders may be one avenue to address systemic bullying, however, it will require considered thought on the competing interests at play. Our Pro Bono & Human Rights practice will keep a close eye on these legislative developments and share thoughts on the extent to which appropriate balances have been struck, and on challenges with respect to implementation.

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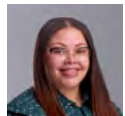
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